

CSABA VARGA*

The Law's Homogeneity

Challenged by Heterogenisation through Ethics and Economics

Abstract. The Atlantic civilisation has over the past centuries been composed of two definitely diverging ethosos and social philosophical inspirations, differing also by their very foundations. The contrasts are perhaps most conspicuous today as to be seen in the difference between approaches to *life as a struggle* and to *law as a game* within it. No doubt, on the one hand, there prevails the rest of (1) a *European Christian tradition*, characterised by communal ethos, with provision of rights as counter-balanced by obligations, in which priority is given to the peace of society and a traditional culture of virtues is promoted to both circumvent excesses and acknowledge human rights, with a focus on prevention of and remedy to actual harms. It is such an environment within which *homo ludens* as a type of the playful human who is at the same time dutiful and carefree—entirely joyful—constitutes a limiting value. If and insofar as struggle appears at all on the scene, it is mostly recognised as a fight for excellence. As a pathologic version, the loneliness of those staying away from participation may lead to psychical disorders which require subconscious re-compensation, the symbolic sanctioning of which was once accomplished by the psycho-analysis. On the other, there has also evolved (2) an *Americanised individualistic atomisation of society*, expecting order out of chaos, with absolutisation of rights ascribed to individuals, all closed back in loneliness. As an outcome, obligations are circumvented by entitlements, and unrestrained struggle becomes a part of any normal course of life with the deployment of human rights just to neutralise (if not disintegrate) community-centred standards. “Life is struggle”—the hero of our brave new world enunciates the words as a commonplace with teeth clenched, convinced that life is barely anything but fight against anybody else (as an improved version, hailed as civilisatory advancement as re-actualising—under the pretext of maximising the chances of—the ominous *bellum omnium contra omnes*, formulated once in early modern England). Starting from the common deployment of some symbolical “cynical acid” in foundation of modern formal law but developing through differentiated ways of how to search for reason and systemicity in law, the conceptual and methodical effect of this very division is shown in the paper within the perspectives for curing malpractice in law and also in the role of ethics in economy.

Keywords: modern formal law, Europeanism, Americanisation, malpractice, ethics in economy, tendential unity

1. The Formalism of Law in Modernity

Justice Oliver Wendell Holmes of the Supreme Court of the United States, one of the classics of the formative years of American legal realism, defined his programmatic stand almost one hundred and fifteen years ago as follows: legal notions have to be washed with “cynical acid” so that they can serve as genuinely legal concepts, stripped of theological and moral (etc.) overtones.¹ Because, as he saw it, “[m]oral predilections must not be allowed to influence our minds in settling legal distinctions”.² Thus the question arises: is someone calling for cynicism inevitably cynical himself?

* Emeritus Research Professor, Institute for Legal Studies, Centre for Social Sciences, Hungarian Academy of Sciences, H-1250 Budapest, P.O.B. 25; Emeritus Professor, Department of Legal Philosophy, Pázmány Péter Catholic University, H-1428 Budapest 8, P.O.B. 6.
E-mail: varga@jog.mta.hu; homepage: <http://drcsabavarga.wordpress.com>

¹ Holmes, O. W.: The Path of the Law [1897]. In Holmes, O. W.: *Collected Legal Papers*. New York, 1920. 167–202 on 174.

² Holmes, O. W.: *The Common Law*. London–Cambridge, Mass., 1882. 148.

We know that such approach was called *functionalism* at that time. It held as a basic tenet that each and every component of the social complex has to serve with full strength in its own place, as it is just its specific particularity as distinguished from anything else that may have motivated its coming into a separate existence.

