

LEGAL MENTALITY AS A COMPONENT OF LAW. RATIONALITY DRIVEN INTO ANARCHY IN AMERICA

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ABSTRACT: *Panoramic views on the mentality of living cultures may be edifying. For no law can be made a fetish or abstracted from the society collectively shaping it. The more the everyday life of legal cultures is based on written records, on formal mediation by texts and on the internal constraint of debates within a professional community, the stronger are the mechanisms in-built that aim at further increasing the complexity and refinement of the law's internal structure and operations. In large systems ramifications are also larger, so the chances are greater for both functional excesses and dysfunctional forced paths to occur. As the present US case-study reveals, there are destructive consequences if social space vanishes from behind the law, if religion instead of cementing society becomes inoperative, if values degenerate into personal pleasure, and social normativity is atomised. Then law will remain the last common denominator among individuals, with implied rationality elevated to the heights of omnipotence. Now their lawyers are expected to stand for human certainty. With a view to their mythical self-belief and obsessive rationalism, the postmodern construct of "secular humanism" is at stake again, including the trouble of defining and justifying societal ends when classical foundations are refuted.*

KEY WORDS: *juridification, jurispathy, verbal magic, legalisation through processualisation, hyperrationalism, self-interest of the legal profession*

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1. THE BACKGROUND

1.1. Transformations in Law and Legal Mentality

Law is based on the idea of *ordo*, and modern formal law endeavours to enforce some kind of order built on ideal regulation that offers unambiguous application to anyone ready to draw rational conclusions from it.

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Historically, differing institutions and rationality-concepts (with a variety of constructions and normative expectations) were to build in various cultures. In ways and roles characteristic of them individually, they all aimed at serving safety in application by developing a logic that may ensure inevitable conclusions, drawn with no alternatives. As is known, on the European continent, regulation was conceived geometrically as a conceptual system, logically organised and striving for completeness. So, continental law is dominated by abstract deductions. Anglo-Saxons have always been different, preserving sensitivity towards the concretely unique features of individual cases to be assessed eventually by judicial fora, and this has allowed them to consider analogically judicial solutions applied in earlier similar cases.¹ And American law developed from the English system, showing increasingly differing features step by step. Today, it is overwhelmingly codified as based on legislation. Moreover, in the United States, the English method of distinguishing (having recourse to or excluding analogy between past cases and the present issue) has become both liberated and complemented by argumentation through principles, and thus significantly less formal than the mere observance of rules, over the past few decades. Therefore, the self-image of American law is contradictory from the outset. In contrast to the English, they believe that law, inasmuch as it is cognisable, can provide unambiguous guidance for all in principle. In consequence, present-day American regulations incessantly interfere with life relations, including the private sphere, which had been protected as free from legal intervention until now. At the same time, in the name of the rule of law and in order to support the enforcement of law at both individual and collective levels, they constantly increase the range of procedural choices for action. Consequently, it may well occur that the law's final word would only be heard long after the last available procedural measure was taken (and in some cases practically never). This is because the struggle to be tirelessly continued and resumed again, which is encouraged in the name of law, as a practical matter may exclude legal force from ever being reached.

Our age is characterised by legal transfers all over the world. Our Central and Eastern European region is especially involved in this (in addition to Latin-America, Asia and even Africa), because after half a century of imposed experimentation with the Communists' party-state and centrally planned economy, we had to re-adapt ourselves to legal frameworks drawn by parliamentary democracy, a multi-party system, and an economy based on free competition and the market. At the same time, as we become integrated into Western Europe within the European Union, we have tens of thousands of pages of rules and regulations translated daily to be adopted (along with the Union's constantly forming law) in our law. We should, therefore, be expected to be familiar with laws serving as patterns for us from Brussels to Washington in their everyday implementation and overall effect, while we, as specialists, are used to seeing trees instead of the forest itself, with no capacity to assess their total outcome. European law is being formed day to day, and now with us also taking part in forming it. But on the other hand, the compound federal and state complex (made up of a multitude of institutions and myriads of regulations and practices, with an army of practically unavoidable specialists trained expensively and employed at high costs for their procedural tricks and ingenious

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

argumentation) we call American law in books and in action scarcely reveals itself in transparent dimensions for outsiders as a lively whole, whether to those searching in law libraries or visiting the States. This is not peculiar at all. After all, monographs necessarily treat technical details, and the visitor's eye could only be opened by a reflection both critical and endowed with self-irony if it is due—a gift that Americans as world power players since World War II, owing to their self-closing mass socialisation,² cannot boast of in the least.

The everyday formation and experience of an arrangement, making it liveable or perhaps problematic for those living within it, can hardly be grasped from an outsider's position. Let us consider as one minor instance that the institutionalised and apparently world-conquering practice called political correctness—despite being more powerful and efficient in shaping American public discourse (within media, scholarship and education) than the thoroughly re-interpreted Constitution itself—has not (yet) been elaborated in professional literature. Hence, (in terms of transparency afforded by disciplines describing sources of social normativity) it cannot be taken otherwise than as a mystery how it could have become as overwhelmingly dominant as it is. Paradoxically, reading American tabloids offers a better chance to sense the prevalent ethos of everyday common and professional life than perhaps anything else. Yet it would obviously be bizarre to draw conclusions regarding considerations dominating legal life from phrases and occasional exaggerations in the press, prompted by incidental turns of mind, while the professional reader is flooded by some fifty-thousand pages of essays and analyses from hundreds of journals published by American law faculties and lawyers' organisations every month.

