

## LAW AS A FACTOR OF GLOBAL INSTABILITY

From the time of ancient China and Mesopotamia on, the legitimization of earthly powers has secularized step by step and almost imperceptibly, and in parallel, and degree to degree, too, the princely enactment of laws has turned into an overtly free manifestation of human determination and will.<sup>1</sup> Thereby a new and revolutionizing idea emerged, that of human capability to create a new order and, further on, an artificially planned and improved society. Following this course, as a feasible agenda, the striving for a social reform with the total renewal of ideals was launched. It was followed by more daring and risky wishes, involving the uncompromisingly direct implementation of reformist ideas within some new institutional framework and arrangement, which, in their intellectual perspective, could already foresee the overall re-scheming of human life as the final asset.

And once the traditional—feudal—idea of acknowledging (restituting or restoring) exclusively that what could qualify as “old good law” had ultimately been left behind,<sup>2</sup> the law itself was capacitated to become the launching instrument and means of enforcement of such new ideals.<sup>3</sup> All this complexity of human „self-liberation”, as pre-forged in the century of the Enlightenment and the French Revolution, eventually culminated in the idea of social engineering, formulated expressly a century ago,<sup>4</sup> and in the program of changing (changing over, indeed) the total set of peoples’ beliefs, as stressed nowadays.<sup>5</sup> This cannot

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<sup>1</sup> Cf. Michel Villey ‘Eessor et décadence du volontarisme juridique’ *Archives de Philosophie du Droit* 3: Le rôle de la volonté dans le droit (Paris: Sirey 1979), pp. 87–136.

<sup>2</sup> For the notion of „gutes, altes Recht”, see Fritz Kern *Kingship and Law in the Middle Ages I: The Divine Right of Kings and the Right of Resistance in the Early Middle Ages / II: Law and Constitution in the Middle Ages*, Studies; transl. S. B. Chrimes (Oxford: Basil Blackwell 1939) xxxi + 214 pp. [Studies in Mediaeval History 4].

<sup>3</sup> The idea of reforming society through law is due to the Jewish eschatological thought according to A. Leo Oppenheim *Ancient Mesopotamia Portrait of a Dead Civilization* [1964] rev. ed. (Chicago: University of Chicago Press 1977) ix + 433 pp.

<sup>4</sup> Cf. Peter Swirski *American Utopia and Social Engineering in Literature, Social Thought, and Political History* (New York: Routledge 2011) xiii + 255 pp. [Routledge Transnational Perspectives on American Literature 15].

<sup>5</sup> The US Secretary of State who had once forced aggressive interventionism in the envelope of “exporting democracy” and then contested to American Presidency, was among the early ones who (in her case, to win her abortion party) said openly: “And deep-seated cultural codes, religious beliefs and structural biases have to be changed.” Hillary Clinton in »Women in the World Summit« (New York City, April 2015) <<http://www.nationalreview.com/article/417448/hillary-clinton-religious-beliefs-have-be-changed-accommodate-abortion-joel-gehrke>>. For the sake of accommodating same-sex marriage, euthanasia and the like in American society, she was working for long to foment an outbreak in the United States, namely, some smashing “Catholic Spring”, reminiscent of local destabilization in time of the “Arabian Spring” when American interests were serviced amidst the general turmoil in fact. Here and now, “planting the seeds of the revolution” was aimed at, against “backwards” values attached to a church which has allegedly remained a “middle ages dictatorship”. See Marc A. Thiessen ‘Hillary Clinton is a Threat to Religious Liberty’ (October 13, 2016) in <[https://www.washingtonpost.com/opinions/hillary-clinton-is-a-threat-to-religious-liberty/2016/10/13/878cdc36-9150-11e6-a6a3-d50061aa9fae\\_story.html](https://www.washingtonpost.com/opinions/hillary-clinton-is-a-threat-to-religious-liberty/2016/10/13/878cdc36-9150-11e6-a6a3-d50061aa9fae_story.html)>, with reference to staff correspondence in 2012, thanks to WikiLeaks. As a high priest opined later on,

be but based on legal voluntarism, professed since the modern times, expressing the ultimate phase of development and of the final victory of the human gift of rationalism. And this is held nowadays as well, as the level able to crown the humans' long-dreamed longing for self-consciousness, which seems to be justified by the achievements of Western civilization, due to progress the Euro-Atlantic culture may have shown up as materialized in the advance of science.

