
Csaba Varga

# COMPARATIVE LEGAL CULTURES

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PHILOSOPHIAE IURIS
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# COMPARATIVE LEGAL CULTURES

## On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism with Appendix on Legal Ethnography

Csaba Varga

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Allegoric Justice (1625) on the Mural of St. James' Church at Lőcse/Leutschau/Leutsovia
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[Audience at the Imperial Chamber Court] (Frankfurt am Main, 1750)
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# DISCIPLINARY ISSUES

# LAW AS CULTURE?*

The greatest change in the history of law occurred when it became objectified as a text through being embodied by a written form as reduced from *ius* to *lex*. This indeed meant a most conspicuous change, by providing law with properties easy to identify through external signs, for both legal phenomenologies (including objectivation-theories) and doctrines regarding the sources of the law. With the help of such formal signs, legal philosophies and theories of law-application may unambiguously define where the ultimate identity of law—the core of 'juridicity'—lies and how a judge can eventually reach a response in 'the law'. In terms of such a definition, we can answer as well whether the law is mostly referred to or indicated by a written text (as in the English doctrine of the Common Law or in modern natural law, especially in the law of reason), or it is at the same time also exclusively embodied by specific written forms (as in present-day statutory positivism).

In its classical rigour, which took complete form with an exegetic perspective as to its practical application, statutory positivism prevailed in Western Europe from the early 19th century until the end of the Second World War, while in Eastern Europe it survived until the collapse of communism. The movements of the law of reason and free law (making legality conditioned by principles, or sociologising or pragmatising it) were continuously trying to loosen the limitations imposed by statutory positivism from the late 19th century, and the rigorous austerity of 'socialist normativism' began to be somewhat relaxed mainly due to the influence of some Western European contemporary trends from the late 1960s.

Once the theoretical and practical aspects are treated separately in law, the decisive feature of legal positivism (taken as the professional deontology characteristic of the domain of modern formal law) will now by no means be the extent to which the law becomes defined in practice according to the ideals of statutory positivism[1] but—rather—the unquestion-

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* Published in its first version as 'A jog mint kultúra', a reply to András Karácsony's polemical essay in *Jogelméleti Szemle* 2002/3 <http://jesz.ajk.elte.hu/varga11.html>.

[1] As we know, this has never been a fulfilled claim, not even in principle—if not back in the age of exegetic law-application in the first third of the 19th century, when this ideal was pursued with all efforts in the euphoria of the textuality of the *Code civil*, with mechanical imple-

able fact that legal positivism has from the 16th century onwards increasingly been shaping a very specific approach to law in continental Europe. It is this specific approach that is the basis for our entire legal concept as a cardinal focal point to such a depth that even historical and contemporary endeavours to loosen it (and post-modern trends heralding its downfall) can only formulate their claims with the simultaneous re-assertion of the foundational solidity of legal positivism, thus far unbroken.[2]

Law and legal scholarship are, in the last analysis and from a sectoral perspective, nothing but a sort of communication about some specific communication. Therefore, we have to distinguish between the way we speak about how official actors in law refer to the law in their institutional capacity, and the way we speak about the extent to which theoretical reconstruction can justify (or, if needed, correct or replace) this. As far as the official discourse in law is concerned, since my early studies on LUKÁCS, which led to my recognition of the ontological nature of the lawyers' professional deontology (to be directly existential and thereby also irreducible to the issue of epistemological verifiability), I have realised that m o d e r n f o r m a l l a—both as a phenomenon and as an institutional arrangement—is inseparable from the basic tenets of positivism, that is, that the specific criterion of law can exclusively be met through the law's inference from specifically authorised texts. At the same time, on the level of theoretical reconstruction, modern analyses have concluded that such a positivistic claim cannot be fulfilled, not even in principle. Notably, what the so-called law-application means is basically a symbolic action, that is, a metaphorical abbreviation of an extremely complex operational process, covering practical routine in typical cases within the range of social normality.

mentation guaranteed and the legal clearly separated from the non-legal. The legal profession's smooth acceptance of the regime of National Socialism was due largely to the positivistic formalism inherent in modern formal law—similar to the strikingly easy transition of the German bureaucracy once created by BISMARCK to the post-BISMARCKian era, as described by WEBER. Both Soviet Bolshevism and German National Socialism broke with legal formalism, tracing it back to the liberal tradition, and condemned it as anti-revolutionarily bourgeois. The national socialist conception of law, defined by OTTO KOELREUTTER as he introduced *Völksgeist* and the *Führer-Prinzip*, remained faithful to this all along. In contrast, Bolshevism, further reduced to STALINism, returned to the classical bourgeois model simplistically idealised and broken into a dictatorial hierarchy. Cf., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp., especially chs. V–VI.

[2] As to the latest development, cf., by the author, 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44 & <http://www.akademai.com/content/x39m7w4371341671/fulltext.pdf>.