Some of the changes that took place in American legal practice over the past few decades may have also been perceived overseas. The first to be mentioned is (1) juridification, that is, the increase in both the diversity of ways through various formal procedures and the number and variety of occurrences actually resorting to them in a constantly broadening circle. The second is (2) processualisation, that is, with substantive regulation being gradually pushed into the background, the growing tendency to assert law as an in-itself neutral set of rules of a formal game, presuming equality of the parties (through an emphasis slowly shifted to the protection of the individual—even if a criminal—against the state). And, as a theoretical achievement and then also making its way into practice, the third is (3) argumentation by principles. In accordance with the Americans' widespread spirit of extending individual freedom to their personalised choice from an almost unlimited set of values and patterns of self-realisation within just few decades, this creative argumentation has resulted in the thorough re-interpretation of the Constitution with such a long-term impact that, from now on, whether to follow rules is made a function of whether or not the rule concerned encounters lawyerly counter-argumentation that refers to any principle or value claimed to be constitutional. By now, all this has torn American law practically into two, duplicating the paths that can be followed as a function of the result hoped for by the client, which actually crumbles the rules' authority by relegating them to the role of a mere substitute.³ It is to be noted that

² Allan David Bloom *The Closing of the American Mind* How Higher Education has Failed Democracy and Impoverished the Souls of Today's Students (New York: Simon and Schuster 1987) xv + 382 pp.

³ See, e.g., by Csaba Varga, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi's »The Fifth Man«] ed. Katalin Mezey (Budapest: Széplalom 2000), pp. 61–93 and 'Meeting Points

this tendency inspired sympathy in Western Europe and, later on, in Central and Eastern Europe as well, particularly in countries which were facing transition to the rule of law. For, as a technique innocent in itself, it only suggested revitalisation of one of the components of Roman law (long forgotten in our region),⁴ while it also offered rehabilitation to the very wording of constitutions, neglected till then as a proper—*sui generis*—source of the law.

1.2. Changes in the Juristic Ethos

Experience in this Central and Eastern European region may have made it clear by the end of the past decade at the latest that almost unforeseeable consequences (deteriorating the law's prestige) may be induced if social space vanishes from behind the law, and religion (with ideas fundamental enough to cement society together and traditional enough to generate communal reproduction) becomes inoperative, that is, if values degenerate to a function of personal choice and, in the final analysis, social normativity is also atomised to the depth that law would remain the only common denominator among individuals, acting as a self-generating demiurge.⁵

For, according to legal sociology, no matter how much additional burden we are compelled to put on law (out of the constraint to modernise), we have to bear the limits of

between the Traditions of English–American Common Law and Continental–French Civil Law (Developments and the Experience of Postmodernity in Canada)' *Curentul Juridic* IX (2011) 1, No. 44, pp. 24–47 & <http://revcurentjur.ro/arhiva/attachments_201101/recjurid111_2F.pdf>.

⁴ As can be remembered, even the so-called socialist legality was based on a strictly interpreted kind of rule-positivism reflecting the official acknowledgement of the superiority of statutes that at the same time rejected Western European post-war developments of a creative jurisprudence either through general clauses or based upon argumentation by general principles, constitutional or other. And now the urge to reject one's own responsibility (by considering its task reduced to the exclusively mechanical application of posited rules) is the most burdensome heritage of all this, having survived from socialism as prevailing in the ethos of the legal profession, since its staff is basically unchanged. This is one of the explanations for the absolutely negative attitude of our constitutional judiciary (arising from the unspoken presumption of a most rigid and formalistic legal continuity), compared to the willingness and determination in both Germany and the Czech Republic to face politically motivated and therefore not prosecuted crimes of the old regime without granting them a legalistic pardon. Cf., by Csaba Varga, *Transition to Rule of Law On the Democratic Transformation in Hungary* (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] & <<http://drsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>>, »Coming to Terms with the Past«, pp. 119–115, *Coming to Terms with the Past under the Rule of Law The German and the Czech Models* (Budapest 1994) xxvii + 178 pp [Windsor Klub] as well as *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe* (Pomáz: Kráter 2008) 292 pp. [PoLiSz Series 7] & <<http://drsabavarga.wordpress.com/2010/10/25/varga-transition-to-rule-of-law---constitutionalism-and-transitional-justice-challenged-in-central-and-eastern-europe-2008/>>, »The Burden of the Past«, pp. 107–196.

⁵ This was already realised by legal sociology (powerfully developed then, and having been in unreasonable decline since) in its efforts at humanising developments by the late phase of Communism, among others in Hungary. Cf., e.g., by Csaba Varga, 'The Law and its Limits' [1985] in his *Law and Philosophy Selected Papers in Legal Theory* (Budapest: ELTE Project on "Comparative Legal Cultures" 1994), pp. 91–96 [Philosophiae Iuris] & <<http://drsabavarga.wordpress.com/2010/10/25/varga-law-and-philosophy---papers-in-legal-theory-1994/>> as well as 'Macrosociological Theories of Law: From the »Lawyer's World Concept« to a Social Science Conception of Law' in *Soziologische Jurisprudenz und realistische Theorien des Rechts* ed. Eugene Kamenka, Robert S. Summers & William Twining (Berlin: Duncker & Humblot 1986), pp. 197–215 [Rechtstheorie, Beiheft 9].

its optimum load capacity in mind, because it can also collapse under its own weight.⁶ Speaking paradoxically, law operates with an optimum efficiency when it is resorted to only exceptionally and mostly symbolically as the ultimate authority, that is, when its regulation points to the path the actual social movement takes anyway.⁷ After all, even if its eventual overburdening may increase its apparent significance, playing added roles that cannot be filled properly will unavoidably provoke changes in character in the long run.

It is a change of ethos through the challenge by our post-modern age⁸ that is seen as behind such developments by the American author whose considerations I shall assess in the following.⁹ The intention of self-revelation through providing a faithful mirror is to be highly appreciated, especially when it originates from academic circles. PAUL F. CAMPOS, Professor of Law at the University of Colorado and Director of the Byron R. White Center for the Study of American Constitutional Law, dipped his pen into vitriol. He did so to stir up the still water of a world in which legal professionals' business is becoming increasingly costly (with no added input) and increasingly complicated in technicalities, while unavoidably being wedged out of mere self-profit in the ongoing social events. What he describes is a pathology not only of the caste of lawyers as a post-modern super-elite, but also of present-day American public speech, continuously promoted by means of the media.

