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IDOL, DEDUCED FROM AN IDEAL?

Rule of Law, Universalization, Degradation[1]

"All people of broad, strong sense have an instinctive repugnance to the men of maxims; because such people early discern that the mysterious complexity of our life is not to be embraced by maxims, and that to lace ourselves up in formulas of that sort is to repress all the divine promptings and inspirations that spring from growing insight and sympathy. And the man of maxims is the popular representative of the minds that are guided in their moral judgment solely by general rules, thinking that these will lead them to justice by a ready-made patent method, without the trouble of exerting patience, discrimination, impartiality – without any care to assure themselves whether they have the insight that comes from a hardly-earned estimate of temptation, or from a life vivid and intense enough to have created a wide fellow-feeling with all that is human."

George Eliot[2]

"There is no need at all for different people, religions and cultures to adapt or conform to one another. […] I think we help one another best if we make no pretenses, remain ourselves, and simply respect and honor one another, just as we are."

Vaclav Havel[3]

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[2] George Eliot, *The Mill on the Floss* (1860) Book 6, chap. 2, https://www.gutenberg.org/files/6688/6688-h/6688-h.htm#41.

[3] Quoted in Philip K. Howard, "Vaclav Havel's Critique of the West," *The Atlantic* (December 20, 2011), http://www.theatlantic.com/international/archive/2011/12/vaclav-havels-critique-of-the-west/250277/.

I

For more than a quarter of a century, the almost mechanical and unreflective *reception* of Western mainstream trends across the entire Central and Eastern European region has made the chance of any fresh start the function of a soullessly estranged doctrinarianism, declaring its newest inventions the law of the day, profoundly self-defeating for those countries concerned.[4] For whatever its present state – even if it appears obsolete, strange or crude to an external observer at first glance – within a given civilizational level it is only *tradition,* the accumulation of generations' lived experience – i.e., the historically evolving culture of each and every community – that can offer an integrative force to any given society, and dignity to the persons belonging to it.[5]

Just to start with our central concept, it is a degrading paradox to realize how much the English-American legal heritage strives to become the Number One teacher of Europe in making it to understand what the overemphasized and overused notion «*Rule of Law*» means. For it is surprising to notice that – as to the *English past* – an ideal is extended to gain acceptance worldwide as a universal model that has from the beginning targeted the preservation of the

[4] Cf., as to the once Soviet Union's destiny, Csaba Varga, "Failed Crusade. American Self-confidence, Russian Catastrophe," in *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe* (PoLíSz Series Books 7, Pomáz: Kráter, 2008), 199–219, http://mek.oszk.hu/14800/14851. A general overview with an assessment has recently been made by Stephen Holmes and Ivan Krastev, *The Light That Failed. Why the West Is Losing the Fight for Democracy* (New York: Pegasus Books, 2020).

[5] We are hardly longing for reviving the nomadic life of the Steppe again, but the political and social wisdom of its ordering may have been adequate and thoroughly balanced in its time. Abdumalik Nysanbayev, "Kazakhstan. Cultural Inheritance and Social Transformation," in *Kazakh Philosophical Studies I–Cultural Heritage and Contemporary Change Series IIIC Central Asia 2* (Washington, D. C., Council for Research in Values and Philosophy, 2004), http://www.crvp.org/book/Series03/IIIC-2/chap-2.htm, ch. II: "Common Law Philosophy of the Kazakhs: Potentials for Democracy". Cf. also Csaba Varga, "Ősnépeink jogszemlélete" [The legal mentality of our ancient ancestries], *Hitel* 28, no.11 (2015): 83–96, http://www.hitelfolyoirat.hu/sites/default/files/pdf/17-varga.pdf. While the Albanian Highland's "Blood Feud" [*gjakmarrja*] will scarcely be regarded positively today, nevertheless, "Albanians have a reverence for honesty and good faith that plays an almost sacred role in their customary law. These same values can bring justice to modernity, and control the atomism and the positivism that have defaced the rule of law in other, more modern, European societies." Genc Trnavci, "The Interaction of Customary Law with the Modern Rule of Law in Albania and Kosova," in *The Rule of Law in Comparative Perspective Series: Ius Gentium: Comparative Perspectives on Law and Justice* Vol. 3 (Dordrecht, Springer Science+Business Media B. V., 2010), 201–15, at 215. Cf. also Arburim Iseni, Ylber Sela, and Adem Beadini, "A Comparative Study of Albanian Customary Law with the Code of the West and the Common Law of England. Lex Scripta vs. Lex Non Scripta," *Journal of Law, Policy and Globalization* 18 (2013): 50–60, http://www.iiste.org/Journals/index.php/JLPG/article/viewFile/8498/8437.
The first comparative attempt at drawing a legal map of the world genuinely based on tradition is Patrick Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (Oxford: Oxford University Press, 2014), with parts detailing the varied roles tradition has always played especially in classical Jewish and Islamic understandings and practices of law. For the variety of roles tradition used to play, see Csaba Varga, *Comparative Legal Cultures. On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism* (Budapest: Szent István Társulat, 2012), 83–5, http://mek.oszk.hu/15300/15386.

autonomy (or independence from the royal power) of the judiciary. And ironically, the most essential feature, i. e. that common law has never been embodied in clear rules and that the incessantly growing mass of precedents cannot but be based on an *ex post facto* declaration of what the kingdom's law has always allegedly been, that is, plainly retroactive for the contended case,[6] is not disputed by either its classic or contemporary jurisprudence.[7] And as to the *United States of America's presence*, their understanding of what the rule of law stands for is founded on the political and hierarchical supremacy of judicial power, in such a way close as to amount to the breaking down of what has been left from their founding fathers' ideas on democracy and representation. As to the motives – as domestic critics repeatedly claim, – it is rooted in the short-term striving to win, characteristic of American culture, including politics. And in its main orientation of not losing, the state power's democratic (representative) machinery, legislation-cum-government, is oriented to attract voters' favor, and therefore frequently passes on, obstinately, those issues that risk unanimous popular consent, to readily available judicial fora. For this reason, divisive issues – that is, those that would indeed need disputing at a *demos* level – are, instead of achieving the people's representatives' democratic consent, decided *in camera* by a judicial forum, throughout homogenized and formalized in law, not exceptionally on crucial issues as well, pioneering over the stance of huge parts of massively shared popular values.[8] As an added and self-multiplying effect, there is also constitutional adjudication imposed upon legislation: the law enacted by the sovereign representative is, if brought to judicial fora, dependent on reaffirmation by a professional body which is not representative, not easily accessible to democratic control either, and acts, again, in a legally homogenized and formalized way. In its own self-generating turn, this offered an invitation to the recently deceased Ronald Dworkin to propose judicial review for assessing political party programs as well, before a party may launch its agenda before the public. Moreover, even American rule-based law itself gets increasingly deformed in legislative practice so that it can easily serve juristocratic interests:[9] it gets drafted in a manner to ease decisional options for the future judge should the regulated issue be contested.[10]

[6] Richard Ekins, "Rights, Interpretation and the Rule of Law," in *Modern Challenges to the Rule of Law*, ed. Richard Ekins (Wellington: LexisNexis NY, 2011), 165–87, 166–7, 174–8.