Reinforcing the above, or controlling and feedbacking it, or again, as a braking force or counter-pole, perhaps even as a simple impulse of provocation or counter-impulsion, one can encounter another kind of revival, too, in fresh blood but with unchanged nature, reminiscent of the critically destructive power of the Enlightenment. This is the ideology of natural law and natural rights, the last time reborn in Western Europe after the Second World War. In the meantime, however, that ideology has transubstantiated into a re-generated form of human rights, transcribed into international documents adopted worldwide and accompanied also by enforcing mechanisms,<sup>6</sup> for that it can provide a counterpoint, limiting human intentions by also serving as a benchmark. At the same time, however, standing for the ultimate phase of human self-liberation and extended to each and every human being on an individual level, the ideology of human rights degenerated, from its earlier position of a protector of the human subject when excessive state power may have been stressed, into the main instrumentality by which society can be (and not sporadically *is* indeed thoroughly) atomized by the growing exclusivity of rights language, without any counter-balancing service offered or done in return on behalf of the privileged part.

All this is man's business, thoroughly artificial, aimed at benefitting, moreover, maximizing profit available in practice. As known from *The German Ideology* of

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"there are three groups of people in this world: those who believe in God, those who do not believe in God, and those who think they are gods. Hillary Clinton I think is one of those who thinks she is a god." <<http://aleteia.org/2015/04/29/nigerian-bishop-hillary-clintons-remarks-about-religious-beliefs-show-she-thinks-she-is-a-god/3/#sthash.nAHJ2zBl.dpuf>>.

<sup>6</sup> Cf. Чабба Варга [Csaba Varga] 'Природа прав человека' in his *Загадка права и правового мышления* Избранные произведения; Сост. и науч. ред. М. В. Антонов (Санкт-Петербург: Издательский Дом «Алеф-Пресс» 2015), 224–230.

According to Shannon Holzer 'How Liberals Abuse Language' <[https://www.academia.edu/30204590/How\\_Liberals\\_Abuse\\_Language?auto=download&campaign=weekly\\_digest](https://www.academia.edu/30204590/How_Liberals_Abuse_Language?auto=download&campaign=weekly_digest)>, too, such kind of demand is just a game by words. While natural law asks for the deep essence of things, human rights practice only lives with the nominal redefinition of words, "trying to create reality with language". And thereby "Rights [...] turn out to be that which those on the left are trying to force others to accept."

Marx and Engels among others, there is an inborn component of social struggle, namely, that influencers generate ideas not only in their particularity but, by the same stroke of pen, as generalized onto the level of the mankind's devisable universality. Merely human, sometimes personal considerations are thereby getting elevated to apparently absolute validity, made unquestionable for the time being and knowing, without compromise, full implementation only.<sup>7</sup>

Essentially, human rightism practiced on the globe now calls for rights that are no more or less than projections of some actors' (elites', minorities' or others') bare desires: free claims—required from others and to the expense of others; for, as to the nature of our worldly deals, there is a price to be paid for everything gained on this earth. Ontologically speaking, human rightism is just a normative rhetoric used to condition social environment first to accept and, then, to enforce those expectations. As such—revealed already, by the way, by those English conservatives criticizing declarations made by the French revolutionary spirit a century ago—, the list of “human rights” that can emerge in principle is endless and limitless: any one of them will certainly followed by further ones, mostly outdoing and sometimes also antiquating the former one in this never-to-end process.

