

## **THE CHANGING IDEA OF »RULE OF LAW« AND POST-TOTALITARIAN IMPOSITIONS**

**Author**  
**Csaba VARGA\***

**ABSTRACT:** *Post-dictatorship models for transition can be either total defeat with military control, breaking past continuity through preventing local practices to re-organise while re-educating for democracy (as in post-WWII) or just declaring full-pledged rule of law operating from now on (as in post-Communism). Practice may vary in whether or not the Rule of Law is a set of expectations categorically absolute and exhaustively codified or just a respectable ideal having once developed in response to particular challenges somewhere and somewhen, under given historical conditions. Then, it is an art of balancing amongst conflicting values within its ethos: a strive never to end and close, as it is a learning process surfacing new features once new challenges are to be met. Eventually, a choice has to be made between attitudes characteristic of a circus trainer and a gardener. The temptation at substituting past nihilism to a kind of fetishism is also to be faced, as it may strengthen the dependence of target countries on pattern-following by weakening their self-responsibility, vitally needed for successful recovery.\*\**

**KEYWORDS:** *universalism/particularism, nihilism/fetishism, imposition/organicity*  
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### **1. DIVERGING PATTERNS**

One of the models for post-dictatorship transition is exemplified by total defeat followed by the setting up of a military administration and jurisdiction, breaking continuity with the past through preventing the reorganisation of local practices, while re-educating for democracy, as illustrated by the Allied Powers after WWII in Germany, Italy and Japan. Quite another model, at the other extreme, is simply to declare the

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\* Prof. Em, DSc, Institute for Legal Philosophy, Catholic University of Hungary / Research Prof. Em, Institute for Legal Studies of the Hungarian Academy of Sciences, HUNGARY.

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existence of a fully-fledged rule of law scheme, put in operation starting from an artificial zero point, as Central Europe was made to do after the fall of Communism. The costs and benefits of the two models are almost opposites, both for the party who generates the given solution and for the party for whom it was generated.<sup>1</sup> Notwithstanding that the legacies of bygone regimes—with their successors selection of one of the above ideal starts to implement after their predecessors' fall—are hardly comparable, the philosophical considerations (together with the relevant politico-cultural and anthropological pre-assumptions) that underlie the selected paths are already close to actually work in a mutually antagonistic manner.

Characterising the differences schematically, common to both is that they simply introduce a new, hitherto unknown regime, from the moment power and control changes hands.<sup>2</sup>

<b>US with Allied Powers after WWII</b>	<b>US with global forces after collapse of Communism</b>
<i>via military victory &amp; occupation through brutal force of facts</i>	<i>via fully-fledged Rule of Law through mere declaration &amp; institutionalisation</i>
military administration	experimentation
intervention imposed upon – instead of democratic mobilisation	no genuine transitory period
military justice (Nuremberg/Tokyo)	past not confronted
discontinuation of the past with dissociation, dissolution & annihilation	continuation of past, re-organised, re-patterned & re-legitimised
re-education for genuine democracy	quasi (defective) democracy as lived through since

Their most striking difference is perhaps the in-built cynicism and utopianism (with reminders of some a-historical all-mightiness, known incidentally mostly from revolutionary honeymoon periods<sup>3</sup>) that prevails over the solution adopted world-wide today. The very fact that a genuine transitory period is excluded from this dramatic

<sup>1</sup> For the above's first description in a context suggesting that there must be an explanation to why the United States of America changed in the meantime the patterns it offered, see Varga, Cs 1993, 'Transformation to rule of law from no-law: societal contexture of the democratic transition in Central and Eastern Europe', *The Connecticut Journal of International Law* [Hartford], vol. 8, no. 2, pp. 487-505.

<sup>2</sup> Cf., e.g., Friedmann, W 1947, *The Allied Military Government in Germany*, Stevens, London.; Eli E. Nobleman, EE 1950, *American military government courts in Germany: their role in the democratization of the German people*, U.S. Provost Marshal General's School Camp Gordon, Ft. McPherson (Ga.); Montgomery, JD 1957, *Forced to be free: the artificial revolution in Germany and Japan*, The University of Chicago Press, Chicago.; Redford, LH (ed.) 1977, *The occupation of Japan: impact of legal reform* [the proceedings of a symposium], MacArthur Memorial, Norfolk (Va.); Waibel, D 1996, *Von der Wohlwollenden Despotie zur Herrschaft des Rechts: Entwicklungsstufen der amerikanischen Besatzung Deutschlands, 1944–1949*, Beiträge zur Rechtsgeschichte des 20. Jahrhunderts, Mohr, Tübingen. and Diestelkamp, B 1996, *Zwischen Kontinuität und Fremdbestimmung: Zum Einfluss des Besatzungsmächte auf die deutsche und japanische Rechtsordnung, 1945 bis 1950* [Deutsch–Japanisches Symposium], Mohr, Tübingen.