[7] E.g., John Philip Reid, *The Rule of Law. The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (DeKalb, Ill.: Northern Illionis University Press, 2004) and James R. Silkenat, James E. Hickey Jr., and Peter D. Barenboim, eds, *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Ius Gentium: Comparative Perspectives on Law and Justice 38 (Heidelberg: Springer, 2004).

[8] "Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment." Robert H. Bork, *The Tempting of America. The Political Seduction of the Law* (New York: Simon and Schuster 1990), 17.

[9] Cf. *Die Stufenweise Entstehung des Juristokratischen Staates / The Gradual Emergence of the Juristocratic State,* ed. Béla Pokol & András Téglási (Budapest: Dialóg Campus, 2019) & <http://www.dialogcampus.hu/users/default/dialogcampus/ebooks/978-615-6020-71-0/pdf/pdf_die_stufenweise_entstehung_des_juristokratischen_staates_the_gradual__.pdf>.

[10] Eric Helland and Jonathan Kick, "Regulation and Litigation: Complements or Substitutes?" in *The American Illness*. Essays on the Rule of Law, ed. F. H. Buckley (New Haven, London: Yale University Press, 2013), 118–36.

In reaction, oppositional scholarly literature has in the meantime emerged addressing the destructive effects of this new *"political religion"*,[11] calling attention, among others, to the intellectual climate, in the womb of which quantities of unrestrained law professors, rivalling each other to arrive at intellectually constructed extremes, alongside profit-hungry advocates, skilled in filling available or artificially established gaps in the law, and who construct their own rule of law – to the detriment of the one-time ideals of the founding fathers.

What have they produced and what may have produced them? As a sign of the dissolution of social trust and the disintegration of the social network in American society over the last fifty years, divorce has multiplied by four, birth out of wedlock by twelve, violent crime by ten, at a time when, as critics allege, the hypertrophically increasing curve of regulatory intervention and litigation had already corroded faith in the law.[12] Instead of being a remedy, law has itself become the problem, a *major pathogenic factor* in the sickening of America, as repeatedly stated by home critics.[13] Accordingly, at a stage when representative democracy is forced back by the triumphal judicial power[14] and mainstream ideology (upheld by some from a minority partisan background) is estranged from basic human needs, the cry for "Government by real people, not theories" has also surfaced as a new re-vindication.[15] Or, proud and arrogant *"American exceptionalism"* (recognizing, in the mirror of America, the "end-of-history" type[16] universal ideal of human existence) is already seen and diagnosed by some as a repressed impotence-cum-chauvinism, characterized by an over-expensive legal order, artfully legalized wrangling, and an influential lawyer cast parasitic on corruption.[17] It is usual to attribute this more and more to the proliferating brainchildren, easy and irresponsible, of elite universities acting as "short-sighted, self-interested groups",[18]

[11] Ran Hirschl, *Constitutional Theocracy* (Cambridge, Mass.: Harvard University Press, 2011).

[12] Francis Fukuyama, *The Great Disruption. Nature and the Reconstitution of the Social Order* (New York: The Free Press, 1999). Cf. also Csaba Varga, "Humanity Elevating Themselves? Dilemmas of Rationalism in our Age," in his *Theory of Law. Norm, Logic, System, Doctrine & Technique in Legal Processes, with Appendix on European Law,* Philosophiae Iuris (Budapest: Szent István Társulat, 2012), 131–64, http://mek.oszk.hu/15400/15409.

[13] F. H. Buckley, *The American Illness. Essays on the Rule of Law* (New Haven – London: Yale University Press, 2013) is itself an inquiry into, as stated in the Preface, "whether the U. S. legal system is contributing to the country's long post-war decline". Cf. also, as a reflection on Paul F. Campos, *Jurismania. The Madness of American Law* (New York: Oxford University Press, 1998), comments by Csaba Varga, "Legal Mentality as a Component of Law. Rationality Driven into Anarchy in America," *Curentul Juridic* XVI, no. 1 (2013): 63–77, http://revcurentjur.ro/arhiva/attachments_201301/recjurid131_7F.pdf.

[14] Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge, MA and London: Harvard University Press, 2004).

[15] Philip K. Howard, *The Rule of Nobody. Saving America from Dead Law and Broken Government* (New York: W. W. Norton & Company, 2014), heralded as a chapter title; cf. also Philip K. Howard, *The Death of Common Sense. How Law is Suffocating America* (New York: Random House, 1994).

[16] Cf. Francis Fukuyama, *The End of History and the Last Man* (New York: The Free Press, 2006).

[17] F. H. Buckley, "The Rule of Law in America," in *The American Illness*, 3–39.

[18] Philip K. Howard, *The Collapse of the Common Good. How America's Lawsuit Culture Undermines our Freedom* (New York: Ballantine Books, 2002).

that social solidarity has molded. Or, as has been concluded, "the legal foundation of the road to serfdom was devised by law professors," at a time when "social policy litigation has corroded democracy and contributed to public polarization and the fiscal crisis."[19] That is, thanks to the overall mass of laws, and lawyers wedging themselves extensively into the available ongoing processes and movements of habitual social practices, medical expenditure is hypertrophically higher and litigation costs have multiplied by four to nine times as compared to other countries; with the end-result of an "overlawyered, overregulated country with multiple access points for bureaucrats and special interests to interfere with business decisions."[20] Not by chance, some months before his assassination, Robert F. Kennedy, too, on the mainstream understanding of the Rule of Law ideal, opined on "the gross national product [… that …] measures everything, in short, except that which makes life worthwhile. And it tells us everything about America except why we are proud to be Americans."[21]

Well, now it seems as if such new developments were at the same time anticipating *European Union* political and legal reality as well. For, as recently stated: "The European Union (EU) is not driven by the Rule of Law as an institutional ideal. Instead, the Union deploys the 'Rule of Law', viewed to a large extent through the lens of the autonomy of the EU legal order, to shield its law from potential internal and external contestation. This is precisely the opposite of what the classical understanding of the Rule of Law would imply. The perverse semantics of the Rule of Law in the EU legal context would not be worthy of a lengthy investigation, if it were not for the fact that far-reaching destructive consequences of this perversion directly affect the very constitutional essence of the European Union and its Member States by undermining the values – the Rule of Law included – on which both constitutional levels are purportedly built."[22]