Considering the present stage of overtly politicized ideological struggles pervading the contemporary world, there has always been a challenging contrast to ancient human wisdom which has ever served as the counter-pole to the human ambition fueled by the belief in infinite possibilities and potentialities, exacerbated by the “revolutionary honeymoon period” feelings of perennial human Utopianism, now equipped with modern social organizing techniques and affirmed, even if ostensibly, by those various temporal triumphs achieved thereby. What I have here in mind is perhaps a most ancient conviction of mankind,<sup>8</sup> expressed in twofold ways, present in the root of all our known ideas in respect of law.

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<sup>7</sup> As exposed in a classical development, cf. Karl Marx & Friedrich Engels *Die deutsche Ideologie* [1846] <[http://www.mlwerke.de/me/me03/me03\\_009.htm](http://www.mlwerke.de/me/me03/me03_009.htm)>.

<sup>8</sup> Albeit theology is devoted to illuminating the place what human beings are planned to reserve in the scheme of God, the same theology cannot be but human formulation, rooted in human experience at the same time.

Namely, one is, as expressed by Christian symbolism as the biblical foundation of our faith, the trust in the figurative power of the Last Judgment. In our case, for law, it means that in the fullness of time, the true weight and merits of whatever human intent and deed can exclusively be judged in the divine sphere and by the Divine authority. Subsequently, in its turn it leads to the conclusion that administration of justice, invented, channeled and operated by humans, can only serve momentary and ephemeral purposes on this Earth, just to arrange our mundane affairs here and now. In the legacy of Roman Law as resuscitated on the European continent, once the idea of *ius* [ $\approx$  *правда*] was reminiscent of its divine origins in natural law as a coeval product of the Creation. Later on, however, it became reduced to the plainly this-worldly, overtly human, willful princely manifestation of *lex* [ $\approx$  *закон*]. In contrast to such a course of things, within the tradition of the same Roman Law as revitalized in the Anglo-Saxon world, jurists took the courage of processing inductively the experience they could draw from the past through the precedent-like recurrence of precedent-like cases and judicial solutions in a case to case approach, not without some parallelism with a kind of reinstatement of the classical Jewish and Islamic legal mentalities and patterns. For, as is known, Jewish and Islamic laws as sacred and theologically inspired arrangements are conscious of such origins, and do their best to avoid trusting (and especially trusting too much) in whatever forms of logic and conceptual formalism.<sup>9</sup>

The other immemorial expression is a prayer calling from despair for help, the exclamation of the primeval woe: “Out of the depths have I cried unto thee, O LORD.”<sup>10</sup> This is just anguish, grown into an ultimate call for relief; it testifies the destiny of ingrained weakness, moreover, straight misery and impotence of everything human—i.e., of us, as falling human beings indeed—, placing our sole hope in God, in a transcendental perspective.

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<sup>9</sup> Cf. Csaba Varga *The Paradigms of Legal Thinking* [1999] enlarged 2<sup>nd</sup> ed. (Budapest: Szent István Társulat 2012) 418 pp. [Philosophiae Iuris] & <<http://mek.oszk.hu/14600/14657/>> and Csaba Varga *Comparative Legal Cultures On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism* (Budapest: Szent István Társulat 2012) 253 pp. [Philosophiae Iuris] & <<http://mek.oszk.hu/15300/15386/>>.

<sup>10</sup> Psalm 130.1. King James, Psalter in <<https://www.kingjamesbibleonline.org/Psalms-130-1/>> resp. Псалом 130 in <<http://www.russianbible.net/Psa-130.html>>.