2 . THE AMERICAN SCENE

2.1. Legalisation by Processualisation

As it is revealed, it is trivial that present-day America is not just the land of opposites but also of extremes, often switching into each other uncontrollably (p. vii¹⁰). America happens to be undergoing a period of the law's hypertrophy: courts are flooded with 30 million cases a year (p. 178); the duration of some lawsuits extends to one decade

⁶ Cf., above all, Kálmán Kulcsár *Modernization and Law* trans. Vera Gáthy (Budapest: Akadémiai Kiadó 1992) 282 pp.

⁷ As Campos [note 9] appropriately expresses it on p. 183, "law is always a somewhat crude and potentially destructive social steering mechanism, that works best when it remains a tacit presence in the social background."

⁸ Signalled by the rather strong tone of criticisms, among others, as to the deontology, sworn in *versus* practiced, of the legal profession. For instance, Anthony T. Kronman *The Lost Lawyer* Failing Ideals of the Legal Profession (Cambridge, Mass.: Harvard University Press 1993), p. 1 acknowledges that "Every year produces a fresh crop of scoundrels and renewed doubts about the ability of the profession to police itself, along with familiar complaints about the undue power of lawyers (which any democratic society is bound to regard with suspicion)." and Mary Ann Glendon *A Nation under Lawyers* How the Crisis in the Legal Profession is Transforming American Society (Cambridge, Mass.: Harvard University Press 1994), »Introduction«, diagnoses "a significant advance of arrogance, unruliness, greed, and cynicism in the legal profession [...]. A breakdown in self-discipline among lawyers". This is substantiated by further complaints, e.g., as to the quantity of the legal stuff, Philip K. Hovard *The Death of Common Sense* How Law is Suffocating America (New York: Random House 1994) 202 pp. and, as to the complexity—without return—of processes, Harold J. Rothwax *Guilty* The Collapse of Criminal Justice (New York: Random House 1996) xiv + 238 pp.

⁹ Paul F. Campos *Jurismania* The Madness of American Law (New York & Oxford: Oxford University Press 1998) xi + 198 pp.

¹⁰ Let us mention as an illustrative example the "growing awareness that the whole culture of dieting and rigid exercise is the root cause of the fat explosion", as concluded by Richard Klein in his *Eat Fat* (New York: Pantheon 1996) xx + 247 pp.

and hundred-page decisions for them are becoming usual, while articles of several hundred pages in length are devoted to analyse them in the professional press with half a thousand of notes each (p. 81). Could the Fathers of the Constitution have anticipated that both the perfection of their work and their efforts at making it accepted by the member states would be devalued as a mere trifle compared to the alleged sacrifice of time and energy detailed in the bills by O. J. SIMPSON's lawyers until they got, through craftiness, the appointed jury entirely replaced (p. 21)? And do today's taxpayers realise that the lawyers of TIMOTHY MCVEIGH, convicted for the 1995 bombing in Oklahoma City that killed 168 people, charged ten million dollars for a trial lasting only three months at the cost of the American public, without even straining themselves to come up with serious exculpatory evidence (p. 183)?

What lies behind all this? Corrupt practices? Or *zeitgeist*, some snobbish contemporary trend of thought? It seems that wealth and imperial dimensions may also have an effect on socialisation, in that it is difficult to stay modest. And if it is rational organisational capacities (in addition to power) to which America owes its success, then it is exactly this field where temperance may encounter difficulties. Anyway, public discourse in America is mostly cut short: "problems have solutions" (p. 125), with a "mania for giving reasons" in the background (p. viii.). All this adds up to a culture of "juridical saturation" with almost all social interactions "subject to possible surveillance and regulation via the agencies of state" (p. 34), for "the best way to attack a problem is to inflict a comprehensive regulatory scheme on the social context in which the problem occurs" (p. 82¹¹). "Legalize it!" (p. 6) And the panacea of "going to law" (p. 5) is obviously promoted as a substitute, as if lawyers (just as advisers are gradually replacing priests these days) had a kind of inherent wisdom or learned knowledge distinguishing them from the rest of society (ch. 7 on »Addicted to Law« as well as p. 186).

Thus, actors from libraries to sports associations (no longer trusting themselves, and as if having forgotten the gift of common sense) begin enthusiastically drafting regulations of several hundreds of pages each to insert into everyday processes something external to rely on, as a substitute for both reason and authority, afforded by both quasi-law and therapy as embodied by mediators, counsellors and psycho-analysts.¹²

It is not "obsessive proceduralism" (p. 179) and not even the "passion for regulating" (an attribute used earlier to characterise the Prussian Enlightenment of FREDERIC II¹³) in themselves that make American practice problematic. What is really

¹¹ Meanwhile maintaining the "belief that it is possible to both produce comprehensive regulatory regimes and to predict accurately the effects of essentially *ad hoc* legal decision making" (p. 179).

¹² Campos' remark is worthy of attention: just as "a serious gambler does not gamble to win money—he wins money in order to gamble", likewise "we look to the visible law not so much for answers to the unanswerable, but to submit ourselves to the will of those who assure us they have such answers." (p. 79) This is why he quotes JOSEPH DE MAISTRE's opinion summed up by ISAIAH BERLIN: "Men—moral beings—must submit freely to authority: but they must submit. [...] No man, no society can govern itself; such an expression is meaningless: all government comes from some unquestioned coercive authority. Lawlessness can only be stopped by something from which there is no appeal. It may be custom, or conscience, or a papal tiara, or a dagger, but it is always a something."