And what has happened, what about the consequences? By now, on a widened scene, both domestic and international agencies (mostly the non-lawyer representatives of political bodies and international agencies, including the United Nations[23]) use, overuse and abuse

[19] Randy E. Barnett and Philip K. Howard, quoted by Walter Olson, *Schools for Misrule. Legal Academia and an Overlawyered America* (New York: Encounter Books, 2011), 407.
[20] Richard M. Reinsch II, *America's Rule of Law Sickness* (2013) http://www.libertylawsite.org/2013/07/24/americas-rule-of-law-sickness/. As background, cf. Csaba Varga, "Law, Ethics, Economy: Independent Paths or Shared Ways?" in his *Theory of Law. Norm, Logic, System, Doctrine & Technique in Legal Processes, with Appendix on European Law,* Philosophiae Iuris (Budapest: Szent István Társulat, 2012), 202–215, http://mek.oszk.hu/15400/15409.
[21] Robert F. Kennedy at the University of Kansas on March 18, 1968, quoted by Vishal Majithia, Great Leaders are Made, not Born (October 27, 2006), https://www.flickr.com/photos/vm1757/280433501 from Robert F. Kennedy, *Make Gentle the Life of the World. The Vision of Robert F. Kennedy*, ed. Maxwell Taylor Kennedy (New York: Harcourt Brace, 1998).
[22] Dimitry Kochenov, "EU Law without the Rule of Law. Is the Veneration of Autonomy Worth It?" *Yearbook of European Law* 34, no. 1 (2015): 74, https://ssrn.com/abstract=2642689.
[23] Thomas Fitschen, "Inventing the Rule of Law for the United Nations," *Max Planck Yearbook of United Nations Law* 12 (2008), 347–80.

catchwords such as 'rule of law', 'democracy' and 'human rights', as if such sphinx-like expressions could stand for genuine legal authorities themselves.[24] Almost like political slogans, these are appealed to as if they were implied normatively well-defined and legally operative measures, able to offer exhaustively exclusive and lawyerly manageable criteria. For that matter, they do this fully aware of the fact that, indeed, both their meaning and the consequences of what have been attributed to them by politically and legally maneuvering actors are ambiguously open. After all, this performance is a barely disguised, ill-concealed *political rule*, practiced by manipulation with the tone of the exclusivity of some quasi-absolutism.[25] This is that makes such claims over-generalized, emptied of their historically established context and original meaning. And assuming the above characterization proves to be a correct premise, what is left cannot be more or less than lost conceptualization, transformed into a merely referential idol, qualified as "meaningless thanks to ideological abuse and general over-use."[26]

II

Three decades ago, those now in government, at the time my own university students in the metropolitan law faculty in *Hungary*, organized an international conference on the understanding of the Rule of Law, at a time when they already perceived the dawn of the collapse of the communist regimes.[27] John Finnis of Oxford, attending the conference, set the tone with a surprising but upbeat and pertinent admonition. There is an immense number of books dedicated to the topic – he said – with all of them addressing you in your

[24] In the meantime, the once balance of duties/rights have been unilateralised, with an "expansion of the language of rights […] without boundaries and without responsibility" – Paolo G. Carozza, *The Protean Vocabulary of Human Rights* (Chambésy: Caritas in Veritas Foundation, no year), http://www.fciv.org/downloads/Carozza.pdf – , a pattern having become almost exclusive. Mary Ann Glendon, *Rights Talk. The Impoverishment of Political Discourse* (New York: The Free Press, 1991). By today, it is human rights and the rule of law that are emphasised in pair as embodying the supreme human values to be guarded by law, whose activation can only be guaranteed by all-social participation wedged in through the various forms of soft law. Isabel Trujillo, *"Human Rights, Peace, and the Concept of Law: The Story of an Incomplete Legal Revolution,"* Plenary lecture at the International Association for Philosophy of Law and Social Philosophy XXVIII World Congress, Lisboa (July 20, 2017). Thereby a new kind of legal pluralism seems to be born, ending in the flowless dissolution of what has ever been known as law.

[25] Reminding of repeated times with "the intervenors [who], when challenged, always resort to a moral justification – natural law and Christianity in the sixteenth century, the civilizing mission in the nineteenth century, and human rights and democracy in the late twentieth and twenty-first centuries." Immanuel Wallerstein, *European Universalism. The Rhetoric of Power* (New York: New Press, 2006), 27.

[26] Judith Shklar, "Political Theory and the Rule of Law," in *The Rule of Law. Ideal or Ideology,* ed. Allan C. Hutchinson, and Patrick Monahan (Toronto: Carswell, 1987), 1 et seq. on 1. Cf., as recently monographised, by a constitutional justice, a member of the Venice Commission, ex deputy *procureur générale* of Hungary, András Zs. Varga, *From Ideal to Idol? The Concept of the Rule of Law* (Budapest: Dialog Campus, 2019).

[27] E.g., Joseph Raz, "The Politics of the Rule of Law" *Ratio Juris* 3, no. 3 (1990), 331–9 refers expressly to the lecture he delivered at the time, reformulated later as an academic paper.

endeavor in rebuilding your country after communism. But don't bother with them, please – he added. It would be meaningless for you. There is only one single sentence out of them all that may have a particular message for you. One, from my own book. And it reads: "Rule of law is not and cannot be a pact of collective suicide."[28] Well, what was meant by such a cryptic, sharp and shocking formulation? As he explained, the Rule of Law stands for the *culture* of the exercise of state power. This has developed differently in differing countries, responding to local contingent challenges. And challenges being *hic et nunc*, that is, particular with varied emphases and cultural contexts, there is *no exclusive response* available. And whatever response eventually arose, there and then, it was solely a response to the urgently felt need in the first place, with no specific concern for an abstract posterity. That is, the Rule of Law is a *civilizing idea* of how state power can pacify and humanize: a tool to achieve the public good as a strategic target, but not an excuse not being able to achieve it. All in all, in principle, it is the function of any given state exactly what culture it cultivates and how it is to implement its measures in various situations.