<sup>3</sup> For the expression, see Sorokin, PA 1925, *The sociology of revolution*, Lippincott Sociological Series, J. B. Lippincott Company, Philadelphia & London.

change, both in theory and practice, and that a fully-fledged rule of law scheme is simply declared to have come into force from one moment to the next<sup>4</sup> will inexorably result in a basically counter-productive effect. Namely, the new regime—certainly with an abundance of limitations and a lack of authority, and without instruments for safe operation, which are best developed through the setting up of new conventions in the face of everyday conflicts arising from practical implementation, meaning that long periods of time are needed—will in the final analysis only *re-state its own negated past*. It will do this in a new form and under new legitimacy but there will be a resurgence of past power relations and networking connections, waiting in the silent background with the sole aim of getting re-organised, so that after a while they can, step by step, re-pattern and eventually also take the lead in the overall political and socio-economic process. In other words, the likely outcome will be a dialectical *Aufhebung*, by sublating the past (recalling the *Hegelian* triad of negating / preserving / transcending its subject). This is why and how the past may turn into the present, a kind of present that is able to define at a later stage as well the temporal history of the region.

All this means that the divergent incidents of history as to why and under what conditions the challenge is faced may predetermine the approach to, the background ideology and the overall effect of, the whole transformation process.

Accordingly, *military threat* with the imperative for self-defence was the major factor in the first case and profiteering from a given situation while *extending control* over the target countries was the prime motive in the second case. In the latter case there was an expressed longing over many years to return to an institutional Europe proper<sup>5</sup> which initially offered a general framework (patterned on the European Economic Community and fore-shadowed by the North Atlantic Treaty Organization). The aim was gradual assimilation into this larger scheme.<sup>6</sup> Overall, the twisted interest shared by at least one over-mighty entity among the main partners in the transformation is perhaps the main explanation of why and how a quite clear artificiality of the entire setting has deeply characterised the latter model of transition.

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

<sup>5</sup> The countries concerned in *Central Europe* have in fact belonged to Europe/West (instead of the East) for the last thousand of years, even if political deals may have manoeuvred them to get subjected to powers of Europe/East, as it happened the last time as an issue of the Yalta Treaty in 1945. For the whole span of a historical overview, see Szücs, J 1983, ‘The Three Historical Regions of Europe’, *Acta Historica Academiae Scientiarum Hungaricae*, vol. 29, nos. 1-2, pp. 131-84., in parts reprinted in Gessner, V, Hoeland, A & Varga, Cs (ed.) 1996, *European legal cultures*, Tempus Textbook Series on European Law and European Legal Cultures, vol. I, Dartmouth, Aldershot, Brookfield USA, Singapore & Sydney, pp. 14-48.

<sup>6</sup> Cf. Höland, A 1993, ‘Évolution du droit en Europe centrale et orientale: assiste-t-on à une renaissance du »Law and Development«?’, *Droit et Société*, no. 25, pp. 467-88.

<i>own lives to be lost being at stake</i>	<i>taking control over target countries in power vacuum &amp; amidst their financial dependence being at stake</i>
imposition of actors & acts	lead by <i>ancient régime</i> survivors
military regime with military measures taken	adoption of ready-made schemes taken from EU and/or being on sale <sup>7</sup>
no issues concerning domestic national interests	almost disregard of domestic national interests
<i>thorough change provoked</i>	<i>change-over of nothing but techniques of power in the final account</i>

It has, after all, led mostly to re-arrangement of the well-known scene, while almost essentially the same play and assertion continues, with a partial replacement of some of the players involved. The rather urgent time-schedule, accelerated during the transformation itself together with the felt need to formally re-join Europe proper, set up the conditions for huge masses of foreign normative materials to be simply implanted, without either proper care or the sheer ability to make adaptations and refinements. The rule of law framework that had developed at a relatively early period of transformation (literally preceding the total collapse of Communism and thereby also the start of any rule of law scheme coming into genuinely full operation) with the overwhelming *legalistic view* and the accentuated *juristic treatment* of the process itself (in reaction to the former legal nihilism, which imbues any dictatorship, and in response to the widely voiced popular longing for an end to the over-politicisation of daily issues, characteristic of the Communist era) could only contribute to the final outcome. After one or two terms of freely elected parliaments and governments, heralding both the change-over and the foundational change of the past regime, old-new forces—basically the *ancient régime*—are able to take the lead again with renewed and seemingly legitimate slogans but in fact exposing the country to the free market of global capital without due (or duly negotiated) consideration of local interests, needing to be asserted and protected.

Or, in the final analysis, the sense and the *ratio* of relative costs in investment and benefits gained therefrom were reversed, also in terms of which side was to shoulder the burden for all this and had the most likely chance of profiting from such a planned situation.

	<i>huge costs of military intervention</i>	<i>almost no costs of control</i>
<i>short-term perspective</i>	no issue impacting on post-war living standards	reduced living standards & loss of national wealth
<i>long-term perspective</i>	radical renewal with success in return	uncertainty about future with hopes & broken promises

<sup>7</sup> Cf. Mattei, U 1997, *Introducing legal change: problems and perspectives in less developed countries*, paper presented to the World Bank Workshop on Legal Reform in Washington, D.C., April 14.