¹³ Thomas Babington Macaulay 'Frederick the Great' [1842] in his *Essays* [popular ed.] (London: Longmans 1895), pp. 808 and 805, as well as Thomas Mann 'Frederick the Great and the Grand Coalition: An Abstract for the Day and the Hour' [1914] in his *Three Essays* (London: Secker 1932), pp. 156–157. For the context, cf. Csaba Varga *Codification as a Socio-historical Phenomenon* [1991] 2nd {reprint} ed. with an Annex & Postscript (Budapest: Szent István Társulat 2011) viii + 431 pp. & <<http://drcsabavarga.wordpress.com/2010/10/25/varga->

puzzling is the way it resorts to the law's instrumentality by making the community believe that legal professionals are more competent in value-choices as well as in defining preferences involving balancing and mutual thinking than anyone else; so much so that they may not only overshadow policies but also have to control political alternatives as ultimate judges with their principled justifications and authoritative (judicial) approval.¹⁴ To put it briefly, nothing matters anymore but law. Nothing else can create community but law. And there is no other authority than that of law (as, by absolutising our individual self-realisation, we have rendered all our choices a reflex of our momentary mood). And what is at stake here is not just airy desires, or intentions or a merely ideological guise. What we have to reckon with now is a change in the character of the whole legal set-up with the social use of law, affecting procedures and methods, attitudes and the entire ethos as well, that can also be traced in the judicial handling of everyday cases.

2.2. Hyperrationalism

For, in America, "law is manifesting itself as a kind of cultural madness, whereby hyperrational modes of decision making are employed in a vain attempt to resolve rationally what are rationally irresolvable moral and political conflicts." (p. 182, similarly p. viii), while "the American civic life has become burdened with the widespread delusion that something called »the rule of law« can succeed where politics and culture fail." (p. 181) This tendency is not just dangerous in itself but also threatens to cause law in American practice to become extremely one-sided, that is, with potentials increasingly narrowing but increasingly imposed upon society. This is so because "[t]he current cultural dominance of legal modes of thought—the belief that political and ethical decisions are legitimate only to the extent they can be crammed into the conceptual categories of legal reasoning—helps reinforce a legal culture in which other modes of decision making are treated as degraded versions of law, rather than as potentially valuable alternatives to law's imperialistic grasp." (p. 187)

2.3. Example of the Genuine Query: Status of Lost Property Found

As a methodological illustration, the author refers to the issue of ownership of lost property and rewarding its finder. Guiding precedents¹⁵ only emphasise contradictory aspects, such as returning to the original owner, meeting the expectations of both the finder and the owner of the place of finding, rewarding luck and honesty or, after all, finding any solution that is easy and rapid (p. 84). Whatever the case may be, debatable concepts will necessarily emerge such as 'prior owner'—by no means as a function of competing interpretations but as one of the substantial dilemmas inherent in law. For every "legal concept of possession is of course an artifact of legal reasoning itself, which

codification-as-a-socio-historical-phenomenon-1991/>, especially at pp. 76–77, with notes 22 & 28 on pp. 86–87.

¹⁴ It is Professor RONALD M. DWORKIN who has actually come to the conclusion that traditional politics with the representation of group interests can only be legitimate as far as its message can be developed or reconstrued—as approved of by a federal justice—through "a single, coherent set of principles". Campos, p. 39.

¹⁵ Such as the decisions in the cases of *Hannah v. Peel* (1945), 1 King's Bench 509; *Bridges v. Hawkesworth* (1851), 21 LJ Queen's Bench 75; and *South Staffordshire Water Co. v. Sharman* (1896), 2 Queen's Bench 44.

is to say it is a socially constructed concept rather than a plain fact of nature; [...] the concept will be sufficiently ambiguous to accommodate the essential tensions between the various social values the legal concept reflects.” (p. 85)

This cannot be otherwise, for “All rules by their nature as rules must be both over- and under-inclusive” (p. 88). And the same is the reason why there evolve successive opposing movements in legal development, firstly to standardise exceptions from the rule, and then, in counter-reaction to the confusion emerging from this, to regulate the practice confused by those exceptions (p. 89).

2.4. Verbal Magic

The question arises, therefore, whether or not interpretability, controversial in itself, is an incidence of law that has to be settled by lawyerly instruments. Or is it a necessity, a function and outcome of the subject conflicting in itself (albeit concealing its very nature)? In one of my earlier attempts at reconstruction,¹⁶ I reached the conclusion that no matter how sensitively the law is formed, by its very nature it cannot be but a net of conceptual projections that reflects an ideal order according to the intention, imaginative power and conceptualisation of its designer, while, as the law is followed, real life strives, by balancing conflicting values and interests, to find fulfilment within the framework of such a conceptualisation. Or, this means that such a contradiction is neither a defect of law nor a deviation in life but the very substance of any legal (or formally mediated) game. Moreover, law could not even reach more security either, this being the fate and exclusive possibility of every conceptual projection contrasted to real life. CAMPOS identifies the knot of American legal culture in the fact that the legal ideology has been silent on the very issue for a century, with formalists denying the failure of rational choice between conflicting interests and values, on the one hand, and realists accepting it exclusively as a practical matter to be faced at the most within individual situations, on the other (p. 90). This explains why there is constant mystification, and even “incantation”, “verbal magic” and “delusion” in judicial discourse (p. 10), with a “bald assertion of intuitive belief masquerading as rationally compelling argument” (p. 91). That is, all these “blatantly circular forms of pseudo-formal reasoning” (p. 112) and “legal artifacts are the fruit of futile, hypertrophied exercises in forms of argument that can themselves »reason«, but that in fact must conclude with the assertion of axiomatic [that is, logically not following from any premises in logic—Cs.V.] or circular [that is, drawing from and concluding with themselves—Cs.V.] propositions.” (p. 101)¹⁷

¹⁶ See Csaba Varga *Theory of the Judicial Process The Establishment of Facts* [1995] 2nd {reprint} ed. with Postfaces I and II (Budapest: Szent István Társulat 2011) viii + 308 pp. & <<http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/>>.