This amounts to stating that the Rule of Law cannot become a fetish. Moreover, it cannot even be treated like an artificially dichotomized duality, in the style of all-or-nothing, without counting with gradualism[29] and – of course, ethically and juristically also thoroughly balanced – practicality.[30] After all, the Rule of Law ideal is not an operational concept; it has

[28] John Finnis, *Natural Law and Natural Rights,* Clarendon Law Series (Oxford: Clarendon Press, 1980) holds indeed that security of law being a public good and rule of law being having the potential to secure all aspects or even the essence thereof, by choosing, in the dilemma of unconditional legality and a statesman's act, one may be forced to renounce its full implementation.
By the way, since Justice Jackson's dissent in *Terminiello*, 337 U. S. at 36 in 1949, calling the Court to temper its doctrinaire logic with a little practical wisdom for it will not "convert the constitutional Bill of Rights into a suicide pact", this argumentation has been accepted by the Supreme Court of Israel, among others. As quoted by its president – Aharon Barak, "The Role of a Supreme Court in a Democracy, and the Fight against Terrorism," *University of Miami Law Review* 58 (2003): 132, http://www.antoniocasella.eu/archica/Aharon_Barak_2003.pdf: 132 – "A constitution is not a prescription for suicide, and civil rights are not an altar for national destruction. The laws of a people should be interpreted on the basis of the assumption that it wants to continue to exist. Civil rights derive from the existence of the State, and they should not be made into a spade with which to bury it."
[29] Cf., e.g., Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006), who holds that rectroactivity, to a certain extent, is characteristic of practically all well-arranged societies, independently of whether this is perceived or not.
[30] F. A. Hayek, The *Road to Serfdom* (Chicago: University of Chicago Press, 1944) on 22 emphasizes, for instance, that "retrospective legislation can be beneficial when it corrects some legislative slip or permits the overcoming of some hardship to some persons without injury to the rights of others." Kameshwar Nath Chaturvedi, "Legislative Retrospectivity and Rule of Law," *Statute Law Review* 34, no. 3 (2013): 207–20 adds that it may be legally unproblematic as well. And what is if it runs counter earlier expectations, perhaps conform to formally legal tenets of the day, especially after the path of transition from dictatorship to rule of law is covered? Well, Andrei Marmor, "The Rule of Law and its Limits," *Law and Philosophy* 23, no. 1 (2004): 20 responds, referring to efforts at coming to terms with the past after a dictatorial regime, that "If the legal system is profoundly corrupt, citizens are not morally entitled to assume that whatever is legal at the time is something that they are permitted to do."

no commonly accepted notion in law either.[31] This is also to say that it belongs to those concepts which are from the beginning *essentially contested*. Such is the typical feature of conceptualizations to which neither narrowing (or reductive dogmatism) nor widening (or open-ended eclecticism) can offer a solution. Expressive of value-content and very varied considerations by definition, their unending democratic disputation, controversy, polemics and argumentation are – instead of making them sharp to induce one single conclusion – only select from the variety of equally defendable understandings, in themselves each conceivable and viable in law.[32] For what is at stake with the Rule of Law is not an accomplished and positivized system but a *living culture*, built step to step by each and every relevant occasional action. Developing through the unending chain and accumulation of challenges and responses, it draws from the *hic et nunc* historical experience of any given people. Moreover, taking into consideration the most intimate connection and overall embeddedness of any given stage within the cultural patterns prevailing there and then, it cannot – roughly speaking – be more than a synthetic average of what is ordered from above and what its popular assistance dictates on a changing – perhaps daily – basis.[33]

No need to add that as a cultural aspiration, the Rule of Law ideal can spread through peoples with whom there has evolved some demand for a mutual learning process. Thereby, on the one hand, kinds of assimilation may eventuate (in order to form types characteristic of given historical periods) and, on the other, common development can ensue (in order to form types characteristic mostly of, e.g., the Common Law or the Civil Law). However,

[31] "Firm adherents are locked in great disagreement about what the rule of law really is." This is the statement introduced by Ronald Dworkin, *The Rule of Law as a Practical Concept,* Keynote Speech. Venice Commission Conference (2012), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL%282013%29016-e. Cf., as an already classical overview Richard H. Fallon, Jr, "The Rule of Law" as a Concept in Constitutional Discourse," *Columbia Law Review* 97, no. 1 (1997): 1–56, followed by, e.g., Daniel B. Rodriguez, Mathew B. McCubbins, and Barry R. Weingast, "The Rule of Law Unplugged," *Emory Law Journal* 59, no. 6 (2010): 1493, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.hu/&httpsredir=1&article=5990&context=faculty_scholarship, concluding on 1493 that "It is likely that no single definition of Rule of Law will ever achieve consensus among those who make Rule of Law promotion their central goal. Aggregating all of the existing measures into an ordinal scale or index, which is the most common approach, does little to overcome this definitional divide and only serves to violate every tenet of measurement theory."

[32] Walter Bryce Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society,* New Series 56 (1955–1956): 167–98; cf. also https://en.wikipedia.org/wiki/Essentially_contested_concept.

[33] "The Rule of Law probably cannot exist in a society unless people engage in constant argument what the Rule of Law amounts to" – holds Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" *Law and Philosophy* 21, no. 2 (2002): 164 —, therefore – as stated in the classic F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 206 – "many of the applications of the rule of law are also ideals which we can hope to approach very closely but can never fully realise. If the ideal of the rule of law is a firm element of public opinion, legislation and jurisdiction will tend to approach it more and more closely. But if it is represented as an impracticable and even undesirable ideal and people cease to strive for its realisation, it will rapidly disappear. Such a society will quickly relapse into a state of arbitrary tyranny." That is to say, there is a sensitive balance to be drawn and re-drawn all through.

the constant formation of how the ideal is implemented via actual moves, measures and provisions that are necessary to meet current needs does not make it a universal (or universalizable) pattern either: it remains the living culture of the peoples concerned, responding to their own challenges according to their own ways as part of solely their own heritage – independently of whether or not, in the persistent whirling of imperialisms and globalisms on our globe, there are power centers endeavoring to impose their own routines, as if they were a universal pattern, on others.[34] And now, what follows? It has, what was in the past the myth of the civilizing "white man", followed by the Spanish/English and French/Dutch colonizing "European superiority" and "cultural supremacy", in the meantime transubstantiated into *"American exceptionalism"*.[35] Aggrandizing their great power and sole global power ethno-centrism,[36] it is now used to excel in denouncing even modest local assertions of others' national interests as hideous "nationalism".

By its nature, the Rule of Law withstands encapsulation into dogmas. Its guiding spirit is far from any clear-cut command as to how to proceed in a concrete case or take an individual decision. It is *weighing and balancing* in situations where equally legitimate, relevant considerations, values and interests are in conflict and competition, in situations the optimum fulfilment of which can only be something of a middle course, a compromise solution.