Accordingly, for me the genuine question is not when and to what extent legal positivism could become dominant at all—either as a theory or as an allegedly successfully implemented practice—but its underlying ideology. For the whole concept of Civil Law is defined throughout by the reduction of *ius* (as the core element of juridicity) to *lex* (as a set of posited texts), that is, by the embodiment of anything legal being posited by legal acts and, thereby, by reducing the complexity of legal processes to the artificial separation between 'law-making' and 'law-applying', or—in brief—by an institutional ideology (no longer separable from the very structure it institutionalises) that has remained up to the present day quite alien, strange and simply incomprehensible in light of the English as well as for the classical Jewish and Islamic understandings of law.[3]

It was more than thirty-five years ago that I formulated for the first time as my own realisation just how dual our approach to law and legal conceptualisation is. That is, within a given legal arrangement we cannot but formulate each and every issue in a positivistic way, or, to put it another way, from the perspective of the image and ideology the law offers about itself, while in scholarship we have to provide a (philosophical, sociological or analytical) description and conceptual definition verifiable/justifiable in theoretical reconstruction.[4] And, my studies on LUKÁCS also revealed to me that such a self-image is by no means something randomly attached from the outside to the otherwise automatically well-functioning realm of law after the fact, but is part of the legal arrangement in question as a *sine qua non* integral component of it.[5]

This is the context in which the feasibility of investigations dedicated to equations like "law as…" emerges, with variables such as history, culture, communication, process, linguistic game (etc.) — in addition to "law…" as positivation, text, rule (etc.). However, all this is not meant to eliminate the law's positivistic self-description as it defines the self-identity of modern formal law but only to promote theoretical reconstruction with insights not otherwise accessible. And it is to be noted that no such investi-

[3] Cf., e.g., Peter G. Sack 'Law & Custom: Reflections on the Relations between English Law and the English Language' *Rechtstheorie* 18 (1987) 4, pp. 421–436.

[4] Cf., by the author, 'Quelques questions méthodologiques de la formation des concepts en sciences juridiques' in *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 205–241 {reprinted in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994), pp. 7–33 [Philosophiae Iuris]}.

[5] Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985; ²1998) 193 pp., ch. VI, para. 4.

gation directed at "law as…" is exclusive in itself: by sublating the neo-KANTian creed of methodological unity through ontological reconstruction, they all are to compete with each other.[6] This must be so in order to be able to answer the fundamental dilemma: how is it conceivable that courts routinely arrive, even under the strictest dominance of statutory positivism, at some given response (output) as the response of the law, while upon the basis of the officially textualised information (input) selected by the judge from the mass of legal provisions and statements of facts according to a strict logic, "it could be otherwise as well—as ANDRÁS KARÁCSONY formulated it[7]—, albeit, actually it is not the case"?[8] In what does such an additional definition lie, where is it drawn from, which definition may, even upon the basis of the same statutory wording, result in one legal response in one country or period, and another one in another? Well, it is exactly this refinement of how the law's ideologically posited demand for logical conclusion and justification is fulfilled in practice that theoretical reconstruction aims to describe, through investigations dedicated to questions like "law as…", in a form more complete and provable in a scholarly acceptable way.

What we call post-modernity is in fact scarcely anything more than a mental projection, formed in intellectual debates in the West at the end of the second millennium. Whether or not it has ever generated anything more than the autotelic debates, negations and relativisations so much fashionable today will in due time be answered from a proper distance. Nevertheless, the catch-word of post-modernity is one of the mainstream

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[6] Cf., by the author, *Jog és nyelv* [Law and language] co-ed. Miklós Szabó (Budapest: Osiris 2000) vi + 270 pp. [Jogfilozófiák], 'The Quest for Formalism in Law: Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion' *Acta Juridica Hungarica* 50 (2009) 1, pp. 1–30 & <http://www.akademiai.com/content/k726206g254078j/>, 'Autonomy and Instrumentality of Law in a Superstructural Perspective' *Acta Juridica Hungarica* 40 (1999) 3–4, pp. 213–235, 'Law as History?' in *Philosophy of Law in the History of Human Thought* ed. Stavros Panou, Georg Bozonis, Demetrios Georgas, Paul Trappe (Stuttgart: Franz Steiner Verlag Wiesbaden 1988), pp. 191–198 [Archiv für Rechts- und Sozialphilosophie, Supplementa 2], *A jog mint folyamat* [Law as a process] (Budapest: Osiris 1999) 430 pp. [Osiris könyvtár: Jog], and *A jog mint logika, rendszer és technika* [Law as logic, system and technique] (Budapest: Osiris 2000) 223 pp. [Jogfilozófiák].

[7] András Karácsony 'A jog mint kulturális jelenség' [Law as a cultural phenomenon] *Jogelméleti Szemle* 2002/4 <http://jesz.ajk.hu/karacsony11.html>.

[8] Cf., by the author, 'On the Socially Determined Nature of Legal Reasoning' *Logique et Analyse* (1973), Nos. 61–62, pp. 21–78 & in *Études de logique juridique* V, publ. Chaïm Perelman (Bruxelles: Établissements Émile Bruylant 1973), pp. 21–78 [Travaux du Centre Nationale des Recherches de Logique] {reprinted in his *Law and Philosophy* [note 4], pp. 317–374}.

expressions of thought, recognition and institutionalisation that preoccupy certain intellectual circles nowadays. Well, it is exactly this terminology that allows the self-destructive drive (by no means inherent in the very concept of culture or the mere method of cultural comparison itself) seeking to "crack the pedestal of self-identity"[9] to operate—dissolving and, thereby, also sacrificing itself on the altar of that which is utterly incidental, lost in the postulation of any optional "other" and, thereby, also losing its very self.