¹⁷ I have found similar developments in some American phenomenological reconstructions, by chance in a MARXising critical legal studies direction. Cf. William A. Conklin *The Phenomenology of Modern Legal Discourse The Judicial Production and the Disclosure of Suffering* (Aldershot, etc.: Ashgate 1998) xii + 285 pp., as reviewed by Csaba Varga ‘What is to Come after Legal Positivism are Over? Debates Revolving around the Topic of »The Judicial Establishment of Facts«’ in *Theorie des Rechts und der Gesellschaft Festschrift für Werner Krawietz zum 70. Geburtstag*, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676.

He also finds—and rightly so¹⁸—logical positivism responsible for such mystification, as it creates artificial certainty with its special emphases, while excluding real human processes from the circle of scholarly investigation.¹⁹ Albeit what MIGUEL DE UNAMUNO once called “the tragic sense of life” is sensibly based on the recognition that our values may be irreconcilable with each other and there is no rational justification available to control the choice from among them. Meaning the same, ISAIAH BERLIN could also only conclude that “a »notion of plurality of values not structured hierarchically« does not entail relativism, but it does entail »the permanent possibility of inescapable conflict between values.«” (p. 160) For we hardly “know” anything (pp. 144–145²⁰). The most we can do is merely to live again, process and improve the tradition cultivated by our predecessors and fellows, construed as knowledge. For human thinking is mostly tautological, even if covered by public speech. This is “a symptom of how the contemporary worship of analytical and supposedly scientific modes of thought can shade off into a type of dogmatic pseudo-religious belief, and eventually into the realm of a sort of intellectualized irrationalism.” (p. 150)

2.5. Jurispathy

Translating all this to juridical language, ROBERT COVER blames judicial decision-making for being thoroughly “jurispathic”, as faced with the “luxuriant growth of a hundred legal traditions, [judges] assert that this one is law and destroy or try to destroy all the rest.” (p. 160) This is why Professor ROBIN WEST, known for her feminist reconstructions, can openly declare that “reason alone is not going to compel agreement. [...] If we are really aiming for genuine consensus, then the experiential gaps must be bridged.” Because “moral convictions are changed experientially or emphatically, not through argument [...] reason alone simply will not move us—but experience, empathy, and reflection might.” (pp. 160–161²¹)

¹⁸ Having had the opportunity to research in great libraries from Canberra to Edinburgh to Berkeley, what I found the most staggering is that those tens of thousands of books devoted to ‘cognition’ and ‘knowledge’ considered their subject as a hypothesising intellectual game, i.e., as a conceptual set of cases formed of other concepts out of purely analytic interest. For actually they constructed a thoroughly theoretical ‘cognition’ and ‘knowledge’ that scarcely have anything in common with cognition practised in either everyday or professional (scholarly and lawyerly) life and knowledge acquired by humans.

¹⁹ According to logical positivism, a statement is true if it can be empirically verified by virtue of a definition (in logic or mathematics), while statements on personal preferences are just emotive expressions with truth either merely subjective or uninterpretable on the whole (Campos, p. 152).

²⁰ As Campos himself points out, this is by far not more than—with the words of Ludwig Wittgenstein (*On Certainty*)—“the psychological experience of certainty that is a product of the interpreter’s unconscious reliance on the truth of various nonverifiable interpretive axioms.” We have to remember how ISAAC NEWTON eventually summarised his experience of life: “I do not know how I may appear to the world; but to myself I seem to have been only like a boy, playing on the seashore, and diverting myself in now and then finding another pebble or prettier shell than ordinary, while the great ocean of truth lay all undiscovered before me.” Recently, JORGE LUIS BORGES concluded as follows: “There is no classification of the universe that is not arbitrary and conjectural. The reason is very simple: we do not know what the universe is.” And finally, Albert Einstein (*Geometry and Experience*) characterised his subject in rather restrictive terms: “So far as the laws of mathematics refer to reality, they are not certain. And so far as they are certain, they do not refer to reality.” (Campos, p. 150)

²¹ Consequently, she proposes pro-life against pro-choice activism by authentically displaying the guilt felt by those who underwent abortion, growing to unbearable degree at times, or the way foetuses killed by abortion are “hacked to pieces in a procedure difficult to distinguish visually from simple infanticide” (Campos, p. 162).

All in all, owing to the general practice of argumentation by principles, “The Constitution has become [...] what the prophecies of NOSTRADAMUS represent [...]: an ideally vague set of oracular-sounding propositions, whose very vagueness comfort the devotee with a sense that the correct interpretation of an essentially magical text will provide insight into mysteries that would otherwise remain unknowable and obscure.” (p. 169) While “Indeed the Constitution as a whole (as opposed to judicial decisions that refer to the Constitution) appears to have nothing whatever to say about a right to abortion, or to privacy, or individual autonomy, or sacredness, or any of the other highly abstract concepts that make up the heart of DWORKIN’s argument. [...] For all legal rhetoric’s grandiloquent talk of »reason« and »principle« we know that our law is always a contingent product of fallible human choices—choices that within interpretive equilibrium zones must remain essentially contestable.” (pp. 115 & 116)

It is exactly this that present-day American hyper-realism, striving for certainty at any price, is unwilling to recognise. For American justices are mistrustful of any decision making based on personal responsibility; therefore, they rather prefer judicial argumentation drawn directly from the Constitution as well as from the field of practical policy. But this testifies to their mistrust of democracy itself—that is, (as an anthropological presumption) of man considering his matters and therefore ready to choose, and (in technical realisation) of his adjusting his personal decisions to majoritarian individual opinions. In such a way, personal stance is replaced by the “expertise” of lawyers, alleged to allow a deeper insight. After all, obviously, “Voting [...] is an explicitly arational mechanism for deciding controversial issues [...], [because] it doesn’t require any justification of particular results beyond reference to the formal definition of the activity itself.” (p. 70²²)