After all, the most acute and vigorous idea of the 'rule of law', 'democracy', 'human rights' and so on – as the Polish Pope of yesterday also reminded us[37] – embodies an *instrumental*

[34] Cf. Csaba Varga, "Transfers of Law. A Conceptual Analysis," in *Hungary's Legal Assistance Experiences in the Age of Globalization,* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange, 2006), 21–41, http://mek.oszk.hu/17500/17543 [Reproduced: "Rule of Law through Legal Transfer. Historical Patterns and Contemporary Dilemmas," *East European & Russian Yearbook of International and Comparative Law* 4–5 (2010–2011): 45–61]. Even pieces of historical particularity are universalised when such a feature unreproduceable elsewhere – Thomas M Franck, "The New Development. Can American Law and Legal Institutions Help Developing Countries?" *Wisconsin Law Review* 12, no. 3 (1972): 783 – gets implemented not only in the reach of Common Law but also in dissimilar cultures like South-Africa and Israel. Cf. Hirschl, Towards Juristocracy.
On ideological overgeneralisation and universalisation of the winner's interests at any time, see the classic Karl Marx, and Friedrich Engels, *Die deutsche Ideologie. Kritik der neuesten deutschen Philosophie in ihren Repräsentanten Feuerbach, B. Bauer u. Stirner u. des deutsches Sozialismus in seinen verschiedenen Propheten, 1845–1846*. [Volksausgabe der ersten ungekürzten vollständigen Erstausgabe der Marx-Engels-Verlag im Auftrag der Marx – Engels – Lenin-Institut Moskau.] Hrsg. Vladimir V. Adoratskij (Wien – Berlin: Verlag für Literatur u. Politik, 1932).

[35] Cf. https://en.wikipedia.org/wiki/American_exceptionalism and http://nationalinterest.org/about-the-national-interest, respectively.

[36] One of the early realisations was the account drawn in re of one of the major American targeted interventions in aid policy; cf. James A. Gardner, *Legal Imperialism. American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin Press, 1980).

[37] Cf. Csaba Varga, "Buts et moyens en droit," in *Giovanni Paolo II. Le vie della giustizia. Itinerari per il terzo millennio. (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato.)*, ed. Aldo Loiodice, and Massimo Vari (Roma: Bardi Editore – Libreria Editrice Vaticana, 2003), 71–5 [cf. its expanded version in translation, Csaba Varga, *The enigma of law and of legal philosophising: Selected works*, ed.

value, nothing more. For law is a category of social mediation, as language is: they are neutral in themselves. What they mediate is taken over from other social complexes.[38] So they are to mediate fundamental values, among others, too, and the ultimate value of the instrumental value of 'rule of law', 'democracy', 'human rights', and so on, is dependent on what *are* those values in the occurrence they actually are or allege to mediate.[39]

An excellent recapitulation has been given by the president of the Supreme Court of Justice [*Curia*] in Hungary, messaging that "values laying the foundations of legal order and substantiating why society is legally organised – like dignity, liberty, and the peace of persons and communities – have to be asserted and condensed in the very notion of the rule of law. But the implementation of such values is from the beginning impaired if other rule of law notional components – like legal security – are granted absolute priority. For legal security and rule by law embody values themselves, on the one hand. But values can conflict and therefore need balancing, on the other. Once instrumental value protecting the law's consistency conflicts with a fundamental value, this latter has priority."[40]

M. V. Antonov (Saint Petersburg: Publishing House Ltd. "Alef-Press", 2015 (in Russian), 173–84, http://93.174.95.29/_ads/9166F93B38A410059DC56C227D339861], as already clearly formulated by Aristotle saying that there are "things good in themselves" and "things good for the sake of things good in themselves", which latter can only serve as "instruments to them"; cf. Aristotle, *Nicomachean Ethics,* rev. ed. Robert Crisp, Cambridge Texts in the History of Philosophy (Cambridge: Cambridge University Press, 2014), Book I (para 10–15) on 8–9.

[38] Csaba Varga, *The Place of Law in Lukács' World Concept,* 3rd (reprint) ed. with Postface (Budapest: Szent István Társulat, 2012), http://mek.oszk.hu/14200/14249/ and Csaba Varga, "The Contemporaneity of Lukács' Ideas with Modern Social Theoretical Thought. The *Ontology of Social Being* in Social Science Reconstruction with Regards to Constructs like Law," *Archiv für Rechts- und Sozialphilosophie* 99, no. 1 (2013), 42–54. [Reprint, From the Ontology of Social Being to the Law's Ontology, *Journal of the Siberian Federal University Humanities and Social Sciences* 8, no. 10 (2015): 2002–17 http://elib.sfu-kras.ru/bitstream/2311/19820/4/01_Varga.pdf.

[39] Csaba Varga, "Goals and Means in Law," *Revista da Faculdade de Direito da Universidade de Lisboa* LI, no. 1–2 (2010): 263–74, http://www.thomasinternational.org/projects/step/conferences/20050712budapest/varga1.htm.

[40] Péter Darák, "Társadalmi problémák – jogi megoldások" [Social problems – legal solutions], in *(L)ex cathedra et praxis. Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából*, ed. Zoltán Csehi, András Koltay, Balázs Landi, and Anett Pogácsás, Xenia (Budapest: Pázmány Press, 2014), 591, note 6. It is worthwhile to note that in a scandalous precedent made a quarter of a century ago, the Constitutional Court of Hungary practically declared all abuses of the past murderous regime no longer prosecutable, referring to the mere passing of time under statutory limitations, denying the relevance of the fact that an obstinately criminal state-organized police network as actor had also excluded, even retaliated brutally on their occurence, any lawful intent at investigation according to the criminal and procedural codes made by the socialist state in force at the time. As declared in both justification and excuse, but setting its future tone, the Constitutional Court opined that "Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice." A Magyar Köztársaság Alkotmánybírósága [1992] Constitutional Court of the Republic of Hungary No. 11/1992 (in Hungarian), http://public.mkab.hu/dev/dontesek.nsf/0/A0D36B21A86C45BEC1257ADA0052B4F7?OpenDocument.

III

In such a perspective, it is not only the hyperactivity, doctrinarianism and excessive formalism of some *constitutional courts* in the region that are to blame in representing a genuine and long-term danger. Albeit their activism's supreme illegality may have called into question why the rule of law is worthwhile at all, and hindered (if not simply blocked) the chance of a true(r) transition,[41] nowadays what is even more troubling is the *European Union's* manipulation, maneuvering with unfounded criticism on a daily basis as a quasi-legal intervention, in order for it to *marshal domestic issues* as well. This is perhaps a post-modern imperialism, springing to the attack with the sacred passion of a new ideologist, the incarnation of the final truth.

Ideologists today act as a *judgeocracy*, working with soft law.[42] Due to this, the benefits of representative power, parliamentary sovereignty and the underlying meaning of democracy may be impoverished and minimized.[43] Once *law in action* is freed from the *law in books* by the judiciary, widening or narrowing of the law's scope becomes discretionary, menaced by *sabotage judiciaire ou révolte* as well.[44] As is known, balances and proportions that come to frame and structure institutions and ideologies at any time are confused by new claims, if advanced and pushed under voluntarist pressure. This is necessarily an outcome, because

[41] Cf., Csaba Varga, *Transition to Rule of Law. On the Democratic Transformation in Hungary,* Philosophiae Iuris (Budapest: "ELTE Comparative Legal Cultures" Project, 1995), http://mek.oszk.hu/14700/14760/.