In a broader historical perspective, all this may have had repercussions on the changing ways “Rule of Law” has been understood and in fact implemented, in the past and today, resulting also in a crucial division of the ways as far as the science-philosophical and science-methodological issue is concerned. This issue involves the conceptualisation of a historical idea evolved to play a formative role in channelling legal practice as an ultimate ideal (equally to be cultivated intellectually and treated as a part of the very ontology of social existence).<sup>8</sup> is concerned. For quite opposite presuppositions can be reconstrued of the transition-to-the-rule-of-law process from those that prevailed as the two historical instances then and now.

concrete-historical understanding of the Rule of Law	abstract-absolutistic understanding of the Rule of Law
cf. <i>Carl Schmitt</i> : <sup>9</sup> history with ideals in the background, bound to conditions	universalism from the outset
cf. <i>Edmund Burke</i> : achievements must be fought for & through	a case of nothing more than mere will, determination & proclamation
cf. sociologism: we, individuals & society, are all culturally rooted products	cf. mechanical (quasi biological) determinism: for any society at any time & under any conditions

Such a sharp difference in underlying presuppositions explains why, in the former case, a true and, in many ways, original, democratic arrangement was the ultimate outcome although—for the time being at least—a sham and in the latter case the establishment from the very beginning of a defective politico-legal culture, as if it exemplified nothing but the lowering of values, directed by contemporary currents, accompanied by low efficiency in quality selection (prophesised by the “revolution of the masses” described by *Ortega y Gasset* almost eighty years ago<sup>10</sup>).

## 2. HISTORICAL PARTICULARISM VERSUS ABSTRACT UNIVERSALISM

Practice in Central & Eastern Europe varies in terms of whether or not the Rule of Law is conceived of as a set of expectations to be considered categorically absolute as quasi exhaustively ready-made and gaplessly codified, or if it is taken as a respected ideal

<sup>8</sup> For the ontological status and significance of *juristische Weltanschauungen* [lawyerly ideologies] in the law’s existence, see Varga, Cs 2012, *The place of law in Lukács’ world concept*, 3<sup>rd</sup> ed. [1985], Akadémiai Kiadó, Budapest & <http://drsabavarga.wordpress.com/2012/03/13/the-place-of-law-in-lukacs-world-concept-19852012/>.

<sup>9</sup> Cf. Varga, Cs 2005, ‘Change of paradigms in legal reconstruction (Carl Schmitt and the temptation to finally reach a synthesis)’, in Wahlgren, P (ed.), *Perspectives on jurisprudence: essays in honor of Jes Bjarup*, Scandinavian studies in law, vol. 48, Stockholm Institute for Scandinavian Law, Stockholm, pp. 517-29. & *Rivista internazionale di Filosofia del Diritto* [Roma], vol. LXXXI, 2004, no. 4, pp. 691-707.

<sup>10</sup> Ortega y Gasset, J 1930, *La rebelión de las masas*, Revista de occidente, Madrid. & *Revolt of the masses*, Allen & Unwin, London & Norton, New York.

which developed in response to particular challenges in given cultures under given historical conditions. That is, Rule of Law is seen as the art of balancing differing, even conflicting values and interests within its own ethos or, to put it differently, as an effort without end or closure, as nothing more ambitious than a never-ending-stop learning process, a compound of various viewpoints and shifts, layers and levels, which brings new features re-repeatedly to the surface, once the field of everyday routine in either typical situations or most common solutions is abandoned in favour of the new challenges it has to meet.<sup>11</sup>

Accordingly, the duality of understandings as portrayed above repeats itself here.

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

Very little research has been directed to calling scholarly attention to the facts of the past, which are rich in historical messages. Such research would function as a warning against the type of “honeymoon period” a-historicism, which also refutes the scholarly achievements of the last century, especially regarding the legal sociological and anthropological analysis of the classic cases of transplantation and of their well-developed *Rezeptionslehre*<sup>13</sup>—concluding to that mere acts of will (i.e., imposition of power) cannot

<sup>11</sup> For the perception of how much that what is now clearly seen—even if wrongly—as an unprecedented historical exception in a local (or regional, but in any case: epoch-making) context, can be transposed into a modality further adapted from—when allegedly copying—a past exception made somewhere else, a modality which had already been amalgamated and pacified into routine, cf. Posner, EA & Vermeule, A 2004, ‘Transitional justice as ordinary justice’, *Harvard Law Review*, vol. 117, no. 3, pp. 761-825 & <<http://www.law.uchicago.edu/academics/publiclaw/resources/40.eap-av.transitional.both.pdf>>.

<sup>12</sup> “The Rule of Law is not, and cannot be taken as, a collective pact of suicide”—as taught by *John Finnis* in Budapest on 19 February 1990, at an international conference on “Rule of Law / *Rechtsstaatlichkeit*” convened by the political party FIDESz (now the strongest in opposition to the old-new Communists in the parliament), referring to the consideration above as practically the sole and exclusive message our region (under quite new conditions never met before, as facing transition from a subversively brutal and lasting dictatorship) may draw as reasonably useful from the library-wide Western literature on the Rule of Law. For a background, see Finnis, J 1988, *Natural law and natural rights*, [1980], Clarendon Law Series, Clarendon Press, Oxford, particularly p. 175. For the context, compare also with Varga, Cs 1995, *Transition to rule of law: on the democratic transformation in Hungary*, Philosophiae Iuris, ELTE “Comparative Legal Cultures” Project, Budapest & <<http://drscsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>>.