To be sure, both expressions left their imprints on the main aspirations and paths ever known in legal history and the anthropological features of whatever legal mentality. They even shaped and framed the manner in which law has been formalized, moreover, skeletonized as the systemic or practice-bound sequence of purely formal units or decisional patterns to a large extent. This is evidenced especially by (1) the pursuit of legal authority through a competitive rivalry amongst standing and emerging legal authorities in an institutional struggle (on behalf of *law in books*, *law in action*, and *law in popular mind*) for supremacy;<sup>11</sup> (2) the efforts at resuming judgments in law thanks to institutionalized appeals for that a given decision already made can be reconsidered again, and/or (3) once the force of law has been reached, clemency can be granted; (4) the recourse to procedures parallel to the law, either by processing (interpreting and applying) the law's formalism and internal logic in a different manner or, simply, using differing standards for channeling and controlling the decision-making procedure; and, at last but not the least, (5) in case of both primitive laws in the past and advanced legal systems today, alternating (if not expressly switching over) de-formalizing tendencies with formalizing ones. Such are, for instance, the clash between models that “make the law livable”, i.e., equitable law, and strict law, as classically shown already by Hillel vs. Shammai in early Judaism and Proculeans vs. Sabinians in Roman law.<sup>12</sup> These are, by the way, everlasting varieties of legal techniques that are neutral in themselves albeit they challenge one another in polarized positions. For, simplifyingly distorted in nowadays' sterile, sometimes overpoliticized legal theorizing, such alternative potentials are used to be presented as if they were representatives of diametrically opposite directions taken by, e.g., democratic and undemocratic approaches. After all, legal machineries are in a standing fight within themselves in order to select, define and fix the model that—for

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<sup>11</sup> It is remarkable that overlooking legal regimes majoring the world today, János Jany's *Jogi kultúrák Ázsiában* [Legal cultures in Asia] (Budapest: Typotex 2016) 720 pp. [Panta] sees Islamism not simply as an insurgence against Western cultural dominance but also as a new power's struggle for establishing its ultimate authority.

<sup>12</sup> Chaim Perelman 'Legal Ontology and Legal Reasoning' *Israel Law Review* 16 (July 1981) 3, pp. 356–367.

a while at least—may win the day.<sup>13</sup> In any case, in the humans' struggle varying from situation to situation it is not the human ability to face challenges that calls for our interest and needs explanation: it is only the context that is always new. Moreover, it can also be asserted that when we happen to fight with apparently renewed arms, in fact we are fighting old battles anew.<sup>14</sup> For role actors may change every time but, all that notwithstanding, the game remains what it has ever been.

We can only see that the struggle is going on at all points, and our world today is more fragmented than ever.

The most important thing to realize now is that we are living in a rather dangerous age. In a way unaltered through time, today's Eves continue to eat new apples, and their Adams, as usual, remain perplexed. Unchanged, complacency of the self is limitless in present times, and we have virtually no signs, no guiding posts to find the way out.<sup>15</sup>

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What conclusions can we draw from what we have told about the nature and characteristics of law?

- 1) Today, both legally defined pseudo criterialities (such as democracy and parliamentarism) and terms expressed as parts of the law (like the ones of Rule of Law and human rights) dominate—or, as to their real significance, over-dominate—the world of international politics, embedded in the latter's basic vocabulary. It is an in itself very guessing fact that they are used as criteria, albeit they are not suitable for operative use, because they are undefined, and perhaps even indefinite, as they primarily stand for conceptualities and concepts

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<sup>13</sup> See the papers collected in *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1].

<sup>14</sup> David Dyzenhaus *Legality and Legitimacy* Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar (Oxford: Clarendon Press 1997) xiv + 283 pp. and also Csaba Varga 'Múltkutatás, jövőkeresés Közép-Európa jogában' [Inquiries into the past and search for the future in the law of Central Europe (2015)] in his *Jogfilozófia a múlt, jelen és jövő ölelésében* (Budapest: Pázmány Press 2018), p. 377 [Tanulmányok 44] & <<http://mek.oszk.hu/18900/18995/18995.pdf>>.

<sup>15</sup> See, e.g., Robert Nisbet *The Quest for Community* (San Francisco: ICS Press 1990), pp. 3–65.

covering the basic orientation of our common and mainstream Western civilizational *ideal*.