It is the ideal of functionalism in law, which modern formal law was invented and developed to institutionalise. Historically, this was the product of the European bureaucratism (which gained strength from the early 19th century) that began to assimilate the state structure to its organisatory needs with a previously unheard-of efficiency.³ As its first step, law was thoroughly formalised to develop its particular homogeneity. In return, law became *autonomous*; with *distinguished* particularity;⁴ to function in a *specific* way. This necessitated its own responsibility in overall co-operation, with interactions in any direction regarding any complex.⁵

Thereby, functionalism is also expressive of an *instrumental tendency*, which is a theoretical conclusion of the fact that, from now on, modern social existence can only be explained as the self-realisation of straightforward co-operation of partial totalities, relatively separated yet thoroughly connected on the plane of the whole totality. This is what George Lukács and his circle once described as the domination of homogeneous autonomies developed on the terrain of undivided heterogeneity emerging in everyday existence, in which each and every complex (which has separated out from the total complex by advancing its particularities) becomes both specified and, operating according to its own criteria as one given *homogeneity*, relatively independent from the total complex (while facing the risk of confrontation).⁶ On the field of macro-sociological theory-building, Niklas Luhmann, too, arrived at a similar conclusion one decade later, formulating the category of *Ausdifferenzierung* as a theoretical foundation stone, to indicate separation and isolation, in the course of which the specific operation of law would appear with a binary code, responding with the exclusive alternative of either “lawful” or “unlawful”.⁷

All this anticipated the chance of dysfunctionality in actual operation, running against the values originally designed to be implemented. For, as has been long known, scholarship has considered such occurrences to be mere mistakes, marginal in practice.⁸ At the same

³ Cf., e.g. Gladden, E. N.: *A History of Public Administration*. I–II. London, 1972. and Finer, S. E.: *The History of Government*. I–III. Oxford, 1997.

⁴ For the qualifying term “distinctively legal”, see Selznick, Ph.: *The Sociology of Law*. In Sills, D. L. (ed.): *International Encyclopaedia of the Social Sciences*. New York, 1968. 51.

⁵ Cf. Varga, Cs.: *Moderne Staatlichkeit und modernes formales Recht*. *Acta Juridica Academiae Scientiarum Hungaricae*, 26 (1984), 235–241.

⁶ In philosophical elaboration of an initially aesthetical origin, see, by Lukács, G.: *Über die Besonderheit als Kategorie der Ästhetik*. Neuwied am Rhein–Berlin, 1967, *Über die Besonderheit als Kategorie der Ästhetik* [1957]. In Lukács, G.: *Probleme der Ästhetik*. Neuwied–Berlin, 1969. 537 et seq., *Die Eigenart des Ästhetischen*. 1–2. Neuwied am Rhein–Berlin–Spandau, 1963. as well as *Zur Ontologie des gesellschaftlichen Seins* (ed.: Benseler, F.). Darmstadt, 1984–1986. From the circle of disciples, see also Heller, Á.: *Everyday Life*. London, 1984.

⁷ From Niklas Luhmann, e.g. *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie*. Frankfurt am Main, 1981.

⁸ It is by far not a mere chance that Marxism was the first in the modern age to develop a theory of alienation, addressing it as a core issue of social scientific thought. Cf., among others, Israel, J.: *Alienation. From Marx to Modern Sociology: A Macrosociological Analysis*. Atlantic Highlands, New Jersey, 1979, as well as, by Varga, Cs.: *Chose juridique et réification en droit*. *Archives de Philosophie*

time, however, theoretical description has defined the ontological result by some *mutuality in operation*, forming a “*tendential unity*”, which is a *sine qua non* of the operability of—and, as such, will at any time determine—the total whole. This Lukácsian recognition is also expressed by the fact that in his social ontology, language and law are from the outset distinguished from the rest of the complexes of social being (taken as the total operation of the total complex consisting of partial complexes). Or, language and law are held to be mere intermediators that do not operate with their own values, for they exclusively mediate among values taken from other (non-mediatory) complexes. By the help of instrumental values, they may operate as wedged in the process, at most strengthening the efficiency of their mediatory role. Of course, inspired by historical materialism rooted in economic determinism, Lukács presumed a component able to play an over-dominant role in the total process *hic et nunc*. But having arrived at social ontology from Bolshevik revolutionism, the aged Lukács had already realised that hegemonic determination through any complex becoming totally dominant (e.g. the economy in general, or politics in transitory or pathological states, in the shadow of which no further partial complex could any longer play the proper role to be played) would inevitably harm and distort the whole totality,⁹ with lasting effect on most of its occurrences.¹⁰

2. Intertwining: A Case Study

Let us raise the question: what practices may arise in our day from such and similar recognitions? If we consider only the alternatives of medical law, i.e. of making malpractice a subject of civil action, one of the three solutions that follow may emerge in principle: no responsibility and no justiciability in practice (as was once practised under the aegis of the “actually existing system of socialism” in Hungary and the entire region); or responsibility made almost absolute (as evolved as a result of the self-assertion of lawyering in the United States of America); or personal or institutional responsibility enforceable via specific media made up by the medico-legal profession (idealised as a perspective for Hungary after the fall of Communism).