<sup>13</sup> Cf. primarily Kulcsár, K 1992, *Modernization and law*, Akadémiai Kiadó, Budapest. as well as Sajó, A 1988, *Társadalmi-jogi változás* [Socio-legal change], Akadémiai Kiadó, Budapest., and the long series of case studies like, e.g., Starr, J 1978, *Dispute and settlement in rural Turkey: an ethnography of law*, Social, Economic, and Political Studies of the Middle East, vol. 23, Brill, Leiden. and Scholler, H (ed.) 1996, *Westliches Recht in der*

end in the kinds of borrowing that can organically integrate into the working body of the law in a way suited to exert an impact on it, comparable to the efficiency with which it functioned in its original context.

One trend among earlier researches was to relate on-going processes and their ideologisation to the criticism formulated on the “*Law and Modernization*” movement,<sup>14</sup> to the major reasons why it had been bound to fail (overall more than partially) in a mostly Latin American context,<sup>15</sup> and to its survival, and moreover transposition in *renaissance*, in the conceptualisation and methodological preparation of the changes to be provoked in a new terrain, i.e. that of Central & Eastern Europe;<sup>16</sup> a criticism of “honeymoon period” a-historicism mostly and significantly because of it being embedded in a kind of ethno-centrism, that stands for the abstract-universal view of global approaches, viewing societies as being without a past and tradition of their own, and therefore open to quasi mechanical treatment.

Another trend tried to reconstruct the nature of the need for a *Rule of Law* in history. Asking where and how and as a result of what challenges it evolved, and ending by responding to the question of whether it is a cultural ideal to be aspired to, through measuring pros & cons and weighing and balancing amongst conflicting aspects, even if it is never fully attainable or, in the context of present-day conditions with well-established standards both internationally and domestically, whether it is just a pre-determined set of clearly formalised normative requirements which are to be simply abided by, strictly and formally and under any conditions.

Mitigating the two trends is a third direction which casts light on the basic differences in underlying *mentalités juridiques*<sup>17</sup> between the two main historical manifestations of the same basic idea,<sup>18</sup> namely, the *Rule of Law* proper, developed in cultures of the

*Republik Türkei: 70 Jahre nach der Gründung*, Arbeiten zur Rechtsvergleichung, vol. 181, Nomos, Baden-Baden.

<sup>14</sup> Cf., as an early monographic criticism upon it, Gardner, JA 1980, *Legal imperialism: American lawyers and foreign aid in Latin America*, University of Wisconsin Press, Madison.

<sup>15</sup> For the main pieces of criticism, cf., e.g., Trubek, DM 1972, ‘Toward a social theory of law: an essay on the study of law and development’, *Yale Law Journal*, vol. 82, no. 1, pp. 1-50.; Franck, TM 1972, ‘The new development: can American law and legal institutions help developing countries?’, *Wisconsin Law Review*, vol. 12, no. 3, pp. 767-801.; Trubek, DA & Galanter, M 1974, ‘Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States’, *Wisconsin Law Review*, no. 4, pp. 1062-102. and Merryman, JH, Clark, DS & Friedman, LM 1979, *Law and social change in Mediterranean Europe and Latin America: a handbook of legal and social indicators for comparative study*, Stanford Studies in Law and Development, Stanford University Press, Stanford & Oceana, Dobbs Ferry (N.Y.).

<sup>16</sup> Cf., as a most telling example, Linz, JJ & Stepan, A 1996, *Problems of democratic transition and consolidation: Southern Europe, South America, and post-communist Europe*, Johns Hopkins University Press, Baltimore.

<sup>17</sup> An expression by Pierre Legrand, e.g., in his fabulous stand to be taken nonetheless seriously in Legrand, P 1996, ‘European legal systems are not converging’, *The International and Comparative Law Quarterly*, vol. 45, no. 1, pp. 53-81. and as synthetised in Legrand, P 1999, *Le droit comparé*, Que sais-je?, vol. 3478, Presses Universitaires de France, Paris. Although hidden in reconstruction (by the example of German and English languages) of how differing terminologies as coming from differing word uses and cultural understandings are to represent Civil Law and Common Law respectively, cf. the pioneering characterisation by Sack, P 1987, ‘Law & custom: reflections on the relations between English law and the English language’, *Rechtstheorie*, vol. 18, pp. 421-36.

<sup>18</sup> Cf. Varga, Cs 2007, ‘Legal traditions? in search for families and cultures of law’, in Moreso, JJ, *Legal theory: legal positivism and conceptual analysis* [Proceedings of the 22<sup>nd</sup> IVR World Congress Granada 2005], vol. I,

Common Law on the one hand, and the form of *Rechtsstaatlichkeit* in arrangements of the Civil Law, on the other. Justiciability, open-ended if due process of law is also present, represents the former; whilst formal security of/in law, entrusted in mere enactments, represents the latter one. Paradoxically, completed perfection of the law as enacted without gaps and waiting for nothing to be added to a quasi mechanical application reflects the spirit the latter,<sup>19</sup> while the former is mostly used, in global mass transfers, as a closed set of requirements codified almost to smallest details.<sup>20</sup>