- 2) At the same time, as the present paper reveals, the defensive role of law, suggested widely to be so strong and foreseeable and controllable as the bastions of any fortification, is by far not reliable. In fact, law does not offer any guarantee of certainty, because due to its very nature as shown above, it does not and cannot provide indeed predictable support or security.
- 3) According to foundational evidence shared by social science as it stands now, any politics is based on humans who are socially conditioned decisively, being a product of the triad composed of socialization, education, as well as manipulation from birth to the end. In fact, behind actual social movements just as behind the law built with hierarchical barriers, there is always some sort of “dominant will”, working from a kind of centrality and mastering the process in a manner more or less hegemonic. This is the background force that holds all interpretations and applications in hand. In other words, as opposed to the jurists’ professional ideology in Continental Europe focusing on the positive (positivated) law taken as a textual objectification, only the Anglo-Saxon approach may prove to be true and justifiable in ontological terms. In reality, the being of law as a component of social ontology is related to its actual influence exerted, and by far not—or not exhaustively—to its positivized quality. In the final analysis, the law’s overall impact is independent of how it prevails or stands, or how it declares itself a valid rule of the state. The key issue is the way on which the law is interpreted and applied. Or, as classically stated by an episcopal exposition, “Bishop Hoadly has said: »Whoever hath an *absolute authority to interpret* any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them«; *a fortiori*, whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver.”<sup>16</sup>

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<sup>16</sup> John Chipman Gray *The Nature and Sources of the Law* [1909] 2<sup>nd</sup> ed. (New York 1927), 102, quoting Benjamin Hoadly’s *Sermon* [The Nature of the Kingdom or Church of Christ; A Sermon Preached before the King at ... St. James’s, March 31, 1717] (London: J. Knapton 1717), p. 12.

- 4) Historically speaking, the law has never existed in an empty or emptied spiritual space. This is only a trial spread over the world from the general decay caused in America by and after the 1968 rebellion. Notably, it is the common belief in the self-identity of the community (expressed in common religious faith or related to the population or territory in question), in company of the common morality developed in and by it, that has always provided (and should provide today, too) the necessary background to law. For whatever the appearance is, the law is no more than a symbolic power. So, although the law is the ultimate factor of any successful social integration and conflict resolution, it is far from omnipotent. Its genuine mobilizing, enforcing and punitive power, i.e., its ultimate authority, lies in being able to maintain order by effectively dealing with offenses occurring individually, but not in mass. It can no longer endure when faced to some majority, i.e., disorder emerging as commonplace every day. For once not backed by the greatest support, law is to collapse. After all, as Kant said, by its very fact, conceptually, the continued lack or impossibility of sanctioning amounts to revolution.
- 5) Thus, once the back-up force is emptied behind the law, what is left cannot be more than an empty frame of law. That is, what may have been law becomes a helpless normative shell now. And such a law, left alone, can have no more ambition than mere exercising of violence, i.e., by chance *action gratuite*, until its whole regime breaks down.
- 6) All in all, from the perspective we can foresee presently, our future will lead indeed to nothing but a clash of civilizations,<sup>17</sup> the cacophony of unpredictability, unless some sort of a final resolution, truly worth of the spirit of the 21<sup>st</sup> century humanism,<sup>18</sup> cannot appear on the scene to rearrange the fate of the world.

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<sup>17</sup> Samuel P. Huntington *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster 1996) 367 pp.

<sup>18</sup> But suggestions exhausting in aesthetes' self-criticism like "The fear of barbarians is what risks making us barbarians."—Tzvetan Todorov *The Fear of Barbarians Beyond the Clash of Civilizations* (Cambridge: Polity Press 2010) vii + 233 pp.—seem rather "rhetorical", all the more so because the underlying problem concerns "the West's moral response to Islamist terrorism" (Michael King in *The Times Higher Education* November 11, 2010).