For the paradoxes revealed by the polemical treatise of DIRK BAECKER,[10] instead of describing *sine ira et studio* what culture is, draw rather from the confusion of post-modern theoretical claims, driven to inconsistencies and self-contradictions. The autotelic intellectualism that indulges in the self-realisation of the "contingency of each way of life" and relativises everything (including itself) as contrasted to anything "other" (with the psychically destructive consequence that in the final resort "nothing can be really what it is"),[11] by no means arises from the very tradition of culture but its pathologic (de)generation into post-modern nihilism. For instance, my own undertaking in *Comparative Legal Cultures*[12] has indeed proven (as a continuation of my earlier survey of the positions taken in legal anthropology[13]) that certain basic functions (safety of regulation, differentiation in arrangement, etc.) and fundamental ethical values (prospective and just regulation, etc.) could be achieved in various cultures and ages through the creation of differing, yet mutually competing ways to achieve efficiency. There is no miraculous 'royal way', and theory—by disqualifying the tendencies towards self-absolutisation of contemporary neo-liberalism in the want of practical tolerance—does not justify any kind of cultural imperialism. Actually, what it stands for is not cultural relativism but the realisation that the organic development

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[9] Karácsony [note 7], p. 3.

[10] Dirk Baecker 'A társadalom mint kultúra' [Society as culture] *Magyar Lettre International* 38 (Autumn 2000), pp. 7–9 and, for a background, also his *Wozu Kultur?* 2nd enlarged ed. (Berlin: Kadmos Kulturverlag 2001) 203 pp.

[11] Baecker 'A társadalom mint kultúra' [note 10], p. 8.

[12] Cf. *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hongkong, 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].

[13] Cf., by the author, '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, Waseda University, ed. Institute of Comparative Law, Waseda University (Tokyo: Waseda University Press 1988), pp. 265–285 {reprint in his *Law and Philosophy*, pp. 437–457}.

and optimum exploitation of the full potential of its instrumentality can only be achieved upon the basis of the maximum preservation (re-generation) of its self-identity. What is more, luckier cultures (as, e.g., the Japanese) are able to function openly, ready to absorb external patterns, in such a way that they can interiorise their novel (even deliberately borrowed) responses into their own original settings, thereby symbolically re-asserting their own identities.

As against the tendencies of "an inquiry pushed up to the excess" and, underlying it, the "intention of questioning everything given",[14] nowadays prevailing in response to modern society's increasing internal self-emptying,[15] I rather agree with the legal-philosophical conclusion according to which "[m]an is, however, not simply a cognitive being but one being at home in the world. His life involves more than mere cognisance; after all, it builds upon routine and ease in being patterned by orientations with intellectual peace as well."[16] This is exactly what I have tried to serve by both revealing the contingent human factors at work behind legal formalisms[17] and describing the alienation of modern epistemology as increasingly closing itself into a one-sided and distorting concept, restricting human entirety through its exclusive dedication to rational cognition, and, thereby, impoverishing the one-time richness composed of wisdom, learning and knowledge.[18]

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[14] Baecker [note 10], ibid.

[15] Cf., e.g., Robert Nisbet *The Quest for Community* [1953] (London & New York: Oxford University Press 1978) xxii + 302 pp.

[16] Karácsony [note 7], ibid.

[17] Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

[18] Cf., by the author, 'A racionális jogszemlélet eredendő ambivalenciája (Emberi teljességünk széttörése a fejlődés áraként?)' [The inherent ambivalence of rational legal approach: Disintegration of our human integrity as the price of progress?] in *Békés Imre ünnepi kötet* A jogtudomány és a büntetõjog dogmatikája, filozófiája [Festschrift for Imre Békés: The dogmatics and philosophy of jurisprudence and criminal law] ed. Béla Busch, Ervin Belovics, Dóra Tóth (Budapest: Osiris 2000), pp. 270–277 [A PPKE JÁK könyvei] & 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* Várkonyi Nándor: Az ötödik ember c. művéről [Mankind adrift: on the work of Nándor Várkonyi »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom 2000), pp. 61–93.

# Trends in Comparative Legal Studies*

The line of development that led from the movement of 'Comparative Law' to the study of 'Comparative Legal Cultures' can from the very beginning also be inferred from the changes in scholarly problem-sensitivity and the ways we approach law. In the early 1900's it became more and more inevitable that a change would somewhat open up and internationalise the series of narrow-mindedly domestic concepts of law then hopelessly confined within exclusively national boundaries, which, leaving the positivism of the various countries untouched, eventually re-launched the long suspended communication among the countries on the European continent. The action proved indeed to be successful: after all, by that time comparison had become a *sine qua non* of doctrinal research. Of course, in the Anglo–American law this trend manifested itself mainly in an effort to draw up a map depicting the diversity of the world's legal systems—probably owing to its immanently historical background and openness to the world (thanks to an imperial past). However, positivism is necessarily based upon posited rules made up as a textual body of the law. Therefore, its scholars soon had to face the dilemma in terms of which the most diverse national regulations reach more or less similar or comparable results as implemented in practice in most parts of the world, so, bearing in mind the primordial functionality of all kinds of instruments, research also has to concentrate on components outside the law. Nonetheless, after long decades of comparative positivism, it had emerged that law, if conceived of merely as a rule, excludes any genuine in-depth comparativism from the outset, because it universalises one of the many potential (and concurring) manifestations of the law, while it is unable to explain degenerations (e.g., socialism, built on openly misleading and fake institutionalisation) or historical shifts (e.g., the construction from our domestic codification of a new *jus commune*) even in the medium in which they had evolved. By contrast, the area addressed by comparison of legal cultures and traditions is precisely the way we think in and about law. This serves as a basis to interpret a medi-