### 3. WITH DIVERGING STRUCTURES AND PATHS

As has long been established by legal sociology, and later also by legal hermeneutics, a legal system in operation is by far more than a mere skeleton made up of formal enactments. In fact, it is a working unit of formal and informal components, based on some legal culture, with an adequate tradition in the background.<sup>21</sup> As it has been exactly argued by Scandinavian legal realism,<sup>22</sup> rules, either enacted or casually reconstru(ct)ed, are merely indicators of various kinds of underlying normativity already in operation,<sup>23</sup> from which they surface like the tips of icebergs, hiding much below the surface. Generally, transfers and impositions risk getting stuck in a context of having been, and maybe also remaining, alien to them. This results in them either detaching themselves—as an external interference (and an imposition)—from the target system or disrupting the system itself, by re-routing its further development along an artificial (forced) path, split off from the system's original culture and tradition.

The illustration below clearly shows that no approach to a working legal system can be reduced to a given number of enacted rules as mappable from any formal doctrine of the sources of the law. Nor can it be reduced to the idea that rules provide only basic guidance and merely mark directions, specifying the terrains and channels of what would follow in judicial weighing up, argumentation and reasoning. This is the average condition for all well-developed legal arrangements, stabilised and also crystallised in practice, even if it is not apparent for a first glance. Consequently, at dramatic times when enacted rules are changed because of a revolutionary new start or mass import of law, underlying social practices as well as skills, sensitivities and adaptations in/through judicial practice will also lose ground. At the same time conventions and conventionalisations, destined to both fill gaps and make such a skeleton of rules liveable, will gain ground over the years—

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ARSP Beiheft, no. 106, Steiner, Stuttgart, pp. 181-93. & *Acta Juridica Hungarica*, vol. 46, 2005, nos. 3-4, pp. 177-97 <<http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>>.

<sup>19</sup> Cf. Varga, Cs 1996, 'Varieties of law and the rule of law', *Archiv für Rechts- und Sozialphilosophie*, vol. 82, no. 1, pp. 61-72.

<sup>20</sup> See Varga, Cs 2007, 'Reception of legal patterns in a globalising age', in López Calera, N (ed.) 2007, *Globalization, law and economy* [Proceedings of the 22<sup>nd</sup> IVR World Congress], vol. IV, ARSP Beiheft, no. 109, Franz Steiner Verlag, Stuttgart, pp. 85-96.

<sup>21</sup> Cf. Varga (ed.), (1992) "*Comparative Legal Cultures*", Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press.

<sup>22</sup> For a local overview (with some texts reproduced for text-book use), cf. Visegrády, A (ed.) 2003, *Scandinavian Legal Realism*, Philosophiae Iuris, Szent István Társulat, Budapest.

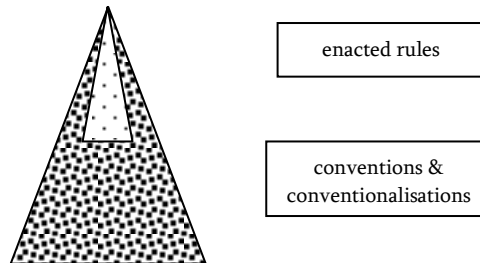
<sup>23</sup> For the latest theory on the core of juridicity, cf. Pattaro, E 2007, *The law and the right: a reappraisal of the reality that ought to be*, A Treatise of Legal Philosophy and General Jurisprudence, vol. I, Springer, Dordrecht: Springer.



perhaps decades or even a series of decades<sup>24</sup>—until the working legal system can be said to fit realistic expectations.

In the meantime, anything can happen for those who are determined enough to take advantage of any chance to succeed, provided only that they are endowed with fewer scruples.<sup>25</sup> The overall tragedy of Russia after the fall of Communism can also partly be attributed to the shaking of regulation at the top and thereby to the collapse of the old regime, which notwithstanding all its Byzantine–Asiatic/Mongolian–Bolshevik complexity, and despite being rather weak, was nevertheless in a position to ensure the mere survival of the populace on a basic level.<sup>26</sup>

More to the point are some examples taken from Hungary’s recent history. Namely, because of the forceful push of a course of doctrinarian libertinism during the early years of the first freely elected government after the fall of Communism, police were afraid to use arms in fact, so it happened more than twice that young policemen on night duty were killed by thieves stealing old cars of extremely low value.<sup>27</sup> – The legalistic overtone had pervaded the government to such an extent that, after half a century of Soviet occupation, it had no effective means of controlling national security, for instance, by starting officially to ask any of the Hungarian diplomats, army and police generals in service if they had ever been and/or continued to be agents for any network of, e.g., Soviet secret agencies. – There is also the over-enrichment, without legal title to justify its volume, that was allowed to continue without control all through and practically up to the present day. This happened because all the successive bills presented to date to insert at least later measures guaranteeing minimum transparency in the process of so-called privatisation (ending, by the way, in the loss of two-thirds of the national wealth without due return in direct financial assets or indirect economic benefits) were equally rejected through a constitutional adjudication that was too activist.



