

Cs. Varga⁴

TRADITIONAL VALUES AND WESTERN EFFORTS TO EXPORT “NEW ETHICS” VIA SOFTING LAW BY REFERENCE TO HUMAN RIGHTS AND THE RULE OF LAW

Panorama from the Past to the Present

In our thinking in Central Europe, what we have called with some simplification *the West* has always been a point of reference and orientation. In fact, what has been called *the East* has historically developed differently. Its political philosophy was based on partly different foundations and thus led to somewhat differing institutionalisation. Consequently, it is natural that the overall conception of statehood and the relationship between the state and the people living in it became very different, too. Given the size and the rich past of their empire, it was therefore quite natural that for her own thinkers the peculiar *Russian* way and ideals were to appear as a desirable and appropriate alternative to the one that might be offered in the event of a free choice. However, as soon as the various economies on earth became elements of the one-world economy and the inter-state relations that grew out of ones of the neighbourhood became truly international, the West transformed its economic predominance into political predominance and, what is even

more, into a quasi world-ruler position of bearing the flag of the ideal that could be demonstrated as the final progress of the humanity. It is a consequence of this that, gradually, geostrategic literature of the Atlantic world and Western Europe began to speak of a *centre*, represented by itself, and of *periphery(s)* in relation to any other territory, that is, to others' history and life pattern.⁵

There is a strong tradition of this vision of Western-centrism as a yardstick. For it was already present in its infancy, when the barely known rest of the world was opened up to the West in one way or another, almost thousands of years ago, so to speak. And it culminated in the age of colonialism, and then in the birth of the discipline of anthropology, which began with the comparative study of various human collectivities.

Intermediate Europe, which its own historians call *Central Europe*, began its development historically, emphatically, from the double grip of Byzantium and Rome.⁶ It is therefore no coincidence that the contrasted characterology of East and West was most eloquently formulated here.⁷ The historically standing and clear western orientation of local aspirations is indicated by the fact that, for example, Hungarian rulers have consistently voted for the latter as a natural choice from the Hungarian Middle Ages, i.e. from the country's alignment to Rome, and even more consciously from the 19th century, the so-called era of modernising re-

⁴ Professor Emeritus of the Institute of Legal Studies of the Hungarian Academy of Sciences and Pázmány Péter Catholic University (Budapest), Dr. Sc. (Law). Visiting professor at many foreign universities (U.S., Australia, UK, Japan, Russia, EU countries). Author of more than 500 scientific works published in English, German, French and other languages, including mono-graphs “Law and Philosophy,” “Paradigms of Legal Thinking,” “Comparative Legal Cultures,” “The Enigma of Law and of Legal Philosophising,” etc. Advisor to the Prime Minister of Hungary (1990–1994), member of the International Academy of Comparative Law. Recipient of the Hungarian government's prize for scientific achievement.

⁵ https://en.wikipedia.org/wiki/World-systems_theory.

⁶ Scott J. W. Rebordering Central Europe // *Cross-Border Review*. 2016. № 1. P. 9–28.

⁷ Iordachi C. Entangled Histories // *Regio*. 2004. Vol. 4 (1). P. 113–147 ; Szűcs J. The Three Historical Regions of Europe // *Acta Historica Academiae Scientiarum Hungaricae*. 1983. Vol. 29 (2/4). P. 131–184.

forms. Increasingly, in the domestic and international scholarship of the modern era, the process of Hungary as a once European power having to make up for the lost ground left by the Tatar destruction, Turkish occupation, Habsburg oppressive liberation and the dramas of more recent times is being referred to more and more exclusively as *modernisation* in a western sense.¹