[42] All over the world the topic is feverishly cultivated covering both its international and domestic application as can be seen (as reduced to national uses) from, among others, Linda Senden, *Soft Law in European Community Law,* Modern Studies in European Law 1 (Oxford – Portland, Oregon: Hart Publishing, 2004); Ulrika Mörth, *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Cheltenham & Northampton: Edward Elgar, 2004); Lui Haocai zhu bian, *Ruan fa de li lun yu shi jian* [The theory and practice of soft law], Ruan fa yan jiu xi lie [Soft law series] (Beijing Shi: Beijing da xue chu ban she, 2010); Luo Haocai, *Soft Law Governance. Towards an Integrated Approach,* trans. Ben Armour & Tang Hailong (from Chinese, 2009) (Buffalo, N. Y.: William S. Hein & Co, 2013); *Soft Law. Scandinavian Studies in Law* 58, ed. Peter Wahlgren. (Stockholm: Stockholm Institute for Scandinavian Law, 2013); Endō Naoya cho, *Sofuto rō demokurashī ni yoru hōkaikaku. / Reform of Japanese Law via Soft Law Democracy* (Tōkyō: Ātodeizu, 2014); Greg Weeks, *Soft Law and Public Authorities. Remedies and Reform,* Hart Studies in Comparative Public Law 11 (Oxford and Portland, Oregon: Hart Publising, 2016); *Soft law et droits fondamentaux. Actes du colloque du 4 et 5 février 2016,* Publications de l'Institut international des droits de l'homme 33 (Paris: Pedone, 2017).

[43] Hirschl, *Towards Juristocracy*; cf. also *The Global Expansion of Judicial Power* ed. C. Neal Tate, and Torbjörn Vallinder (New York: New York University Press, 1995); Walter K. Olson, *The Rule of Lawyers. How the New Litigation Elit Threatens America's Rule of Law* (New York: St. Martin's Press, 2003); Leslie Friedman Goldstein, "From Democracy to Juristocracy?" *Law & Society Review* 38, no. 3 (2004): 611–29; Alec Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford: Oxford University Press, 2010); as well as Bernd Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat. Verfassung und Methoden. Ein Essay* (Tübingen: Mohr Siebeck, 2014).

[44] For a historical case study, cf. Yves-Louis Hufteau, *Le référé législatif et le pouvoir du juge dans la silence de la loi,* Travaux et recherches de la Faculté de Droit et des Sciences économiques de Paris, Série Droit privé 2 (Paris: Presses Universitaires de France, 1965).

all kinds of artificial and imposed developments enforce new kinds of *homogenization* that disfigure the original setting. The assertion of a single consideration, mostly alien to what the matter is strictly about, may distort the whole process.[45] For instance, the human rights centered approach as pressed by the western mainstream nowadays can corrupt and spoil any other consideration, reducing the complexity of adjudication to a single point of view, mostly extraneous to the matter.[46] Similarly, introducing judicial control over government actions may easily lead to ignoring what the proper essence may have truly been. For, then, social acceptance, economic gain, political rationality, even national survival itself may be confronted with mere legality, which may prove to be irrelevant socially and even politically at the time.[47] For, as is known, reductionism equals simplification, homogenization and denaturing, implying falsification. Like a whitewash, when a four-star Pentagon general was told by the supreme commander on duty as an exoneration: "we don't know what to do […], but we've got a good military, and we can take down governments. I guess if the only tool you have is a hammer, every problem has to look like a nail."[48]

Is this *the* progress we are committed to marching for?

IV

In a brief overview of the historical development of what law in Europe has duly meant, and consisted in, from its earliest appearances to its present day variations we are talking about, the ancient *dikaion* justice stood for guidance as a springboard in order to arrive at a there-and-then just solution, with *ius* serving as an airy ideal. Later on, by positing it and thereby also exhaustively embodying it in forms of *lex*, reduced the ideal to what could be realized therefrom within the realm of the *lex*. At the same time, that which was once *regola*, that is, a simplified summary characterization of ongoing decisional practice, became *regula*, that is, accurately drafted and specified normative building blocks in creating the law. In order to make the law an aggregate of unquestionable rules, in European history law-givers repeatedly resorted to prohibition of interpretation. All this notwithstanding, however, the inventiveness of lawyerly tricks would erode original meanings so much in later times that

[45] Howard, *Collapse*.

[46] Csaba Varga, "Az emberi jogok problematikája" [Problematics of human rights], *Társadalomkutatás* 32, no. 2 (2013): 1–15, http://www.vmtt.org.rs/mtn2013/063_082_Varga_A.pdf. [cf. in translation, Varga, *The enigma of law*, 173–84, http://93.174.95.29/_ads/9166F93B38A410059DC56C227D339861].

[47] E.g., Carol Harlow, "European Governance and Accountability," in *Public Law in a Multi-layered Constitution*, ed. Nicholas Bamforth, and Peter Leyland (Oxford: Hart Publishing, 2003), 79–102. A telling series of instances were used from the World Bank's ample documentation as examples in Varga, "Transfers of Law," and, as to the basic change, even complete switch-off, of coming-to-terms-with-the-past-in-law endeavours in the post-dictator areas of the world, in Juan E. Méndez, "Accountability for Past Abuses," *Human Rights Quarterly* 19, no. 2 (1997): 255–82.

[48] In Wesley Clark, "Gen. Wesley Clark Weighs Presidential Bid. I Think About It Every Day," interview, March 02, 2017, http://www.democracynow.org/2007/3/2/gen_wesley_clark_weighs_presidential_bid and http://genius.com/General-wesley-clark-seven-countries-in-five-years-annotated.

Martin Luther, for instance, could only qualify their players as *Juristen, böse Christen.*[49] Not much later, processing and developing the law via logical means, resulted in both conceptualizing it and building it into a coherent system, from which a formal conceptual doctrine, *Rechtsdogmatik*, would result, with an added new essence never heard of in either Jewish or Islamic development, or within the range of Common Law. Conceptualization and subsequent ratiocination would then turn into formal positivism, with a peak of extremity in the exegetic application of nothing but the given provisions of the freshly promulgated French *Code civil*.

Today's ontological knowledge informs us that even if law is a text consisting of signs, their message can only be drawn from their meaning, which necessarily leads us to the law's hermeneutic understanding. In turn, hermeneutics itself leads to recognizing society at large as the exclusive holder and player of law, giving by its *hic et nunc* understanding the actual contents by which it can exert its influence exclusively.