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

<sup>25</sup> Cf., also as mirrored by a Lithuanian case-study, Varga, Cs 2005, ‘Rule of law between the Scylla of imported patterns and the Charybdis of actual realisations (the experience of Lithuania)’, *Acta Juridica Hungarica*, vol. 46, nos. 1-2, pp. 1-11 <<http://www.akademiai.com/content/m3296v37841w54h0/fulltext.pdf>> & *Rechtstheorie*, vol. 37, 2006, no. 3, pp. 349-59. and Varga, Cs 2005, ‘Rule of law – at the crossroads of challenges’, *Iustum, Aequum, Salutare* [Budapest], vol. I, no. 1-2, pp. 73-88 <<http://ias.jak.ppke.hu/hir/ias/20051sz/20051.pdf>>.

<sup>26</sup> Cohen, SF 2000, *Failed crusade: America and the tragedy of post-communist Russia*, W. W. Norton & Company, New York & London. Compare also with its essayistic reviewing by Varga, Cs 2007, ‘Failed crusade: American self-confidence, Russian catastrophe’, *Central European Political Science Review*, vol. 8, no. 28, pp. 71-87. and in Varga, Cs 2008, *Transition? to rule of law? constitutionalism and transitional justice challenged in Central & Eastern Europe*, PoLiSz series, vol. 7, Kráter, Pomáz, pp. 199-219.

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

It tells much about the differences in the underlying *mentalités juridiques* in play that, instead of the continental manner of approaching any issue as a problem to be solved directly in and only through the law, the most useful American suggestion ever addressed to my government in answer to my query<sup>28</sup> was precisely to avoid searching for direct paths, especially those formulated in and through the law. To mention just two instances: instead of removal, the Hungarian government was advised to introduce a physical fitness test to those in the highest army and police ranks with dubious past loyalties to be replaced. The second instance concerned the use of US modelled questionnaires with regard to so-called sensitive positions in national security. That is, the voluntary offer to provide of all the data needed to enable human resources management to begin on the relevant field was conceived as solving the problem outlined in the previous paragraph.

All of this leads to the following realisation: while *substantively formulated paths* may easily be found problematic, *procedural ways* are by far more openly neutral as they withstand and exclude any questioning. In other words, in cases such as those exemplified above, Civil Law methodology mixed with practices known in Common Law may prove to be by far more practicable and function smoothly more than just seeing the issue as a challenge to anyone's right simply limited. That is, the same problematisation in the pragmatism of an object-language as transposed into the law's normatively frameworked meta-language may feature and, in fact, serve the most diverging, moreover, even antagonistic characters and goals, respectively, in the functioning of the (substantive & procedural) directions and (institutional) channels chosen and used, thereby pre-selecting the legal technicality dominating the given field.<sup>29</sup>

#### 4. IMPOSITION OR ORGANIC DEVELOPMENT?

Whether or not the new language is to be predominantly American, i.e., formulated in terms of rights and human rights, and how much the borrower's peculiar technicality and procedural approach segments and departmentalises, or even dissolves, the common responsibility once born for the sake of the *res publica* alive even under the old regime, is another issue that needs to be examined alongside the scholarly treatment of the movements of Law & Development, Law & Modernization, and within the scope of globalised legal transfers.

Accordingly, and most importantly for the region, there is a risk that a new reality has become the mainstream, under the aegis of the new demands of the rule of law, after the fall of dictatorship. This new reality is the rivalry amongst state institutions. With their new legitimacy, the parts and branches that exercise state power—Parliament and Constitutional Court, Government and the Supreme Court, as well as the series of Ombudsmen—are yet (after almost two decades) to fully accomplish to the farthest extent

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

<sup>29</sup> For the transforming magic built in law, cf. Varga, Cs 2006, 'Theory and practice in law: on the magical role of legal technique', *Acta Juridica Hungarica*, vol. 47, no. 4, pp. 351-72 <<http://www.akademiai.com/content/j4k2u58xk7rj6541/fulltext.pdf>>.

(by over-exhausting what is inherent in) their legal status, while also step by step extending their respective competences as far as possible, with an exclusively sectoral and eminently narrow view of their own chances and availabilities, but without any intent to either sensitively safeguard common (i.e., national) interests or to enter into co-operation with any other branches of the state machinery to achieve such a (legally less definable and later less accountable) purpose. Bearing in mind this solitary attitude, the disappointing outcome cannot but be a kind of *practical anarchy*, casting a disfavouredly ambiguous light on the popular understanding of what the Rule of Law is and can be for. The idea of the Rule of Law is starting to be more like the Communist myth and propaganda about a better future than it appeared to be two decades ago, when it had become the slogan as a counter-symbol which showed proof of the ultimate unsupportability of all forms of what we had once known as the “actually existing system of Socialism”.

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

This very option concerns most directly the final conclusion which has ended the criticism of the main relevant American trends of “Law & Modernization”. Notably, ethno-centrism and cultural imperialism have been as just two instances of the key-words used to cover this a-historical new utopianism, which is simply an expression of the contemporary tendencies towards globalisation through total universalisation.<sup>30</sup> Or, the critical mass of papers collected by World Bank bibliographies represents an alternative basic choice to be made between two directions when taking a final stand: either to follow the pattern of a circus trainer, having an abstract understanding of the Rule of Law, transmitting and enforcing one’s own will as previously determined and decided, because taken from one’s own home, or the example of the gardener in a historically particular and locally singular understanding of the Rule of Law. In the latter choice the gardener (1) respects the target culture as given (by cultivating its soil and planting its plants) and, therefore (2) assists its particularities to develop further (instead of imposing or simply transferring any of his/her own fixed ideas or the experiments/experiences, gained of others in some other place at another time. The conclusion to this is that (3) the Rule of Law is a scheme that cannot, at the most, be more than a continued learning programme for all those involved (that is, equally, once the pioneers have formed it historically and former students have grown to the stature of masters themselves thus achieving equal status with the former).