Through channels forced into hiding, this orientation has survived for half a century after the Second World War as the almost entire populace's exclusive dream, in opposition to the utopia of what was imposed as socialism. But by the time the changes in world politics around the 1990s came about, and Hungary was able to join the NATO in the year before the turn of the millennium and the European Union half a decade later, this West had already undergone a profound change of character, as if – symbolically – it were a triumph of, with a breakthrough by, the new moral preaching of the 1968 student revolts in America,² Paris and elsewhere.³ So, within a few decades Hungarians were confronted not only with the dysfunctions of the Western European and Atlantic sense of security and material abundance, of a lavish lifestyle that they did not even perceive, but also with the permanent deterioration, almost disappearance, of their sense of responsibility and of their ability to defend themselves indeed, if needed. Or, by the middle of 2010s, the signs of the crisis of today have already been visible. It included, among others, in addition to the complete disregard to anything surviving as tradition, the rampant migration, the rewriting of morals, the rejection of any taboos in sexuality as well as of humans growing up in a family, i.e. the very factors of social integration, which has led to the eradication of any culture by so-called cancel culture in America and then increasingly in Europe.

Interestingly, today's legal life, change of law, and the social debate around law, are all and constantly guided by two concepts that not only serve a specific aspect, but also play a direct guiding role. Concepts which are neither truly legal nor sufficiently defined, but which nevertheless serve as a kind of an ideal of law. One of these is to act in the name of human rights, the other is to demand the rule of law.

Legal Aspects? The Ideology and Practice of Human Rights

In their ancient forebears, human rights were conceived in terms of the dignity of person, holding the God's image [*imago Dei*]. It was the Enlightenment and its conclusion in the French Revolution that produced their first manifesto-like declaration. The early reactions to their ideologisation already perceived the lack of a real foundation as well as their arbitrary flexibility and contestability. And for scientific reconstruction it became clear that, while these claims asserted from outside the law are rhetorically based on their inherently irrevocable validity, the sole purpose of their activists was to make them inscribed in the law as a self-assertion of and by the law. And once this has been done, the complexity of the legal system will imply that only the le-

gal source level and contexture – the rank – of the human rights norm thus enacted will count, regardless of whether it was originally (politically) born of a specific human rights claim or other consideration.

As for the basis and source of the obligation originating from human rights, scholarly analysis can say only this: human rights are given, as a project. We are given a task; we live by it; we theorise accordingly; and then we adapt our behaviour accordingly. Thus its justification is simply circular. Accordingly, knowledge of human rights itself creates a human rights reality which will already correspond, to a large extent, to the description of the reality it presupposes.⁴ Or, in any formal normative, thus in law, too, the linguistic representation of the bond within a given understanding of the human medium, based on established social practice and the psychological conditioning of each individual participant, is capable, as a factor in the motivational system of action, of influencing it in such a way that it can, on a mass scale and with a certain effectiveness, actually shape action according to its patterns (or, more precisely, bring it into a framework set by its patterns).

Since the proclamation of the *Universal Declaration of Human Rights* (1948), political, diplomatic, jurisprudential as well as political sciences and philosophical fora have been constantly working to expand and extend the officialised catalogue of human rights, almost continuously and almost arbitrarily, with no end in sight.

It is a debatable issue whether human rights are unilaterally conferred on man as an absolute right, independently of all other circumstances, regardless of whether their holder and addressee is under obligations to his fellow man, his community, his state, his world, and whether he has actually fulfilled these obligations, perhaps as a precondition for making these rights respected. Almost a century ago a most influential Spanish thinker warned against the proliferation of the *dissipation of responsibility*⁵ and, above all, the disruptive effect that universal care would lead us all back to a childish state.⁶ And the “rights language,”⁷ which has since been institutionalised as practically exclusive in America, is now a unilaterally expressed expectation of us, and always towards the rest and never towards ourselves, for aid and support, showing parasitism to the expense of the rest. The reason why human rights ideologies are shrouded in a silence expressing dislike at the idea of the unity of rights and duties⁸ is that their implicit aim is no longer this simply curative prevention, but more and more explicitly the atomising individualisation of society into mere singles.⁹

⁴ *Sajó A.* Az emberi jogok mint tudásrendszer [Human rights as a set of knowledge] // *Állam- és Jogtudomány*. 2004. Vol. XLV (1). P. 3–38.