It is ironic to see development or progress as created by trust placed in the rational foundation of decision-making, when it resorts to the panacea of comprehensive regulation and exposes itself to judicial incidentalities. For such a by-chance outcome may, through side-effects, both interfere with the social total motion and divert it on forced paths, as “any systemic action will cause a myriad of unforeseen, and indeed unforeseeable, reactions.” (p. 91) Has anyone considered the fact that since the due process rights of the accused have been highlighted, scarcely anyone proceeds to trial and the majority of criminal convictions (for example, 96% of the total in Colorado in 1995) were the result of other procedures? That since the war on drugs was launched, the number of those in prison has suddenly quadrupled (without having been budgeted) over the past twenty-five years? That scarcely a generation since racial segregation in schools was declared unconstitutional, spontaneous segregation of public schools is incomparably higher than ever? That there is a sevenfold increase in the number of legal malpractice suits only as an incidental result of technical measures aimed at reducing them? (pp. 92–93²³) One may find substantial wisdom in the statement according to which an operable

²² And he even adds that “At bottom many judges and most legal theorists dislike democracy because it is an implicit acknowledgment of the severe limitations of their expertise.”

²³ It was the Supreme Court of New Jersey that started to enforce the statute of limitations rather restrictively, in order to restrict the propensity for litigation at least by those who had switched lawyers during the limitations period. However, to limit their own responsibility, newly hired lawyers launched litigation at once. Adding some more examples, the question might be raised whether the community knows that nearly two-thirds of the immense American medical care costs are incurred within the last six months of people’s lives, because there is

regulatory mechanism needs to be minutely sophisticated, yet “the more it elaborates itself, the more manipulable the system will become, and the more unpredictable the social effects of such manipulation will be.” (p. 95)

2.6. Self-interest of the Legal Profession?

All this seems to be motivated by the self-interest of the legal profession in maintaining increasingly confused methods of regulating and decision-making. American lawyers have proven unprecedentedly successful in this, gaining increasing fields of action, prestige and wealth in return. This also requires them to build a mechanism for self-protection. And to cultivate the myth of the only true knowledge they have acquired when in their “practice of law [...] self-knowledge remain[s] for the most part systematically repressed.” (p. 102²⁴) Well, the fascination of a “relentlessly rational culture” (p. 136) and of the “public reason” (JOHN RAWLS, p. 64) accessible to all obviously brings about its own self-belief. As Yale Law School Dean Anthony Kronman once declared, his faculty’s corporate creed is “a community united by faith in the power of reason” (p. 64²⁵). That is, “even though we now believe unicorns are solely creatures of our imaginations, we are still habituated to a cultural practice in which we talk about unicorns as if they existed autonomously from our beliefs about them.” (p. 141) So it is fine for us to learn that Americans, amazingly unfamiliar with differing cultures, are convinced their law is “the best in the world” and that we are either to be offered American-type rule of law, or Bosnia and Lebanon will be the end-result.²⁶ The only thing that CAMPOS finds suggesting is the recognition of a deeper truth, evident even to simpler minds, namely, that water is obviously a good thing and a precondition of life itself, yet “[t]oo much water, however, and we drown.” (p. 178)

3. CONCLUSIONS

3.1. Post-modern Primitivisation

The more the everyday life of a legal culture is based on written records, on formal mediation by texts and on the internal constraint of discussion, debate and reconsideration

no legal practice? available to separate reasonable prolongations of life from unreasonable ones. And does anyone know that in result of the partial legalisation of euthanasia, several hundreds die every year, e.g., in the Netherlands without clearly consenting? (Campos, pp. 163–164)

²⁴ Professional socialisation itself shows a duality of this type, as “A successful legal education [...] both sharpens and desensitizes the adept’s sense of analytic complexity.” (Campos, p. 120)

²⁵ During my stay at Yale as an American Council of Learned Societies scholar between 1987 and 1988, I called the attention of Professor KRONMAN, monographer on MAX WEBER in the series of “Jurists: Profiles in Legal Theory”, to a conceptual misunderstanding probably due to mistranslation, presenting my paper on the issue once published in English in Rome. Although he seemed not to speak German (and not see any need to do so either), he looked at me and declared articulately that it was this how he interpreted WEBER, and added with charming simplicity that his pioneering work was indeed applauded by many American law review articles.

²⁶ For the interest-driven contexture of such an ideological tenet, cf. Csaba Varga ‘Rule of Law, or the Dilemma of an Ethos: Gardening versus Mechanisation’ in *Rule of Law Promotion Global Perspectives, Local Applications*, ed. Per Bergling, Jenny Ederlöf & Veronica L. Taylor (Uppsala: Iustus Förlag 2009), pp. 213–230 [Skrifter från juridiska institutionen vid Umeå universitet Nr 21], abstract in <<http://www.scribd.com/doc/9436648/Csaba-Varga-Rule-of-Law-or-Dilemma-of-Ethos>>.

of issues within a professional community (that is, in addition to formal law-positivation, it is based on democratism and on the additional normative influence exerted by the common opinion of the legal profession), the stronger are the mechanisms built in it aiming at constantly further increasing the complexity and refinement of its internal structure and operations. In brief, each and every systemic state and course may have its own advantages and disadvantages as well.