Well, assessing the field from such extreme poles (with some sensitivity to our domestic traditions¹¹) within such a threefold perspective of past, present, and possible

du Droit, 25 (1980), 385–411. and »Thing« and Reification in Law. In Varga, Cs.: *The Place of Law in Lukács' World Concept*. Budapest, 1985 (1998). Appendix, 160–184.

⁹ Cf., by Varga, Cs.: Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács' Ontology). *Rivista Internazionale di Filosofia del Diritto*, 60 (1983), 127–142 and in: *Filosofía del Derecho y Problemas de Filosofía Social*. X. México, 1984. 203–216 and <<http://www.bibliojuridica.org/libros/3/1051/20.pdf>>, as well as Autonomy and Instrumentality of Law in a Superstructural Perspective. *Acta Juridica Hungarica*, 40 (1999), 213–235.

¹⁰ Cf., e.g. by Varga, Cs.: *Transition to Rule of Law. On the Democratic Transformation in Hungary*. Budapest, 1995. and <<http://drcsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>> and *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central and Eastern Europe*. Pomáz, 2008. and <<http://drcsabavarga.wordpress.com/2010/10/25/varga-transition-to-rule-of-law-%E2%80%93-constitutionalism-and-transitional-justice-challenged-in-central-and-eastern-europe-2008/>>.

¹¹ A balanced middle-of-the-road stand is presented by, e.g. Kapocsi, E.: Az orvosi hivatás autonómiájának etikai vonatkozásai [Ethical aspects of the autonomy of the medical profession]. *Lege Artis Medicinae*, 10 (2000), 358–364. Cf. also Kövesi, E.: Orvosi etika és gazdaságosság –

future, we can take the following consequences into account in light of today's procedures and of prospects they will become further Americanised:¹² (1) the assumption of responsibility enforced by lawsuits will be built as an auxiliary cost into the expenses of health care, which must result in the overall rise in its budget; (2) the actual accrual of health costs will be taken from the proper field of health care, only to be divided among suing clients and the lawyerly caste; in response to which (3) on the part of both the health supplier and the client, further juridifying mechanisms (mediations and formalisations) alien to the original ethos and inherent rationality of health care will be subsequently wedged in the previously purely health-centred processes, a condition that may shake its very foundations through a parasitical intrusion. With legal safety becoming a consideration in focus, new practices (eliminating procedures and risky choices once generally accepted in practice) may be introduced. Finally, all this (4) further professionalises the practices of the medical profession, cutting up traditional treatment processes into artificially isolated partial processes. That is, the medical profession will reduce both frustration and predictable damages by deploying additional (cost-increasing) staff with professional "mind-healing" (psychological) specialisations in the process (as the paradoxical after-effect of the sheer artificiality and exaggerated bureaucratisation that arises from the depersonalisation of the entire procedure while in fact worsening the patient's prospects to heal)—while needless to say, having no genuinely positive effect as to the overall destination of the whole undertaking in question.

In the final analysis, all this will not in the slightest degree increase the actual (and morally reasonable) responsibility to be borne by social healthcare for actions that are achievable within the given society's tolerance and funding limits.

Or, all it equals to saying that this is probably the most costly outcome both financially and also regarding its erosive effect on the medical ethos, and will result in an external control of health care, alien to it and unduly overcoming it, driven solely by lawyerly arrivism and profiteering as guided by professional imperialism. Yet, at the same time this proves to be the least effective solution. All that notwithstanding, it still seems to step by step subdue the entire medical organisation, whereas this course has by no means been necessary. Two decades ago, at the beginning of our transition from communism, its feasibility and acceptability was still an open issue in Hungary, at a time when external pressure by a professional push—accompanied by an internal agitation to introduce and tolerate an American-type lawyerly rule—first became perceptible in the country.¹³