⁵ *Ortega y Gasset J.* *Revolt of the Masses*. L.: Allen & Unwin; N. Y.: Norton, 1932.

⁶ *Jonas D., Klein D.* *Man-child*. N. Y.: McGraw-Hill, 1970.

⁷ *Glendon M. A.* *Rights Talk*. N. Y.: Free Press, 1991.

⁸ Although the basic tenet that “no rights without duties, no duties without rights” was as clear to Marx (see: <https://www.marxists.org/archive/marx/iwma/documents/1864/rules.htm>) as it is today to the Social Doctrine of the Catholic Church, preaching “mutual complementarities between rights and duties” [Pontifical Council for Justice and Peace] *Compendium of the Social Doctrine of the Church*. 2004. § 156 (https://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html).

⁹ *Varga Cs.* Rule of Law, Contesting and Contested // *Central European Journal of Comparative Law*. 2021. Vol. II/1. P. 245–268, see also: <https://ojs3.mtak.hu/index.php/cejcl/article/view/6041/4723>.

¹ *Kulcsár K.* *Modernization and Law*. Budapest: Akadémiai, 1992.

² *Bork R. H.* *Slouching towards Gomorrah*. N. Y.: Regan Books, 1996.

³ *Varga Cs.* *Humanity Elevating Themselves?* // *Varga Cs. Comparative Legal Cultures*. Budapest: Szent István Társulat, 2012. P. 131–163; <http://mek.oszk.hu/15300/15386/>.

Legal Aspects? The Hidden Role of the Rule of Law

In its function, the demand for the rule of law, as it is common today, is not only similar to that of human rights, but its nature is also specific. It was not, in fact, born of this. In its first version, the German *Rechtsstaat*, as a modern formation replacing the *Polizeistaat* (or administrative state) at the turn of the 18th and 19th centuries, became a category of the doctrine of the form of the state [*Staatsformenlehre*], characterised as an arrangement centred on constitutional organisation according to law, in which everyone, from the ordinary citizen to the ruler, is bound by law. And the *rule of law* proper was historically formulated as a general expression of the constitutionality of English statehood at the turn of the 19th and 20th centuries, and its quintessential criterion was no more than the ability to settle any dispute before an independent court.

At the end of the Second World War, either term was virtually unknown. The English ‘rule of law’ began to take on its current role during the Cold War rage, in 1957, as a certificate of the West of what democracy is, in contrast to the Soviet dictatorship. To take a personal example, when I finished my university studies at Pécs in the mid-1960s, where one of the first universities in Central Europe had once been founded, we only heard of *Rechtsstaat* as a keyword for the Germanic modernisation of the state in the 18th and 19th centuries, and not at all of the term ‘rule of law,’ which at that time was indeed hardly more than an *epitheton ornans* of Western self-praise, used mostly as a legal designator of the West, without a meaning of its own. And this was true enough. Thus the almost vacuous message of *Rechtsstaatlichkeit* and the ‘rule of law,’ that the law was binding on all and could also be enforced in and by a court of law, said hardly more substantive than the otherwise dramatic German wisdom that *Das Recht ist das Recht* [The law is the law]. Yet, under the spell of “socialist normativism” dating back to Vyshinsky, Stalin’s henchman and legal theoretician concurrently, practically the same was professed for those studying law in books and swearing to operate it in action. And as a matter of fact, returning to us, students then, everyone in the whole of Soviet-occupied Central and Eastern Europe had to learn the same teachings; perhaps the only advantage we had from our westernised past was that we could really get to know the “bourgeois” and “imperialist” political and legal doctrines of the early 20th century modernity and the then present more intimately.