Law is usually seen as a specific text, objectified and externalized in an enacted form. However, with *law in action* distinguished from *law in books*, the overall picture of the legal phenomenon will certainly be irreducible to posited law alone. According to the scheme I once proposed,[50] the triple realm of law consists of components *enacted* and/or *enforced* and/or *socially lived in*, and once visualized, all together forming three partially intersecting circles, which concludes that the question of what law is turns out to be a complex issue, depending upon at least four aspects in approaching and naming it. One, there are components of law figured as slices of the respective circles which do and, respectively, which do not overlap with others; consequently any query as to "what is the law?" needs to be complemented by its qualifier "in what respects?"; thus, all legal phenomena can only be recorded as more or less having, or sharing with, the quality of the 'distinctively legal',[51] as compared to others. Two, the life of law represented by these three circles is in principle in constant movement as an unending process, into which and from which new parts are to enter and to recede, ceaselessly. Three, independently of whether or not prevailing ideology and legal machinery force the unitary view of the law as a single entity of what has been enacted in due form and procedure, those three slices of components and the generative factors behind them are in permanent rivalry, simply by pressing their presence or just for

[49] "Lawyers, wicked Christians"; cf. Maximilian Herberger, "Juristen, böse Christen," in *Handwörterbuch zur deutschen Rechtsgeschichte II,* ed. Adalbert Erler (Berlin: Erich Schmidt Verlag, 1978), 482–3.

[50] Csaba Varga, "Quelques questions méthodologiques de la formation des concepts en sciences juridiques," *Archives de Philosophie du Droit* XVIII (1973), 205–41. [Reprint in http://mek.oszk.hu/15300/15333/#, 7–33] respectively Csaba Varga, "Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures," in *Law in East and West. On the Occasion of the 30th Anniversary of the Institute of Comparative Law* (Tokyo: Waseda University Press, 1988), 265–85. [Reprint in http://mek.oszk.hu/15300/15333/#, 437–457.

[51] Philip Selznick, "The Sociology of Law," in *International Encyclopedia of the Social Sciences 9,* ed. David L. Sills (New York: MacMillan and The Free Press, 1968), 51.

mastering the rest. Four, the professional deontology with the adequate law-consciousness involved, characteristic of different legal cultures, is not something added from outside to law as merely an external complement, but forms part of the ontological being of the said law.[52]

Today's challenge leads to a path along which tradition is broken. The relevancy test of rules against *principles*, described and prescribed by Dworkin, has moreover already duplicated legal regimes unduly: it did so practically as a function of the extent of the lawyerly contribution to a case's judicial processing. Next, centering upon the '*human rights*' approach has led to distorting the very merits of the case through their homogenizing reductionism. And last but not least, '*rule of law*' is to remain a mere catch-word, claiming more and better but without sufficient rigor to be able to serve as an operative yardstick. After all, the organic construction of human societies with integrative forces as key elements cementing it, is overshadowed by present day hesitations on whether or not, and to what extent, individual rights are to be balanced by the rights of the collectivity, on the one hand, and rights are predicated by duties,[53] on the other, while the chance of practical anarchy through society's atomization with ensuing disintegration has also to be kept in mind. Ending the list, *soft law* with discretionary guidelines as a basic constituent of a number of new civil codes around the world and law rendered soft by the manner it is used by power centers in many quarters, including the decision-making organs of the European Union, may vary according to the users' explicit or hidden intentions.

In any case, the prevailing juristocracy and the globalizing elites, with an army of internationalized foreign NGOs' partisan interventionism, may easily overcome local democracies, so that sooner or later model legal regimes with model constitutions will be seen entering the scene, for the sake of which they will implement a new world, in which old – genuine – states, constitutions and legal regimes will be degraded into pseudo-entities than real ones. This then may lead to the establishment of the old dream of a global culture which, in its turn, may become the forum of final definition, effecting, through institutionalized cultural or sheer ideological pressure, enforced in law, a kind of contextual pre-determination.

Thus, from the ancient dedication to the concrete, that is, a case and its just solution, step by step in the historical process of two millennia, we seem to have arrived not only at the cultivation of reducing the former's mass to generalizable features (common treatments,

[52] For these developments, see Csaba Varga, *The Paradigms of Legal Thinking*, enlarged 2nd ed., (1996/1999), Philosophiae Iuris (Budapest: Szent István Társulat, 2012), http://mek.oszk.hu/14600/14657/.

[53] Since developments at the end of the World War Two, human rights discourse has become an evolution with new items, families, even, of advanced rights continually put on the agenda. For "rights always agitate for more rights: they create ever new areas of claim and entitlement that again prove insufficient. We keep demanding and inventing new rights in an endless attempt to fill the lack, but desire is endlessly deferred." Costas Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitanism* (Abingdon and New York: Routledge and Cavendish, 2007), 49.

types, subsystems, governing principles one after another and, as a natural conclusion, their summing up and hierarchization in constitutions) but also, as a postmodern hope for some more realistic rather than purely utopian Great Experiment, close to their worldwide synthetization and homogenization, too, when perhaps exclusively final value-assertions by a global power are already about to rule, in a manner freely interpretable by those to whom this unique power belongs to enact, and to enforce, the last word that can be pronounced within the realm of the law. According to the above picture, the history of adjudication is nothing other than the evolution of growing abstraction with an open invitation to whatever discretion, imbued with an innate logic of development leading to complete self-emptying at a point when consequences can already be imputed arbitrarily only.[54]

In the final analysis, the issue is on the divisive question of who is to master; this having remained the eternal query for centuries and millennia, and indeed, from the earliest time human memory now can at all recover or reconstruct intellectually. Then, if it proves to be true, the whole issue will be seen at least partly to be a political one, as it is all on the various sides of being either power-centered or power-dependent, and therefore in need of consideration and treatment, as well as an answer, from a political science approach as well.