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<sup>30</sup> For the basic criticism upon the trends of “Law & Development” and “Law & Modernization”, cf. note 22. As to the tendency of globalisation through universalisation as a specific mentality inherently characteristic of the United States of America as an imperially big country, therefore by far more sensitive to core issues than to small-size subtleties, cf. Campos, PF 1998, *Jurismania: the madness of American law*, Oxford University Press, New York., reviewed by Varga, Cs 2013, ‘Legal mentality as a component of law: rationality driven into anarchy in America’, *Curentul Juridic*, vol. XVI, no. 1 [no. 52], pp. 63-77 <[http://revcurentjur.ro/arhiva/attachments\\_201301/recjurid131\\_7F.pdf](http://revcurentjur.ro/arhiva/attachments_201301/recjurid131_7F.pdf)>.

## 5. RULE OF LAW, CERTAINTY OF LAW, AND THE VALUES INVOLVED

There is, in any case, and especially in Central Europe with its current active constitutional adjudication, a temptation to replace a *past nihilism* of the rule of law<sup>31</sup> with a *kind of fetishism* of the same rule of law,<sup>32</sup> which may further strengthen the dependence of target countries on following patterns, and thereby weakening their own creative forces and sense of self-esteem and self-responsibility, both of which are vitally needed for their successful recovery.

In present-day societies, the variations in the ideal of the Rule of Law, as described in the first two paragraphs characterising post-WWII developments, can best be typified by the illustration below. There is no need to emphasise that this very typification is centred on the transition-to-rule-of-law understanding of the Rule of Law in its most purist and formalist, simplistic and excessive neophytic form, exemplified by the path the Constitutional Court of Hungary chose and unilaterally enforced upon the country. This is then compared to the far more mature and balanced master type formed in the wake of the transition to rule of law after WWII, as exemplified by the jurisprudence of the Constitutional Court of Germany.

German Constitutional Court	Hungarian Constitutional Court
balanced care taken of basic constitutional values	past nihilism changed over by fetishism
bound to nothing but its Basic Law	“elegantly flying to and fro above” <sup>33</sup>
coming from below	partisan forum

<sup>31</sup> Cf. Varga, Cs 1989, ‘Liberty, equality, and the conceptual minimum of legal mediation’, in MacCormick, N & Bankowski, Z (eds.) 1989, *Enlightenment, rights and revolution: essays in legal and social philosophy*, Aberdeen University Press, Aberdeen, pp. 229-51.

<sup>32</sup> In acknowledgement of both the Central & Eastern European lawyerly nostalgic ideal of the rule of law as reflected back to its respective pre-war past and the practical want of any impact upon it by the after-WWII continental (Western) developments in both judicial style and patterns of reasoning, in respect of both the latter’s ways and sources of inspiration (as exemplified particularly by the coming into fore of reasoning by principles; a renewed sensitivity towards the demands of natural law, especially in its form of “the nature of things”; and the growing constitutionalisation of issues), cf., in addition to Varga, Cs 2007, ‘Development of theoretical legal thought in Hungary at the turn of the millennium’, in Takács, P, Jakab, A & Tatham, AF (eds.), *The transformation of the Hungarian legal order 1985–2005: transition to the rule of law and accession to the European Union*, Kluwer Law International, Alphen aan den Rijn, pp. 615-38, and Varga, Cs 2003, ‘Meeting points between the traditions of English–American common law and continental-French civil law (developments and experience of postmodernity in Canada)’, *Acta Juridica Hungarica*, vol. 44, no. 1-2, pp. 21-44 & <<http://www.akademiai.com/content/x39m7w4371341671/fulltext.pdf>>, also Kühn, Z 2004, ‘Worlds apart: Western and Central European judicial cultures at the onset of the European enlargement’, *The American Journal of Comparative Law*, vol. 52, pp. 531-67, and Kühn, Z 2011, *The judiciary in Central and Eastern Europe: mechanical jurisprudence in transformation?*, Law in Eastern Europe, vol. 61, Leiden & Boston, Martinus Nijhoff. As to the conflicted role played by the Hungarian Constitutional Court, at the same time having arbitrarily stipulated what the Rule of Law had to stand for in Hungary, and then, making its own unchallengeable but usurped outcome transubstantiated into an ultimate goal and *sine qua non*, cf. Varga, Cs 2008, ‘Creeping renovation of law through constitutional judiciary?’, in Varga, *Transition? to rule of law* [note 26], pp. 117-60, & ‘Transition marshalled by constitutional court dicta under the cover of a formal rule of law (a case-study of Hungary)’, *Central European Political Science Review*, vol. 9, 2008, no. 32, pp. 9-48.