Interestingly enough, the international rise of this notion, that is, its becoming a key term that may encompass almost everything of the political, economic, and professional lawyerly expectations towards law, started practically at the same time as the dissolution of the Soviet Union and the new path offered to Central Europe. Coincidence or strategic necessity for the remaining one great power may have been the reason? In any case, while the prevalence of the English version of the word in the e-world increased by a factor of around two to three between 1944 and 1991, the rate accelerated spectacularly thereafter: from 1992 to 2007 it increased by a factor of around 17, and from 2008 to 2020 it increased by a factor of 35! And what was behind this?

First and foremost, it was the incorporation of the rule of law as a criterion embodying a standard of values into the language of diplomacy and the conduct of international re-

lations. It was first used by the World Bank and the International Monetary Fund as organs of the United Nations, and thus by the international economic organisation, including worldwide aid policy, as a term that could now be used for blackmail as well. And then it became the number one key term in the campaign launched by the Secretary-General of the United Nations (2004), followed by the OECD (2005) and then the European Union (2011), which used it as a criterion of their own. Moreover, its impact was expected to be multiplied by the re-emergence of a policy of shaming in international relations in these particularly sensitive areas,¹ sometimes replacing rather than complementing the correct and unprejudiced use of language.²

Traditional Values of Humanity or “New Ethics” of the West?

From the perspective of either philosophy of law or legal policy, what is decisive in the above developments is that the *Rechtsstaatlichkeit* and the rule of law, despite their apparently theoretical expression, are historically particular concepts, since they have developed in the daily context of challenge and response in particular countries, in the pragmatics of particular places and times. That is, that both took shape locally in a particular way, since it was everywhere in response to quests that arose characteristically there and then. And it is only since then that they may have become somewhat more universal from their inherent particularities, thanks especially for the mutual assimilation of national experiences as a result of some mutual learning process. At the same time, however, the fact that the rule of law is an *undefined value* has remained unchanged as a pitfall. On the one hand, its historical meaning does not cover its contemporary use. On the other hand, its universalised overuse far beyond its rights have in the meantime inflated its very meaning.

According to literature dedicated to it, the rule of law itself is one of the so-called “essentially contested concepts,” with no obvious and clear-cut focus or boundaries, and in fact without any established dogmatics. And it is open-ended, while being caught in the crossfire of all kinds of political ambitions, the propensity to innovate or of any author’s desire to be seen as a forerunner, with, so to speak, free malleability – changeability and extensibility. Just as in the case of human rights, where day after day a wide variety of power groups, including marginal interests, too, demand support for themselves – always, of course, at the expense and tolerance of others, the rest of society.

In consequence, ‘rule of law’ is *not an operative concept* within law. This is also reflected in the fact that when in the mainly international documents that call for its implementation as a value, it is either used as a term in itself or as a conceptual generalisation with a list of desired components that are themselves nothing more than similarly undefined generalities.

Its lack of conceptual operability is thus already evident on two levels. On the one hand, it is *not factually defined*. That is to say that it is not defined by facts [*Tatbestand*] that may constitute a case in law – and is therefore not a *priori* capable of being applied in law, i.e. of being

¹ Badie B. *Humiliation in International Relations*. Oxford : Hart Publishing, 2017.

² Varga Cs. *The Problematics of Human Rights // Varga Cs. Rule of Law, Contesting and Contested*. Budapest : Ferenc Mádl Institute of Comparative Law, 2021. P. 246–264.

established in law as its case. The rule of law itself, on the other hand, is made up of a set of values which, when fully realised, may prove to be mutually exclusive. This means that their implementation in any case presupposes acts of weighing and balancing in search of an optimum solution at the last and least. It follows therefrom that the rule of law is an *ideal* that is impossible to achieve in its entirety, since whatever the solution reached, it will always remain debatable. Or, otherwise speaking, the rule of law is something that can – and must – only be aspired to, and approached to reach an optimum realisation, with varying fields and degrees of success.¹

‘Human Rights’ and ‘Rule of Law’ as Softeners of the Law and Vehicles of Importing the “New Ethics”

For decades, the main thrust of Western European and Atlantic legal philosophy has been to untie the law, hitherto enclosed in formalities and thus rendered secure, in everyday social practice, and thus, especially, in the political sphere, in the latter’s ever-changing amorphousness. This is the purpose of all attempts to *soften the law*, by infiltrating soft law into every available niche in order to *heterogenise* the law’s hitherto more or less safely preserved *homogeneity*.