* In its first version, delivered as a lecture in a scientific students' circle on comparative law on March 13, 2002, and published in Lilla Drienyovszki & Balázs Fekete 'Összehasonlító jogtudományi törekvések a Karon' [Launching comparative legal studies at the faculty] *Ítélet* [Judgement] [Pázmány Péter Catholic University of Hungary Faculty of Law] V (April 17, 2002) 3, pp. 8–9.

um in which the necessity of any arrangements takes up one specific (and not another) shape.

The historico-anthropological investigation into *The Origin and Change of Legal Traditions*[1] aimed at simply laying the foundations; while I, in my *Comparative Legal Cultures,*[2] aspired to present the ingenuity and genius characteristic of various legal systems (directing attention to the specifically juridifying—standardising, rationalising and justifying—mental transformations in its section on "Comparative Judicial Mind"); and with my colleagues I tried, in the venture of *European Legal Cultures,*[3] to shift the emphasis from intellectual motives to practical realisations, so that research can eventually arrive at a sociological description of actual practice through quantified procedural data,[4] while now it is primarily the sociology of legal effects that is being investigated under the title of *Comparing Legal Cultures* at Oñati.[5] It seems that classical comparativism and hermeneutical investigation (which is also in pursuance of our traditions in law) complement each other organically in education, while it is obviously the newer and more recent direction of research that proves to be far more promising.

The great task our time seeks to accomplish, namely, common European codification, seems to be built on all this as a bridge of intermediation. There were times when the comparative treatment and processing of the provisions of positive law (i.e., the idea of codification achieved through all means) seemed to emerge victorious from recent years' debates and, again, there were times when reliance on traditions (concluding from the deeply rooted historical divergences in the respective mentalities of Civil Law and Common Law that an imminent convergence was infeasible) proved to be a bit stronger and more convincing. The jurisprudential wisdom of HELMUT COING and HEIN KÖTZ, however, finally managed to find an alternate route. They recalled the United States of America where legal unity has

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[1] *Entstehung und Wandel rechtlicher Traditionen* hrsg. Wolfgang Fikentscher, Herbert Franke & Oskar Köhler (Freiburg & München: Verlag Karl Alber 1980) 820 pp. [Veröffentlichungen des "Instituts für Historische Antropologie E.V." 2].

[2] *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].

[3] *European Legal Cultures* ed. Volkmar Gessner, & Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I].

[4] By ERHARD BLANKENBURG.

[5] By DAVID NELKEN et al.

never existed as such. What existed instead, was a mosaic of federal competence combined with the competences of fifty states, as to which in any event Americans have never tried to introduce either codification nor any substitute for it. They have rather experimented with uniform legal education as well as with a unified legal literature and legal profession. As a result, it has become worthwhile to think about the European experience, in order to re-discover its own past in the middle ages and early modern times with the hope of again cultivating a desirable *jus commune*, and also of creating a legal unity built from a broad living culture with mutually approaching mentalities and skills.

# COMPARATIVE LEGAL CULTURES
## Attempts at Conceptualisation*



The notion of legal culture is obviously a function of the direction taken by analysis within which (and for the realisation of which) one holds some interest in the components and connections of given legal arrangement(s).

*1. Legal Culture in a Cultural-anthropological Approach*

Within the frame of the Dartmouth series of "The International Library of Essays in Law & Legal Theory", I edited the introductory volume to the sub-series "Legal Cultures" under the title of *Comparative Legal Cultures*.[1] Through my selection and editorial presentation, I tried to substantiate the claim for an investigation attempting to describe different legal arrangements by characterising nations and times in the history of human culture (conceived as a way and style of thinking, as well as the social practice institutionally expressing it), separating them from one another in terms of features proper to their individual set-up, especially their spirit, inventiveness, and ability to respond under varying conditions. According to the underlying idea, every component and colouring element (from problem-sensibility to the practice of naming, conceptual classification to operational ability, presuppositions to final ideals) falls within the domain of the discipline called C o m p a r a t i v e L e g a l C u l t u r e s. As to its composition and basic structure, it is mainly interdisciplinary knowledge aiming at some

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* An enlarged version of the paper presented at the workshop dedicated to the conceptual delimitation of comparative legal cultures by the International Institute for the Sociology of Law (Oñati) in the Summer of 1996. Cf., as already published, [Comment to The Notion of Legal Culture] in *Changing Legal Cultures* ed. Johannes Feest & Erhard Blankenburg (Oñati: International Institute for the Sociology of Law 1997), pp. 207–217 [Oñati Pre-publications–2] & 'Comparative Legal Cultures: Attempts at Conceptualization' *Acta Juridica Hungarica* 38 (1997) 1–2, pp. 53–63.