Well, to employ a generalisation, the reason why we deal, for instance, with so-called primitive law is that it presents a system in action in an embryonic form that is yet compound and ready for sensitive responses and changes. Meanwhile, elementary contexts and operations can indeed be revealed in it that might stay hidden to the observer in its later, more developed and complex states. For large systems, powerfully developed to reach a higher degree of complexity and sophistication, do not necessarily allow cohesive system-elements as actual pillars to be easily seen and recognised (let us just consider the English law's developmental continuity through a thousand years), albeit their overall spirit is reflected, like an ocean in a drop, in the elaboration of details.²⁷ Taking these two extreme poles—between which Romanian and Hungarian laws may be placed probably somewhere in the middle—, the mass of legal literature (with official collections, compilations, doctrines and commentaries, semi-official and authorial analyses of cases, monographs and review articles) is very telling. How do we assess the volume of legal writing by the Americans, the British, the French, the Germans, the Russians, the Egyptians? This obviously declining sequence²⁸—by far disproportional either to the ancientness of the roots of a given culture or the power and internal differentiation of the society behind it—can tell us even more about the degree of complexity achieved.

In large systems, ramifications are also larger, so the chances are greater for both functional excesses and dysfunctional, forced paths to occur. This enhances the need for various institutions, designed to balance and control and also to provide feedback in both planning and operative functioning, to be intersected from top to the medium level.

Therefore such a treatment is especially suitable to exemplify such manifold paths of movement offering several possibilities. Neither chances nor fields of action are truly closed.²⁹ The widening of prospects necessarily lends new wings to human efforts to profit from them. A number of chaotic directions and temptations have been presented to explore opportunities in a true picture, which most probably could also be viewed differently through someone else's eyes, rooted in another culture. Every panoramic view of the

²⁷ Cf. Csaba Varga 'Introduction' to *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1], pp. xv–xxiv.

²⁸ Having written this paper in the capital of Egypt, I was amazed to find—in the huge collections of the libraries of Cairo University (mostly in Arabic and French) and the American University in Cairo (primarily in English)—that despite its vast Afro-Asian range, the literary cultivation of Islamic law is relatively modest in volume and that Western (English, French, Italian and German) scholarly elaborations of the same law (far from depreciable in their actual extent albeit rather limited in an Euro-Atlantic comparison) play a crucial role in its literary treatment.

²⁹ As Alexis de Tocqueville remarked in his *Democracy in America* ed. Phillips Bradley, I (New York: Vintage Books 1990), p. 280 [Vintage Classics] almost two centuries ago, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings".

mentality of living cultures is edifying. Not even law can be made a fetish,³⁰ as it cannot be abstracted from the society which collectively shapes it, for “law and legal reason are also the simulacra of real community.” (p. 194)³¹

3.2. The Final Query

All in all, it is not by chance that classical values—wisdom, virtues, and readiness to serve the public, following the statesmen’s old stature—are reclaimed for again,³² in reaction to obsessive rationalism accompanying value relativism, and achieved partly through the triumph granted to the over-penetrating practice of political correctness.³³ “Prudence, fortitude, temperance, justice, faith, hope and love.”—such are now the catchwords again, changing anew for an ideal of legal education and professional practice not reducible any longer to the type of a privately owned, hired warrior who can, at ease and please, master and win over legal processes as a merely technical match.³⁴ It is to be seen that on the final analysis it is the postmodern construct of “secular humanism” that is at eventual stake, in trouble again how to define and justify societal ends with classical foundations refuted.

This is why PAUL F. CAMPOS has argued for almost two decades that “public reason”, the superior authority usually referred to in these circles on the last resort, is

³⁰ As Alexander I[saeovich] Solzhenitsyn expressed in his *A World Split Apart* Commencement Address Delivered at Harvard University, June 8, 1978, trans. Irina Ilovayskaya Alberti (New York: Harper & Row 1978) 61 pp., contrasting his hellish home regime with the idealised one: “a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man.”

³¹ As to reflections in contemporary American professional literature, this „diatribe against the increasingly legalistic tenor of American life” [Lisa Stansky in *The American Bar Association Journal* 84 (1998), p. 84] is—albeit acknowledged as “thought-provoking” [David Margolick ‘Courting Disaster’ *New York Times Review of Books* (June 21, 1998) <<http://www.nytimes.com/books/98/06/21/reviews/980621.21margst.html>>] and “provocative” [John Dinan in *H-Net Book Review* (April, 2000) in <<http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=APSA-CIVED&month=0004&week=a&msg=PwaJ2KkRGWWL4gcGuWY4zQ&user=&pw=>>—mostly criticised for its “lack of prescriptive guidance” [Major J. Thomas Parker in *Military Law Review* 158 (1998), pp. 179–191 as well as A. Bradney in *Anglo-American Law Review* 27 (1998), pp. 526–528] and for its being „fundamentally, a literary text”, misconceived and flawed all through; for “Yes, Rome [too] felt, but not at the hand of procedurally fixated lawyers.” [Mathew K. Roskoski *Michigan Law Review* 98 (1999–2000), pp. 1529–1548, quote on p. 1541]. Richard A[llen] Posner *The Problematics of Moral and Legal Theory* (Cambridge, Mass. & London: The Belknap Press of the Harvard University Press 1999) in <<http://www.scribd.com/doc/44395744/POSNER-Richard-Allen-the-Problem-a-Tics-of-Moral-and-Legal-Philosophy>>, p. xii objects exclusively the term ‘sick’ when qualifying—while generalising—American culture or legal system. Cf. also John Dinan in <<http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=APSA-CIVED&month=0004&week=a&msg=PwaJ2KkRGWWL4gcGuWY4zQ&user=&pw=>>.

³² E.g., by Anthony T. Kronman, *The Lost Lawyer* Failing Ideals of the Legal Profession (Cambridge, Mass.: Belknap Press of the Harvard University Press 1993) viii + 422 pp. and *Education’s End* Why our Colleges and Universities have Given up on the Meaning of Life (New Haven, Conn.: Yale University Press 2007) xi + 308 pp.