V

The more it is characteristic of our epoch to learn from everyone and everything from the past and present alike and to recognize that continuous learning grows into a supra-domestic softening of the law in an *All the world's a courtroom* type soft unification of world practices into a global corpus of available and stressed-for modes of judicial argumentation,[55] the more it is an abuse on the part of international agencies to use political slogans as operative terms in law, only so that big and forceful entities' daily routines can be imposed upon the rest as a universal panacea. For, in the perspective of historical generalization, impositions are to impoverish the subject, depriving it of what should have been a potential part of it. Thereby benevolence can also turn into its opposite. External dictates are closer to following a *circus trainer* mentality with in-built interest, while those taking pains to assist and nothing else are closer to the type of a *gardener* who is passionate about nothing else except his/her plants, primarily ambitious for their well-being.[56]

Law is shaped by human needs and serves human interests. It has to withstand fetishization as well as reification ending in alienation. For law is a human adventure transforming historical experience into ordering and planning tools. But "life is nonstandard", the fact

[54] In this sense and from the perspective of alleged reconstruction, the process of deconstruction seems to be equivalent to constructing some kind of conceptual synthesis by lifting historical or living textualities out of their own living cultural and traditional context in a manner that is rationalized by none else than an abstracted systemic ideal with a purely formalistic logic.
[55] Shirley S. Abrahamson, and Michael J. Fischer, "All the World's a Courtroom. Judging in the New Millennium," *Hofstra Law Review* 26, no. 2 (1997): 273–91.
[56] Varga, "Transfers of Law."

notwithstanding that "The modern era has been dominated by the culminating belief that the world […] is a wholly knowable system governed by finite number of universal laws that man can grasp and rationally direct […] objectively describing, explaining, and controlling everything." This is why "[t]he more systematically and impatiently the world is crammed into rational categories, the more explosions of irrationality there will be to astonish us."[57]

Accordingly, the commensurability of the law's regimes is definitely limited. In order to assess them, experienced wisdom formed from long practice has to accompany knowledge.[58]

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[57] Cf. note 2.

[58] Csaba Varga, "Visszavont emberi teljesség? Eszmeuralom és tetszőlegesség" [Fullness of being withdrawn? Ideocracy & randomness], *PoLíSz* no. 82 (2005):14–21.

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Csaba Varga. Idol, Deduced from Ideal? Rule of Law, Universalization, Degradation

Abstract. The Rule of Law idea is defined worldwide by one single legal culture today, the one in which declaration of what the law is is done *ex post facto* (as in English common law) or in the case of political pragmatism which relocates legal innovation from elected representative bodies to the administration of justice (as in the USA). Moreover, Rule of Law used as a political catchword results in ideocratic idealisation. Rule of Law, embodying instrumental value (even if international pressure groups fundamentalise it), represents a particular culture in the play of *hic et nunc* challenges and responses (even if globalism universalises it). Developed under varied conditions particular to place and time, it cannot be more than a series of living cultures of the countries concerned, based on a historically evolving civilising and humanising ideal. Law as an aggregate of values to be defended equally faces values that conflict with one another in daily enforcement, crying for weighing and balancing in a compromise solution at most. Far from standing for all-or-nothing absolutism, onesidedness or homogenisation – idolising legal certainty (as the Hungarian Constitutional Court did) or subjecting government action to judicial or human rights control – may sacrifice justice, with popular support and *raison d'être* vanishing. Moreover, fetishising its own homogeneity may distort the merits it claims to serve. A globalising judgeocracy tries to monopolise the worldwide learning process while isolating local developments from their natural context, in order to enforce its own creation. After all, the quest for those who can master the law is crucial in assessing the interventionism of either international agencies or the European Union in local issues under the aegis of the Rule of Law.

Keywords: rule of law; ideal; legal cultures; values; universalization.

Чаба Варга. Ідол, виведений з ідеалу? Верховенство права, універсалізація, деградація

Анотація. Ідея верховенства права визначається сьогодні в усьому світі однією правовою культурою, тією, в якій дещо проголошується правом *ex post facto* (як в англійському загальному праві) або в силу політичного прагматизму правові нововведення у правосудді залежать від обраних представницьких органів (як у США). Більш того, верховенство права, що використовується як політичний слоган, призводить до ідеократичної ідеалізації. Верховенство права, втілюючи інструментальну цінність (навіть якщо міжнародні групи впливу фундаменталізують її), представляє певну культуру у грі викликів і відповідей *hic et nunc* (навіть якщо глобалізм універсалізує її). Розвинене в різних місцях і в різні часи, воно не може бути чимось більшим, ніж низка живих культур зацікавлених країн, заснованих на такому, що еволюціонує історично, цивілізуючому та гуманізуючому ідеалі. Право як сукупність цінностей, які підлягають захисту, водночас стикається з конфліктом цінностей у щоденному правозастосуванні, що зазвичай вимагає зважування та балансування в пошуку компромісного рішення. Не відстоюючи абсолютизм «все або нічого», однобічність або гомогенізацію, варто все ж зазначити, що перетворення правової визначеності на ідола (як це зробив Конституційний Суд Угорщини) або підпорядкування дій уряду судовому або правозахисному контролю може обернутись принесенням у жертву справедливості за підтримки народу і зникнення *raison d'être*. Більш того, фетишизація власної гомогенності може викривити переваги, яким вона прагне служити. Глобалізована влада суддів намагається монополізувати всесвітній навчальний процес, відокремлюючи місцеві події від їх природного контексту, щоб нав'язати себе. Зрештою, питання про те, хто може опанувати право, є вирішальним при оцінці втручання міжнародних органів та Європейського Союзу в місцеві справи під гаслом верховенства права.

Ключові слова: верховенство права; ідеал; універсалізація; справедливість; глобалізована влада суддів; інтервенціонізм.

Чаба Варга. Идол, выведенный из идеала? Верховенство права, универсализация, деградация

Аннотация. Идея верховенства права определяется сегодня во всем мире одной правовой культурой, той, в которой нечто провозглашается правом *ex post facto* (как в английском общем праве) или в силу политического прагматизма правовые нововведения в правосудии зависят от избранных представительных органов (как в США). Более того, верховенство права, которое используется как политический слоган, приводит к идеократической идеализации. Верховенство права, воплощая инструментальную ценность (даже если международные группы влияния фундаментализуют ее), представляет определенную культуру в игре вызовов и ответов *hic et nunc* (даже если глобализм универсализирует ее). Развиваясь в разных местах и в разное время, оно не может быть чем-то большим, чем ряд живых культур заинтересованных стран, основанных на цивилизующем и гуманизирующем идеале, который эволюционирует исторически. Право как совокупность ценностей, подлежащих защите, одновременно сталкивается с конфликтом ценностей в повседневном правоприменении, что обычно требует взвешивания и балансирования в поиске компромиссного решения. Не отстаивая абсолютизм «все или ничего», односторонность или гомогенизацию, стоит все же отметить, что превращение правовой определенности в идола (как это сделал Конституционный Суд Венгрии) или подчинение действий правительства судебному или правозащитному контролю может обернуться

принесением в жертву справедливости при поддержке народа и исчезновение *raison d'être*. Более того, фетишизация собственной гомогенности может исказить преимущества, которым она стремится служить. Глобализированная власть судей пытается монополизировать всемирный учебный процесс, отделяя местные события от их естественного контекста, чтобы навязать себя. В конце концов, вопрос о том, кто может овладеть правом, является решающим при оценке вмешательства международных органов и Европейского Союза в местные дела под лозунгом верховенства права.

Ключевые слова: верховенство права; идеал; универсализация; справедливость; глобализированная власть судей; интервенционизм.

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