[1] *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].

sort of s y n t h e s i s , composed of legal-anthropological description, legal-historical conclusions, comparison of laws, legal-sociological investigation, as well as generalisation out of legal-philosophical analysis that may provide a theoretical frame (primarily gained from the doctrinal study of law and judicial methodology). The purpose of launching such a volume was just to awaken an interest strongly missing in our day, which can lay the foundations of a particular subject of teaching and literary production,[2] rather than to create a new scholarly field and research profile that can surface some new insights or methodologies in its results. This is all the more true because it does not approach its subject through a systematic survey following objectively determined criteria but focuses on s p e c i f i c a l l y m a n i f e s t e d a b i l i t i e s (i.e., the general spirit, ingeniousness and inventiveness of a given legal culture), and these can mostly be exemplified in varying fields, as the case may be, and through embodiments that may greatly differ from one legal culture to the other in a way only characteristic to the given legal arrangement.

Such an approach may have the advantage that it treats legal culture as a systematically organised unity of cultural responses, given to situations crying out for legal intervention and judicial adjudication. In the analysis of such situations, it recognises a variety of equally feasible cultural responses, and approaches them without the straitjacket (or taxonomy) of paradigmatic preconceptions and previously developed notions. At the same time, it makes legal culture seen as the carrier of social values, and in case of misuse or over-use of its instruments, it may also conceptualise a degenerating/degenerated legal culture as well. In the 20th century, inhumane manifestations of Socialism and National-Socialism in Europe and the hardly classifiable products of crises caused by increasing poverty such as the *Jeito* (on the periphery of the Brazilian megalopolis) still prove to be worth analysing from the perspective of Comparative Legal Cultures. We may also think of the poten-

[2] After long preparations, the Universiteit Brabant (Tilburg, The Netherlands) took a pioneering step by instituting a Research Chair for Comparative Legal Cultures a few years ago. Professor PIERRE LEGRAND as the chair-holder came with experience from his hometown, Quebec, as well as Lancaster (United Kingdom), to dedicate a number of magisterial papers to the European future of Common Law and Civil Law. At the Péter Pázmány Catholic University of Hungary, re-founded in Budapest in 1991, with a Faculty of Law as of 1995, the Institute for Legal Philosophy (which I am honoured to have founded and been leading) has for some time planned to introduce Comparative Legal Cultures as a mandatory subject having an own chair within the Institute. (Actually, what materialised in the meantime was its introduction as a subject in 2001, made obligatorily optional from a menu including Anthropology of Law, Sociology of Law, and Natural Law as well.)

tial bordering effects of statutory positivism (as testified by the German claim of "*Das Recht ist das Recht*") or the norm-generating side-effect of any pressure exerted by the over-accumulation and domination of just facts; well, it is mostly in extreme cases that it clearly shows where the limiting values and potentialities latent in normal everyday situations are. For it is only normal values that can be pushed to the extreme.

Individual legal cultures show a certain direction, final ideal or ethos, which is also worthy of investigation. Besides a few exclusively typical calls for inventiveness, the responsive potential of individual legal cultures can mostly be identified by the way in which the judge typically refers, argues and concludes while proposing a standardisable solution, justifiable as deducible from some previously set patterns. For, by so doing, he is expected to channel his reasoning into a path that relevantly and justifiably refers to—as normatively concluding from—some availably codified patterns. At least we can reach such a conclusion by the reconstruction of logical "jump" and creative "transformation" (taken as from within a black box), which concludes from the (normative and factual) information procedurally fed into the official processing of the case [as an input] to the decision finally taken in the name of (as concluded from) the law [as an output]. Within the discipline of Comparative Legal Cultures, the Comparative Judicial Mind is tasked to deal with judicial methodology in light of the above.[3] According to the underlying working hypothesis, legal culture is a phenomenon equally shaped through cultural-historical and institutional development. It shows continuity and stability to a considerable extent within its established framework. It is open to receive new impetuses but its change is slow and gradual at most.

*2. Legal Culture in a Sociological Approach*

Within the framework of the TEMPUS "Textbook Series on European Law and European Legal Cultures" (initiated by Professors VOLKMAR GESSNER and ARMIN HÖLAND in Bremen in a three-year co-operation with the present author), we edited the opening volume under the title *European Legal*

[3] Under the title of 'Comparative Legal Methods' in the volume of *Comparative Legal Cultures* [note 1], Part IV, pp. 333–447, and under the title of 'The European Legal Mind' in the volume of *European Legal Cultures* [note 4], Part II, pp. 89–168. As to its legal-philosophical treatment, cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp. and 'The Nature of the Judicial Application of Norms: Science- and Language-philosophical Considerations' in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Loránd Eötvös University Project on "Comparative Legal Cultures" 1994), pp. 295–314 [Philosophiae Iuris].

*Cultures*,[4] which we intended should testify to a strong legal-sociological tradition. Therein, legal culture is conceived as a descriptive notion, for it marks a real practice that can be taxonomically mapped out in every culture without being bound to any value. Consequently, whatever form or operation it displays, it has to be described as a legal culture in action, with whatever 'distortion' or 'degeneration' excluded by definition.