összefüggés-e vagy ellentmondás? [Medical ethics and economicalness: are they in correlation or contradiction?] *Valóság*, 39 (1996) 9, 26–29; Dósa, Á.: Felelősség vagy biztosítás? [Liability or insurance?] *Lege Artis Medicinae*, 6 (1996), 262–265 as well as Balázs, P.: Orvosi etika és gazdasági realitások [Medical ethics and economic facts]. *Valóság*, 40 (1997) 4, 16–28. For an international background, see also Hennekeuser, H.-H.: Zwischen Ethik und Wirtschaftsgebot: Der leitende Krankenhausarzt im Spannungsfeld von Patientenbetreuung und Ökonomie. In: *Jahrbuch für Wissenschaft und Ethik*, 3. Berlin–New York, 1998. 141–147. As a Hungarian legal and medical specialist's stand, see Dósa, Á.: Az orvos kártérítési felelőssége [The doctor's liability for damages]. Budapest, 2004.

¹² Cf. *Archives de Philosophie du Droit*, 45: »L'américanisation du droit«. Paris, 2001. and *L'américanisation des droits suisse et continentaux*. Zürich, 2006..

¹³ As a member of the Prime Minister's Advisory Board in the administration of József Antall, I initiated repeated informal debates about the issue, while our legal experts from academies and universities, including American advisors and Hungarian scholars of American studies, all kept quiet

With homogeneity heterogenised, external intervention dissipates the well-balanced configuration and very substance of the structure and systemically self-reproducing framework of the profession it touches upon.

3. Diversity of Approaches

Considering all this both as a danger and warning¹⁴—when research is so exhaustive as to have a call even to devoting attention to cultural anthropological investigations of tribal communities of a few hundred members surviving sporadically¹⁵—, we might at last take notice of the fact that Atlantic civilisation, so clearly determining our near future, has been composed over the past centuries of two definitely diverging ethos and social philosophical inspirations, which differ by their very foundations. The contrasts are perhaps most conspicuous today in the difference between the approaches to *life as a struggle* and to *law as a game* within it.

No doubt, on the one hand, there prevails a *European Christian tradition*, characterised by a communal ethos, with the provision of rights as counter-balanced by obligations, in which priority is given to the peace of society, and a traditional culture of virtues is promoted to both circumvent excesses and acknowledge human rights, with a focus on prevention and remedy of actual harms. It is in such an environment that *homo ludens* as a type of playful human who is both dutiful and carefree, i.e. entirely joyful, constitutes a limiting value.¹⁶ If, and in so far as, struggle appears on the scene at all, it is mostly recognised as a fight for excellence. As a pathological version, the loneliness of those who avoid participation may lead to disorders of the psyche that require subconscious re-compensation, the symbolic sanctioning of which (typically in the stale and excited Vienna of the turn of 19th and 20th centuries and by a psychologist of middle-class women shut into self-consuming idleness) Sigmund Freud accomplished. On the other hand, there has also evolved an *Americanised individualistic atomisation of society*, expecting order out of

about the risks. Examining the spirit of those days with the easy wisdom of hindsight, C. Dupré—*Importing the Law in Post-communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*. Oxford–Portland Oregon, 2003. 57.—characterised the image of the West formed by the domestic Left (having turned to libertinism [next to nihilistic anarchism] after the fall of Communism) by concluding that there was “a glorified and idealised vision of the West and of liberal law” also referring to the writing of the Lukácsian Budapest-school in-exile-representative, Fehér, F.: *Imagining the West. Thesis Eleven*, (1995) 42, 52–68, which “did not correspond much to the reality”.

¹⁴ Not by chance, there are intermediary proposals for solution today. Cf. the initiatives by Nagy, L.–Kahler, F.: *Közvetítő (mediátor) felállításának szükségességéről az állampolgárok és a gyógyító intézmények (orvosok) közötti vitás kérdések peren kívüli megoldására* [On the necessity of involving a mediator for the extra-judicial solution of conflicts between citizens and medical institutions]. *Magyar Jog*, 42 (1995), 229–231 and Heuer, O.: *Konfliktuskezelés a betegjogi sérelmeknél: Az egészségügyi közvetítő eljárásokról* [Conflict management in cases of the violation of patients' rights: on mediatory processes in health care]. *Lege Artis Medicinae*, 11 (2000), 80–83 and <<http://www.lam.hu/folyoiratok/lam/0101/11.htm>>.