<sup>33</sup> Quoted from one of the Constitutional Court Justices of the first term reporting on their activity’s fruits, Imre Vörös in Halmai, G & Tordai, Cs 1999, ‘»kevesebb lesz az elegáns röpködés a jogrendszer fölött«’ [»There will be less elegantly flying to and fro above the legal system«] [interview], *Fundamentum*, no. 2, p. 68.

in response to expectations	issuing edicts on ultimate choices & values
<i>multilateral</i> democratic participation with profession included if feasible	<i>unilateral</i> democratic participation with profession excluded on principle
legitimacy sought for constantly	legitimacy drawn from mere status
past discontinued	past continued
law is seen in the totality of its working in implementation & adaptability	suggesting following patterns with weakened creative forces in adaptation

Accordingly, on the one hand, in the *post-WWII mature type*, the idea of the Rule of Law comes—symbolically speaking—to the fore from the grassroots, as the outcome of a widely felt and agreed need from below, from the bottom. It preserves, therefore, throughout a rather sensitive relationship with the populace, in the widened sense of democratic participation. Or, under the aegis of the rule of law anything can be done in realisation—and, conclusively, only provided—that living practice of the law is a function of its continued popular support. Or, its smooth functioning is inherently preconditioned because it moves in parallel with rightly felt popular expectations, in the sense at least that the Rule of Law does not become a self-conceited, partisan forum for pre-determining political paths and national policies, for reforming morals and pronouncing on values, but remains cautious, neutral and well-balanced by being bound solely to its Basic Law when decisions are to be taken—not owned by the country’s Constitutional Court but respected as the ultimate foundation stone for the life-span of the common Republic that belongs to all the citizens. Therefore, the guardian of constitutionality does not dissociate itself either from the people or from the relevant profession(s).

On the other hand, the *post-Communism type*, as favoured mostly by Open Society specialists and forces of globalism, has unequivocally opted for formalism and strict rule-positivism whenever it refutes interpretations against its creative innovation. For instance, early enough to pre-define the entire course and end-result of transition, the Hungarian Constitutional Court took a stand in what was an artificially erected contradiction between so-called legality and justice,<sup>34</sup> in terms of which it preferred foreseeability as the sole guarantor of *formale Rechtssicherheit*—coming from formal security in/of law, to rule-of-law continuity with a past based upon total denial of any kind of rule of law—to the detriment of any material or substantive value. Therefore, and in a rather unforeseeable way, it declared the unconstitutionality of several dramatic issues (bills & laws) based upon nothing but its imagined virtual “invisible constitution”, or false references to solutions adopted by “civilized nations” or, if any constitutional clause was actually named and identified as a source, the mere description of the Republic of Hungary as “an independent, democratic state under the rule of law.”<sup>35</sup> In such a way it could certainly

<sup>34</sup> For differing solutions reached by neighbouring countries, cf. Varga, Cs (ed.) 1994, *Coming to terms with the past under the rule of law: the German and the Czech models*, Windsor Klub, Budapest.

<sup>35</sup> Constitution as the Act XL (25 June 1990), art. 2, para. 1. It is to be noted that the Hungarian Constitutional Court treated this clause as well, as the basis to derive whatever argument for its politically activist and

become the marshalling power of the post-Communist transition in Hungary, forecasting its degeneration into unconditional continuity, which could after all solidify old political forces so as that they could come back as new ones, also endowed now by their new rule-of-law legitimacy.

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

The very idea of the Rule of Law is here reduced to the all-mightiness of its uncontrollable discretionary power. For instead of caring about the common advance and destiny of a people, such a constitutional adjudication satisfied itself by making edicts of its positions as if it were hammering in a row nails, acting in the pre-granted security that the kind of constitutionality it presents as the final value for a nation's survival is, from the very beginning, inherent in and embodied within it.

Under such conditions,<sup>36</sup> rebirth of the vitality of DICEY's idea about public opinion as the ultimate support of any progress achieved in law<sup>37</sup> is a lesson still to be learned; notwithstanding the fact that all the various forms in which the idea of the Rule of Law has so far been institutionalised do, in themselves, display a strong civilisational value.

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interventionist arguments from, the fact notwithstanding that the "rule of law" notion defies any legally unambiguous definition. For the Court's nine starting years of marshalling the frameworks and paths of transition, see the preceding note. For the relative openness of anything of the Rule of Law both as an ideal and as a given solution, only weighable within individual balances *hic et nunc* and *in concreto* in a given legal arrangement as a whole, see Fallon, RH Jr. 1997, '«The rule of law» as a concept in constitutional discourse', *Columbia Law Review*, vol. 97, no. 1, pp. 1-56.

<sup>36</sup> The issue of whether or not conditions developed do allow consolidation of a democratic setup is analysed in broader social science terms by Kulcsár, K 2006, 'The new political system and Hungarian reality', *Angewandte Sozialforschung*, vol. 24, nos. 3-4, [»Asphyxiation«], pp. 187-200.

<sup>37</sup> By Dicey, AV 1885, *Lectures introductory to the study of the law of the constitution*, Macmillan and Co., London. and Dicey, AV 1905, *Lectures on the relation between law and public opinion in England during the nineteenth century*, Macmillan and Co., London & The Macmillan Co., New York.