Within a legal culture, as conceived in this way, formal and informal components may gain equal importance throughout the former's characterisation. This is why what may be its most varied manifestations have been included in the discussion of European Legal Cultures, e.g., *travaux préparatoires* and the normative reference made to them as a source of law (especially in the Nordic countries, where the judicial body responsible for future application is involved from the beginning), established ways of normative quotation in judicial practice, or the problem of (un)translatability (even in case of apparent nominal identity for neighbouring countries with similar legal arrangements, especially in French, Dutch and German language territories).

Comparative Legal Cultures as a discipline is to transcend both the dichotomy dividing Civil Law and Common Law in Europe and the trichotomy resulting from adding the Byzantine, Nordic and/or Socialist legal arrangements to this dichotomy. When we consider European influence on the foundation of human civilisation, no trend in Comparative Legal Cultures can ignore any of their developments. For instance, it is of enhanced interest even from a methodological point of view to foresee whether the gap between Civil Law and Common Law (with statutory and judge-made law, that is, deductive-systematic and inductive-pragmatic traditions, respectively, in the background) will deepen further or it will become—as it is also pushed by European harmonisation in a reverse direction[5]—somewhat balanced.

Taking Comparative Legal Cultures seriously, it is important to separate the East from the West in Europe, as well as their bordering zone, i.e., Central Europe. Historically and for today's generations, this primarily involves

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[4] Volkmar Gessner, Armin Hoeland & Csaba Varga *European Legal Cultures* (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) 586 pp. [Tempus Series: Textbooks on European Law and European Legal Cultures 1].

[5] Cf., e.g., by the author, 'Az Európai Unió közös joga: Jogharmonizálás és jogkodifikáció' *Iustum Aequum Salutare* IV (2008) 3, pp. 131–150 & abstract {'The Law in Common of the European Union: Harmonisation and Codification of Laws'} on p. 283.

the realisation that the borders dividing Central from Eastern Europe have remained unchanged for fifteen centuries from CHARLEMAGNE on, despite the settlement at Yalta in 1945 which, acknowledging WWII's almost exclusive territorial conquests, placed the major part of Central Europe at Soviet Russia's mercy. This made the new *status quo* be accepted while also preventing eventual remorse, cynically calling the entire ceded territory 'Eastern Europe'. These borders coincide with the old ones between Rome and the Byzantium. As seen from a Western perspective, these are the borders up to which the waves of the Renaissance and the Reformation extended and where the Romanic and Gothic styles can still be encountered, for example, at the Eastern borders of the Baltic countries, Galicia, Sub-Carpathia and Transylvania, the Southern part of historical Hungary (including Voivodina now in Serbia), as well as the Eastern frontiers of Slovenia and Croatia.[6] Whatever new states may have been artificially set up in terms of the peace treaties concluding WWI and WWII, the unity of the cultural heritage of one and a half thousand years still outweighs the conceited naivety staring at us in wide-eyed astonishment (not even forgivable from a detached Atlantic point of view). It is precisely this naivety that would like to count the distance between, let's say, my native town Pécs (the Mediterranean intellectual and medieval university centre of Southern Transdanubian Hungary) and Belgrade (the Serbian Orthodox capital), barely two hundred kilometres along the Danube, exclusively as if it were about two neighbouring American settlements and not about the dividing line between two civilisations.[7]

The genuine issue here, however, is obviously not the relative difference of Central Europe. One must necessarily differentiate Central Europe from Eastern Europe because (despite our cherished post-modern ahistorical simplicity and ethno-centric utopianism, characteristic of liberal universalism) the East proper, that is, the Sovietised tsarist and imperial heritage, is not likely to please us by just melting into the West. Neither does the East reach the West, nor do the former's hundreds of millions of inhabitants become the latter's poorhouse, but rather it starts at the point from which it may continue at all: to live the Russian past again, by raising the dilemma of

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[6] Cf., e.g., Jenő Szűcs 'The Three Historical Regions of Europe' *Acta Historica Academiae Scientiarum Hungaricae* 29 (1983) 2–4, pp. 131–184 (reprinted, partly, in *European Legal Cultures* [note 4], pp. 14 et seq.).

[7] It was Samuel P. Huntington who largely broke this wall of ignorance, asserted also in the international settlement of conflicts in the recent Yugoslav war, in his essay—'The Clash of Civilizations?' *Foreign Affairs* 72 (Summer 1993) 3, pp. 22–49—rediscovering the old truth.

either opting for Western European assimilation or remaining different, an enigma barely resolvable for the upcoming few generations. This is so, because there is no longer any superior earthly lord with whose cane the ones wanting to separate should be taught a lesson. Furthermore, there is no panacea that could help in jumping over centuries' belated development without coercion, artificial acceleration or *deus ex machina* intervention. Actually, each player plays its own games, and one has to count on the sharpening growth of differences and the rebuilding of those paths of culture that have once diverged from one another, for the very reason of differing traditions.