¹⁵ See, e.g. as the field work of a tribal legal anthropologist, deceased at an early age, Akalu, A.: *The Nuer View of Biological Life. Nature and Sexuality in the Experience of the Ethiopian Nuer*. Stockholm, 1989.

¹⁶ Huizinga, J.: *Homo ludens. A Study of the Play-element in Culture* [Proeve eener bepaling van het spel-element der cultuur, 1938]. London, 1949.

chaos, with absolutisation of rights ascribed to individuals, all closed back in loneliness. As an outcome, obligations are circumvented by entitlements, and unrestrained struggle becomes a normal course of life with human rights deployed to neutralise and disintegrate community-centred standards. "Life is struggle"—the hero of our brave new world enunciates it as a commonplace with teeth clenched, convinced that life is hardly anything but a fight against anybody else (in an improved version, hailed—under the pretext of maximising chances—as civilisatory advancement by re-actualising the ominous *bellum omnium contra omnes*, formulated by Thomas Hobbes in early modern England). Following such examples, feminist self-reliance may stand for a contemporary pathological ideal type, struggling herself back into unhappy loneliness by engaging in the fight with her jaw and the further abilities she has targeted.

It is mostly such and similar stimuli that nourish our uneasy experience of the globalised present, with ideals of order, standards and cultural patterns that transform status struggles (based on gender, colour, etc.) into struggles in law, and which, under the aegis of law, support disproportionate financial indemnification for alleged psychological injuries so as to gain material fortune, and which thereby replace collective solidarity by individual arrivism and disintegrate cohesive forces by growing societal atomisation.

Is it really such an outcome that we have wanted in our nation building through the centuries? Is it really this that is worth searching for now, when we are freed to shape our fate, given the chance to change the past regime?

For want of other points of reference in our spiritually emptying world (almost without unconditional respect for, and adherence to, values), let me recall a few lessons taught by historical legal anthropology¹⁷ and the millennial message of legal philosophy,¹⁸ while referring uniformly to the significance of the moment of trust in the mechanisms of feedback and the necessity of complexity in social existence. Well, both in early Jewish, Islamic (etc.) traditions and even nowadays in surviving autochthonous cultures (which lack in resources and, therefore, stipulate maximum efficiency as the condition for survival), we can observe the compulsion through two sorts of axiomatism with clearly ideological operation, which organise human choices into a framework unquestionably ready-made from the outset.¹⁹ One of these perspectival optima is the idea of *proportionality* with *self-moderation*, based on the priority of public good. This spread first as *shalom*, or the precedence for public peace to protect societal integrity, which, later in Roman development, was formulated as the dilemma of formalism expressed by the *adage of summum ius*,

¹⁷ Cf., e.g. Varga, Cs.: 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, 1988. 265–285 and »Law«, or »More or Less Legal«? *Acta Juridica Hungarica*, 34 (1992), 139–146. As a thoroughly theoretical outline, cf. also Lampe, J.: *Grenzen des Rechtspositivismus. Eine rechtsanthropologische Untersuchung*. Berlin, 1988.

¹⁸ Cf., as a call to natural law, e.g. Varga, Cs.: Legal Philosophy, Legal Theory—and the Future of Theoretical Legal Thought. *Acta Juridica Hungarica*, 50 (2009), 237–252 and in <<http://akademaii.om.hu/content/0318830q86810656/fulltext.pdf>>.

¹⁹ Cf., e.g. with some of the papers collected in Varga, Cs. (ed.): *Comparative Legal Cultures*. Aldershot and New York, 1992, as well as H. Szilágyi, I. (ed.): *Jog és antropológia* [Law and anthropology]. Budapest, 2000.

summa iniuria,²⁰ which was recognised from the Middle Ages on as the virtue of *temperantia*.²¹ The other is the ideal of *natural law*.