³³ E.g., Howard S. Schwartz *Society against Itself* Political Correctness and Organizational Self-destruction (London: Karnac Books 2010) xiv + 216 pp. and Момчил Дойчев »Политическата коректност« срещу либералната толерантност Есе за идейните битки след комунизма (Велико Търново: Фабер 2010) 160 pp.

³⁴ Kenneth L. Shigley ‘Virtuous Lawyer is Not an Oxymoron’ in [State Bar of Georgia] <<http://www.gabar.org/aboutthebar/article3.cfm>>.

empty,³⁵ consequently the ensuing analysis “amounts to little more than the shamanistic incantation of the word »reasonable«”, as the expression itself is employed “in the same way that ‘God’ is invoked in dogmatic religious argument.”³⁶

This kind of emptiness has a wide contexture and far-reaching consequences. As explained by another Colorado professor, PIERRE SCHLAG, the artificial strive for certainty and security cannot be done without self-deceptions of the legal mind.³⁷ For the substitute they choose to metaphysics will be rationality, a kind of “pathological reliance on the principle of reason”, which he is going to diagnose as an epidemic. And once there is a deified call to reason, it can easily turn to be, as standing for, “a manipulative vehicle of power, faith, and prejudice” in everyday practice.³⁸ This is a natural outcome, for there is a simple alternative to make a selection between a traditional metaphysics and the negation of Friedrich Nietzsche,³⁹ with third option excluded. Accordingly, as he continues, “It is no more possible to continue doing law in an intellectually respectable way once the metaphysic is gone, than to continue worship once God is dead. Law is like God here.”⁴⁰

Thereby we seem having arrived back to a basic situation. “American legal thinkers really do want their own desirable *X* to exist, and so they cannot help but produce and reproduce a world of stabilized, transcendent signifiers in which the existence (a deep ontological existence) of their really desirable *X* is authorized and maintained.”⁴¹ As a matter of fact, there is nothing new in this setting, being an evergreen *topos* in any philosophising on law. Now PIERRE SCHLAG, too, realises that “This is what BEALE does for ‘the common law’,⁴² what FISS does for ‘objectivity’,⁴³ what RADIN, MICHELMAN, and BALKIN do for ‘the autonomous self’⁴⁴” — taking his instances from contemporary American legal thinking exclusively.⁴⁵ But basically this is nothing else than the genuine substance of a number of conceptual pairs and theories confronted one another especially since the end of the 19th century (partly echoed in and partly also grown up and nurtured in

³⁵ The same is ascertained later by Pierre Schlag ‘The Empty Circles of Liberal Justification’ *Michigan Law Review* 96 (1997), pp. 1–46 & <<http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=schlagpj>>, emphasising that the task to be performed, the agents to be addressed and the manner of performance are equally believed as justified from the beginning.

³⁶ Paul F. Campos ‘Secular Fundamentalism’ *Columbia Law Review* 94 (1994) 6, pp. 1814–1827 on p. 1817, referring mainly to JOHN RAWLS’ central concept.

³⁷ Pierre Schlag *Laying down the Law* Mysticism, Fetishism, and the American Legal Mind (New York: New York University Press 1996) x + 195 pp. Cf. also, as a forerunner, Steven D. Smith ‘Idolatry in Constitutional Interpretation’ *Virginia Law Review* 79 (1993) 3, pp. 583–631.

³⁸ Pierre Schlag *The Enchantment of Reason* (Durham: Duke University Press 1998) vii + 160 pp.

³⁹ „Gott ist tot.” Cf. <http://en.wikipedia.org/wiki/God_is_dead>; more in details <http://de.wikipedia.org/wiki/Friedrich_Nietzsche> and <<http://www.sterneck.net/literatur/nietzsche-gott/index.php>>.

⁴⁰ Pierre Schlag ‘Law as a Continuation of God by Other Means’ *California Law Review* 85 (1997) 2, pp. 427–440 & <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1625&context=californialawreview>>, p. 440.

⁴¹ *Ibid.*, p. 438.

⁴² Joseph H. Beale *A Treatise on the Conflict of Laws* I–III (New York: Baker, Voorhis & Co. 1935), p. 38.

⁴³ Owen M. Fiss ‘Objectivity and Interpretation’ *Stanford Law Review* 34 (1982) 4, 739–763 & <http://www.law.yale.edu/documents/pdf/objectivity_and_interpretation.pdf>.

⁴⁴ Margaret Jane Radin & Frank Michelman ‘Pragmatist and Poststructuralist Critical Legal Practice’ *University of Pennsylvania Law Review* 139 (1991), pp. 1019 et seq. as well as Jack M. Balkin ‘Tradition, Betrayal, and the Politics of Deconstruction’ *Cardozo Law Review*, 11 (1990), pp. 1623 et seq. in <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1282&context=fss_papers>.

⁴⁵ *Ibidem.*

America⁴⁶), as excellently exemplified by the insoluble debate (never made explicit but which stood for life) between CARL SCHMITT and HANS KELSEN, in their parallel search for the final moment which transforms judicial decision making into genuine making of a decision.⁴⁷ Accordingly, scholarly debates on the purport of why, how, and to what extent law shall be objectified addresses just the same issue. Even if it is not apparent, newcomers revitalise the old enigma only. New clothes may be used but the centuries-old ambiguity remains. For decision needs *decisio* to be taken at some point, presupposing personal responsibility unavoidably to be undertaken for it.

⁴⁶ For a narrowly American position paper in overview of the topic, cf. James R. Maxeiner 'Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law' *Valparaiso University Law Review* 41 (2007) 2, pp. 517–590 & <<http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1170&context=vulr>>.

⁴⁷ Csaba Varga 'State and Law – Challenging and Challenged (Building in a Changing World as Debated by Schmitt and Kelsen)' *Curentul Juridic* XIII (2010) 4, No. 43, pp. 26–41 & <http://revcurentjur.ro/arhiva/attachments_201004/recjurid104_2F.pdf>.