Tellingly, the international declarations of the rule of law are not simply about establishing a *status quo* achieved by common agreement but, by their wording, which refers to human rights in general without specifying or enumerating them, i.e. without any restrictions, they are to make a *status quo post* binding. They thus pretend to impose on states blanket future obligations from the past, obligations that were neither created nor known at the time of the agreement or concluding a treaty in question, and which could even less have been undertaken by the signatory state.

Well, all of this is now being overwhelmed by what the European Union has meanwhile transmitted from Western Europe and the United States of America: migration, gendering cult and gender reassignment, the shaming of being white and Christian and heterosexual, and the extension of supposed obligations of reparation to countries which, having been colonised themselves, have never had a colony.

So, what is the state of the rule of law today, and, with it, of the rule of human rights?

Well, we could summarise today’s practice as follows: everybody has a few Jolly Jokers in their hand, and none of them predict how much their cards are worth. Perhaps they don’t even know themselves. However, everyone gets exactly what they declare when they play their cards. Or, sum-

ming up, it would be a mistake to assume a different conception of the rule of law behind the difference of opinion between – let’s say – Brussels and Budapest. All we can see is that one side is playing Jolly Joker as a fake card player with cards of no fixed value, so there is no card game in reality, and the other side is merely pointing this out as a perhaps non-negligible circumstance. Obviously, when the latter took on the values of the rule of law (or *l’État de Droit* or the *Rechtsstaat*) when it joined, it did so by tacitly accepting their then current understanding, which no one can regard or mistake as an empty frame that can be freely filled in again and again by anyone in a dominant position in whatever future. That is, if today I agree not to go to war, this is not meant that tomorrow I shall be giving up my wife with my extensive family and fortune.

According to the above, globalism is, on the one hand, an ongoing process and thus a fact to be acknowledged, but on the other hand and at the same time, it is also a matter of choice in terms of its desired and opted-for level and depth, nature, and impact. In any case, it is a choice to be done by cultures and nations involved. The question of *globalism and localism* is therefore not simply an either-or question, but an issue of responsible choice, namely in which areas and matters, to what depth and in which direction we wish to see the continuation of traditional values and the continuation of our own culture in our own localism complementing the current world current of globalism.

Conclusion

Drawing the arc of the social and legal transformation from the past to the present, we are now confronted on the one hand with attempts at implementing the utopianism of the limitless and conventionally non-democratic forces whose aim is an open society, globalised and atomised at the same time, and on the other hand with the gradual withdrawal of the components that may offer formal bonds and guarantees in law. As to human rights, they have been transformed from the person’s defence against state overpower into a means of the final individualisation of society, and as to the rule of law, into a framework that can be shaped freely by any dominant force at any given time to meet the political-ideological demands of any actual mainstream. Today, all this is aimed at serving the globalisation of a “new morality,” with characteristic symptoms of the ongoing decomposition in the West, including migration, genderism by choice replacing the male/female duality of human beings, and the substitution of family and national ties for the ideal amorphism of the new liberal desire of so-called open society.

¹ *Varga Cs. Idol, Deduced from an Ideal? Rule of Law, Universalization, Degradation // Philosophy of Law and General Theory of Law. 2019. № 2. P. 192–214, see also: <https://zenodo.org/record/6466110#.YlwXSzW8qUk>.*