As to the latter, it has presumed human responsibility (in forms developed in East-Asia and Latin America, as well as in Christianity and Islam) for our environment as inherited exclusively for our temporary use, to be handed down to following generations safely *in toto*; defined (in its Christianised Greek–Roman version) minimum conditions (suitable to a formulation in sets of principles, rules, and exceptions from rules) as a comprehensive framework for social life in a symbolic expression of the created (or, profanely, the somehow organised) order: first, representing the whole cosmos; then, the humanly observable world; later on, society; and finally, the individual (with responses echoed by both theology and politics, aetiology and cultural anthropology).

Eventually, in our secularised age, this ideal was first replaced by endowing the ideal of natural law, unchanged in principle as transcendent to human existence, with changing (i.e. developing) contents [*Naturrecht mit wechselndem Inhalte*] at the end of the 19th century,²² then, by its institutionalisation as “the nature of things themselves” [*Natur der Sache*; *nature des choses*] by the jurisprudence of continental European countries with Latin or German roots after World War II,²³ in order to provide guidance for the desirable harmony among functions in conflict, as derivable through pondering upon all circumstances of the issue in question.

4. Ideal Models and Mixed Reality

Returning to the foundations of the philosophy of science, the first and primary task of human thinking is to delineate the frameworks, boundaries and limits within which human action may have a context, which prompted our ancestors to search for methodological ways of thought. In fact, from the age of René Descartes, European civilisation reduced that which may be thought of at all to that which can be deduced from some unquestionable truths through logical (re)construction. This has led to a kind of naturalism, reminiscent of

²⁰ In a fictional elaboration, see, e.g. von Kleist, H.: *Michael Kohlhaas. Aus einer alten Chronik* [1810]. Hollfeld, 1998 and in English translation Gearey, J. (ed.) New York, 1967. For its theoretical treatment, Varga, Cs.: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999. para. 2.3.1.8.

²¹ At Cicero (*Tusculanes*. III, 16–18), *sôphrosunê* may be equally realised as *temperantia*, *moderatio* and *modestia*, which he sums up as *frugalitas*. Cf. Labarrière, J.-L.: *Sagesse et tempérance*. In: Canto-Sperber, M. (dir.) *Dictionnaire d'éthique et de philosophie morale*. Paris, 1996. especially at 1325.

²² Stammler, R.: *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung. Eine sozialphilosophische Untersuchung*. Leipzig, 1896, 184–188.

²³ As first outlines, see, above all, Villey, M.: *La nature des choses*. In Villey, M.: *Seize essais de philosophie du droit*. Paris, 1969. 38–59; Larenz, K.: *Methodenlehre der Rechtswissenschaft*. 6. neu bearb. Aufl. Berlin, etc., 1991. para. 5.4.b [“Rechtsfortbildung mit Rücksicht auf die »Natur der Sache«”], 417. et seq.; and Coing, H.: *Grundzüge der Rechtsphilosophie*. 5. Aufl. Berlin–New York, 1993. para. IV.1; as well as *La »nature des choses« et le droit*. Separate issue of *Annales de la Faculté de Droit de Toulouse*, 12 (1964) 1; Noguchi, H.: *Die Natur der Sache in der juristischen Argumentation*. In: Yasaki, M. (ed.): *Law in East and West. Legal Philosophies in Japan*. Stuttgart, 1987. 139–147; and Tzitzis, St.: *Controverses autour de l'idée de nature des choses et de droit naturel. Rechtstheorie*, 24 (1993), 469–483.

naive realism patterned on the wisdom of *lex mentis est lex entis*,²⁴ presuming parallelism, as well as correspondence, between thought and reality. Conversely, in early times, even the created nature of the world was conceived of in a geometrical order according to a mathematical ideal, inspired by the Biblical exposition “[b]ut you have disposed all things by measure and number and weight”.²⁵ As a result, human thought was also confined to a *mathesis universalis*, posited as mere conceptual arithmetic within the presumption of an all-pervasive natural systemicity that could be notionalised. Through the Enlightenment’s combatant materialism, modelling cognition upon the pattern of reflection was developed in depth, which survived, among other things, as the central epistemo-ontological pre-supposition of Marxism, summarised and simplified as the notorious Leninist theory of reflection.²⁶ Most of the unconditional hegemony of rationalism survived from all of this until today, haunting and questioning otherwise normal thought processes all through, up to pushing them to their self-dissolving extremities.²⁷ This is the dogma according to which only that which is rationally justifiable can become the subject of theoretical reconstruction—ignoring the brutal fact that, as a side-effect of modern scientific revolution, such a mind-set can only contribute to depriving man of his further qualities; for man, with his inborn *facultates*, is significantly richer in emotional, intuitive, transcendent (etc.) life than is claimed by the idea that reduces his complexity (when assessing his self-positioning in the world) to one single, exclusive quality, that of alleged—and necessarily apparent—rationality.²⁸