*3. Timely Issues of Central and Eastern Europe*

Cultural comparison raises further dilemmas, primarily for how long instruments can serve as instruments. Do we fall in the trap of overgeneralisation and unjustified universalisation if we are to transform instruments into goals by forcing everyone (using the rigour of the law and the magic words of constitutional democracy and the rule of law, for instance) to apply them, or when we intend to conform them but ignore the original environment that once conditioned them and forget about the challenge that the instruments initially responded to, which created them? One has to remember MARX' and ENGELS' rather convincing thesis in their *The German Ideology* on the ideological overgeneralisation and universalisation of the winner's interests at any time.[8] In fact, for more than half a century the luckier part of the world, the Western hemisphere, has been living peacefully without wars, upheavals and crises bound to raise the tormenting dilemma of life or death. Although this might have been the result of a coincidence of complex effects and certainly not a reward for merits, we cannot be surprised if that specific part of the world considers it to have been plainly deserved and also substantial enough to justify its own path, with its past and present equally included. It will be no wonder if Westerners sense the underlying experience as universal, with its organically developed boundaries (conditioning factors, etc.) falling into oblivion. We have to realise that this may have afforded one of the reasons and ways why and how the world has become a global village, through the overwhelming force of the market and also

[8] Karl Marx & 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. V. Adoratskij (Wien & Berlin: Verlag für Literatur u. Politik 1932) xix + 636 pp.

through conforming to normative expectations transcending all local boundaries. For the global village is both a sociological fact and the fulfilment of a Utopia that will not recognise local particularities and historical dimensions (i.e., the series of the *hic et nunc* concrete and individual determinations) any longer.

Market economy, multi-party system, parliamentarism, constitutional democracy, rule of law and human rights: all these magic formula echo in unison in the whole Eurasian region, from Reykjavik to Vladivostok. Still, despite the fact that the slogans and instruments involved may be apparently the same, they have in fact brought prosperity, balance and security under Western conditions. However, through their contradictory effect and at least for the time being, they are about to produce further destruction for people surviving on the ruins of Soviet-type Communism. What do I mean by all this? There are countries and regions as big as a continent in Central Europe's threatening neighbourhood to the East. Here the state is impotent and anarchy with a disintegrating community constitutes the frame, within the womb of which a Mafia-type social entity, eager to seize also state power, organises (even through political means) the black market, corruption and crime into one conglomerate, practically both embracing and controlling, integrating and exploiting the whole population. Blind selfishness, post-feudal personal ties, the rule of strong-arm and sheer violence raise their heads again, only to prove that nothing but re-feudalising autocracy can result from any inconsiderate, irresponsible and/or *summum ius*, *summa iniuria*-type of application of postmodernism's alluring siren-voice.[9]

We have to keep in mind that culture is bound in its blessings as well. It is historically shaped and conditioned, therefore it cannot serve as a *Jolly Joker* or panacea with any of its components. It is not by mere chance that sensitive viewers have recalled the memory of past failures—especially that of the American programme on Law and Development, set up decades ago to connect Third World countries—, when self-appointed democracy-experts from America and other miraculous healers started to show up in Central and Eastern Europe.[10] We could learn from the example of either earlier

[9] E.g., Vladimir Shlapentokh cries out starting from this very recognition in his *Russia* Privatization and Illegalization of Social and Political Life (Michigan State University Department of Sociology, 25 Sept. 1995) 44 pp. [NATO: CND {Chris Donally} (95) 459]. Similar recognitions are slowly becoming a commonplace among the Russian emigrants. See, e.g., Ravil Buharajev 'Az esztelenség logikája: Kísérlet a csecsen konfliktus értelmezésére' [The logic of folly: an attempt to interpret the Chechen conflict] *Magyarság és Európa* [Budapest] III (1995) 1, pp. 43–51.

Western intellectuals who once sympathised with STALIN or recent revolutionary posers who sought shelter from their Western frustrations in Eastern hopes, that the intellectual is the kind of personality who proudly claims to have always been led by his own convictions but may at the same time despise both the facts of life and common sense as a drag on this inferior mundane life.[11] There is some historical irony[12] in the fact that on the last occasion when today's Atlantic powers genuinely took responsibility for a foreign cause (after WWII, when the victors occupied Germany and Japan, and reigned over them by military administration, thus ruling the two countries at their own risk), they succeeded in disentangling themselves from their everyday well-established and long consolidated routine, and tried to find sensitive solutions with empathy, moreover, supported by considerable intellectual force.[13] In our days, when the Atlantic world has become the bare *voyeur* (with profiteering self-interest in a smooth, alleged transformation) of Central and Eastern Europe, an army of arrivists, fantasisers, dreamers and easy experts of international agencies have flooded the region to give hope for remedy through hammering with magic words.[14] In almost a comical way, unknown civilisers, who arrive uninformed about the region with a few days or weeks' commission and leave still uninformed, without having even learnt about its varied historic past and culture, traditions, customs and potentialities, fall for the simplest happiness of the mere

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[10] E.g., Armin Höland 'Évolution du droit en Europe centrale et orientale: assiste-t-on à une renaissance du »Law and Development«?' *Droit et Société* (1993), No. 25, pp. 467–488.

[11] Cf. David Caute *The Fellow-Travellers* Intellectual Friends of Communism [1973] rev. ed. (New Haven & London: Yale University Press 1988) iv + 458 pp. as well as Paul Hollander *Political Pilgrims* Travels of Western Intellectuals to the Soviet Union, China, and Cuba: 1928–1978 (New York: Oxford University Press 1981) xvi + 524 pp.