This is the pattern with which the very concept of “social science” complies: in its origins, it is a typically American leftist idea (originating from the same source as Marxism, namely, the longing for scientific positivism), according to which science regarding society can be built on thoroughly factual foundations with empirical methodology, enabling social engineers to draw necessary conclusions by measuring given attitudes (etc.) to predict future behaviour (etc.). Well, using “sterile morphology” (which flourished from the interwar period up to the 1950s, as marked by Talcott Parsons’ a-historically universalised analytical system of concepts) has today proved to be a dead end,²⁹ re-admitting the old

²⁴ Patsch, F.: Dogmatikai kijelentések hermeneutikai fejlődése. (Egy »fundamentál-hermeneutikai dogmatika« vázlata) [Hermeneutical development of dogmatic statements: outlines of a »fundamental-hermeneutical dogmatics«]. In: Rokay, Z. (ed.): *Egység a különbözőségben. A 60 éves Bolberitz Pál köszöntése* [Unity in diversity: Essays in honour of Pál Bolberitz on the occasion of his 60th birthday]. Budapest, 2002. 117. et seq., especially para. 1.

²⁵ The Book of Wisdom. 11:20. In: *The New American Bible*. see <http://www.vatican.va/archive/ENG0839/_PLS.HTM>.

²⁶ Cf. Varga, Cs.: Cultivating Scholarship under Communism. (A Case Study on Marxism and Law.) *Central European Political Science Review*, 13 (2011) 44. {Forthcoming}.

²⁷ As a distorted outcome in law, cf. Varga, Cs.: Rule of Law? Mania of Law? On the Boundary between Rationality and Anarchy in America. In: Nótári, T.–Török, G. (eds): *Prudentia Iuris Gentium Potestate. Ünnepi tanulmányok Lamm Vanda tiszteletére* [Prudentia Iuris Gentium Potestate – Studies in Honor of Vanda Lamm]. Budapest, 2010. 492–504.

²⁸ In overview, cf. Varga, Cs.: Önmagát felemelő ember? Korunk racionalizmusának dilemmái [Man elevating himself? Dilemmas of rationalism in our age]. In: Mezey, K. (ed.): *Sodródó emberiség. Tanulmányok Várkonyi Nándor »Az ötödik ember« című művéről* [Mankind adrift: on the work of Nándor Várkonyi’s »The Fifth Man«]. Budapest, 2000. 61–93.

²⁹ Bell, D. In: Bullock, A.–Woodkings, R. B. (eds): *The Fontana Dictionary of Modern Thinkers*. London, 1983. 580. Cf. also Andreski, St.: *Social Sciences as Sorcery*. London, 1972.

ideal of the Humanities, while admitting that when we approach the specifically human, something more is at stake than rational codifiability alone.

Obviously, even more is at stake when we encounter the claim (rejuvenated after the failure of the one-time attempt to axiomatise ethics)³⁰ that we should negotiate moral and social psychological issues on the pattern of classical analysis taken as conceptual mathematics, absolutising a methodology according to which—of course, for the sake and within the bounds of the given conceptual system—only that which can be rationally concluded and justified is thinkable at all, while forgetting that human reflection is by far more complex than that.³¹

Therefore, as against a mechanical world-concept symbolised by the ancient clockwork's metaphor,³² our existence is nonetheless a total whole throughout: a totality resulting from the constant competition of interactions by practically unlimited sets of uninterrupted processes, (re)generated in *autopoiesis*, which inseparably closes its ontological and epistemological determinations and partial processes back into its total process. If we do not raise the issue as a theologically founded query (or if we reject, in the spirit of Occam's classical methodological razor, the teleological moment that could be raised from the outset), then it remains an insoluble enigma whether or not that which we think of as a limit in terms of values in such processes can at the same time also be regarded as objective. Or, formulated as a paradox, is "objectivity" available at all when one insists on "pure" scholarship?³³

5. The Ontological Necessity of Heterogeneity in Action

Returning again to economy, we have to conclude that without a vision of man in his entire complexity (including the theological, anthropological, ethical and psychological aspects as well), not even *economy* can be fully explained. Obviously, ethics is also necessary for economy as a *desideratum* in order to construct mentally and posit ontologically it. In other words, economic rationality is certainly at its proper place in previous calculation when we consider probabilities or take it into account as one of the criteria in managing conflicting situations, but it certainly cannot be the exclusive motivation to rely on in the operation of the overall complex. Or, ethics is by far not just a corrective, complementary factor in economy. This is of a foundational significance, giving it a framework so that the issue of economic rationality itself can be raised at all.

As we have already remarked, in legal regulation the concept of a system (formulated by, e.g. Hugo Grotius at the dawn of the modern age), built up exhaustively and seamlessly in (natural) law and formed according to the ideal of *mos geometricus* as broken down into individual positivations according to logical necessity, was later replaced by the mere definition of basic principles and (somewhat as an added exemplification) their arrangement

³⁰ Moore, G. E.: *Principia Ethica*. Cambridge, 1903.

³¹ Such a methodology can indeed be approved of in fields depending upon positivation that is, aimed at some strictly delimited and exclusively theoretical modelling that selects from the whole arbitrarily, but according to human purposes. If over-extended or extrapolated, then it also becomes problematic on its own terms.

³² Cf. Varga: *Lectures*... [note 17]. 84–85. Note 109.

³³ See Hermerén, G. (ed.): *Proceedings of the Symposium on Scientific Objectivity*. Copenhagen: Munksgaard 1978. = *Danish Yearbook of Philosophy*, 14 (1977).

in rules and exceptions from rules, so that the various situations in life can be judged according to principles in a patterned but individualised way, bearing their total complexity in mind. Likewise in economy, morality serves as an ethos defining a general direction, while in individual situations it helps in balancing conflicts of values by mediating amongst diverging interests mutually considered, leading finally to compromise solutions. Consequently in economy, at the level of *macro-processes*, morality is an ontic component to serve as a foundation that makes economic rationality reasonable and also socially interpretable; while in *micro-processes*, it has also to be taken cognisance of in the background, aware of the fact that it almost never makes recourse directly and one-sidedly but through reconciliatory processes, in order to solve conflicts and reach compromises by balancing, mediating, and mutual consideration.

It is exactly such a duality that opens up to both further requirements and additional wide-ranging prospects that may prove to be useful in our procedures at any time, for in *macro-relations* (e.g. in patterns proposed by medical law), it is exactly ethical considerations that generate the alternative models that we can endow, through strategic planning and a series of tactical decisions, with a definite patterning function, standardised as comprehensive social policies, after their harmonisation with prevailing economic and legal policies is accomplished; while in *micro-relations*, we have to provide for its exemplary operations through education, socialisation, and case analysis, caring for the diverse particularity of individual situations with proper empathy, after our ultimate goals are also taken into account.

With this, we have opted for the demand for human entirety, encouraged to avail ourselves of the potentialities offered by specialisation and homogenisation in our complex age with good conscience, but at all times in such a way as not to miss the ultimate goal, the intention—desirably a guide for all our human actions—of effectively implementing fundamental values in practice.³⁴

³⁴ For earlier attempts at outlining a theoretical framework, see Varga, Cs.: *Doctrine and Technique in Law. Iustum Aequum Salutare* IV (2008), 23–37 and <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>> and <www.univie.ac.at/RI/IRIS2004/ArbeitspapierIn/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc> as well as Varga, Cs.: *Buts et moyens en droit*. In: Loiodice, A.–Vari, M. (eds): *Giovanni Paolo II. Le vie della giustizia: Itinerari per il terzo millennio. (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato.)* Roma, 2003. 71–75 and *Goals and Means in Law: or Janus-faced Abstract Rights. [Tikslai ir priemonės teisėje.] Jurisprudencija* [Vilnius: Mykolas Romeris Universitas] (2005) 68(60), 5–10 and <<http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf>>.