[12] In its first formulation, see, by the author, 'The *sui generis* Nature of the Challenge' in his *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: Eötvös Loránd University Project on Comparative Legal Cultures 1995), pp. 71–77 [Philosophiae Iuris] and 'Transformation to Rule of Law from No-Law: Societal Contexture of the Democratic Transition in Central and Eastern Europe' *Connecticut Journal of International Law* 8 (Spring 1993) 2, pp. 487–505.

[13] Taking the work of one single author as a basis, see, e.g., by Bradely F. Smith, *Reaching Judgement at Nuremberg* (New York: Basic Books 1977) xviii + 349 pp., *The Road to Nuremberg* (New York: Basic Books 1981) 303 pp. and *The American Road to Nuremberg* The Documentary Record, 1944–1945 (Stanford: Hoover Institution Press 1982) x + 259 pp.

[14] E.g., Paul H. Brietzke 'Designing the Legal Frameworks for Markets in Eastern Europe' *The Transnational Lawyer* 7 (1994) 1, pp. 35–63. Claus Offe has shown the practical impossibility of the task in his 'Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe' *Social Research* 58 (Winter 1991) 4, pp. 865–892.

translation of their laws taken from their pockets, and return home with the epoch-making news: "By giving them a (New) World, I acted as their transformation's MADISON!".[15] Everything having become so simple, the liberal Utopia seems to have been consummated.[16] As a counter-balance to all this, both historicity and the moment of concreteness in TOYNBEE's challenge-and-response paradigm (which sets history in motion) will fade away, and universal panels imposed from above will start starring instead.[17]

By generalising timely experiences in the region, we can conclude that

- law is a living system, presupposing relative integrity and stability. Every rule or regulatory principle to be introduced into or interpreted within the system has as a precondition a working law and order with a relatively completed legal system. It only comes to the surface when systems collapse or radically change that, whatever new element we may build in, the new element will remain unviable without background regulations, conventions, living skills and established practices, or its life will be exhausted in disintegrating dysfunction. Law is a living culture with specific rules, and by replacing some of them we can change its structuring skeleton on the surface at most. Consequently, we are bound to fail if we fill the regulatory vacuum with mechanisms designed to achieve final goals directly, without taking into consideration the genuine character, integrity, gradualness and security of the entire process of transformation. Democratising and liberalising upon the ruins left behind by the social destruction of the once-reigning socialist law and order (especially in the Soviet Union) can easily result in libertarian anarchy and the total failure of any public cause. This way, privatisation and the market economy can amount to nothing nobler than pillage, corruption and black markets. The catch-word of human rights becoming the main appeal in an amoral, nihilistic environment

[15] Thomas Waelde & James L. Gunderson—in their 'Legislative Reform in Transition Economies: Western Transplants: A Short-Cut to Social Market Economy Status?' *International and Comparative Law Quarterly* 43 (1994) 2, pp. 347–378 on p. 360—emphasise the ideological narrow-mindedness and the professional self-interest in the push for quick legal *octroi*, instead of carrying out genuine legal reforms.

[16] Francis Fukuyama *The End of History and the Last Man* (London: Hamish Hamilton; Penguin 1992) xxiii + 418 pp.

[17] E.g., by Gianmaria Ajani, 'La circulation des modèles juridiques dans le droit post-socialiste' *Revue internationale de Droit comparé* 46 (1994) 4, pp. 1087–1105 & 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' *The American Journal of Comparative Law* LXIII (Winter 1995) 1, pp. 93–117.

can only undermine public security and frustrate law and order, by disorganising the functions of state regulation including governmental policing and control. Moreover,

- the introduction of any new legal solution presupposes a living legal culture in the background, and its future working will be the function of its socially and culturally sensible interpretation. Well, if our enlightening zeal makes us blind to the above realisation, this may result in the rituals of the rule of law only re-vitalising and re-legitimating former totalitarian practices, instead of creating a new start. This way, freedom of the press can easily give way to the revitalisation of former press monopolies, and the *summum ius*, *summa iniuria*-type rigour of statutory positivism and the ensuing incapability to think in terms of principles may easily block the way to successfully facing (by drawing a caesura on) the criminal past and restoring justice.[18]

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Legal culture is a concept full of interest and not only for theoretical reasons. Revealing its interconnections and contexts in a philosophical, sociological and comparative-historical perspective can become vital to our practical efforts directed toward creating effects in our unifying world. Therefore, any casual miscarriage of practice can often be attributed to the actors' eventual insensitivity towards the complex social determinations that may in fact work for and lurk behind living legal cultures.

[18] See, by the author, as an early formulation of the law's shapeability by both texts and their textual environment, 'Is Law a System of Enactments?' in *Theory of Legal Science* ed. Aleksander Peczenik, Lars Lindahl & Bert van Roermund (Dordrecht, Boston & Lancaster: Reidel 1984), pp. 175–182 [Synthese Library 176] & *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 3–4, pp. 413–416 {reprinted in his *Law and Philosophy* [note 3], pp. 391–398}; of the exclusive interpretability of law within a cultural and socio-historical perspective, 'Law as History?' in *Philosophy of Law in the History of Human Thought* ed. Stavros Panou, Georg Bozonis, Demetrios Georgas & Paul Trappe (Stuttgart: Franz Steiner Verlag Wiesbaden 1988), pp. 191–198 [Archiv für Rechts- und Sozialphilosophie, Supplementa 2]; as well as of a theoretical conclusion by distinguishing the systems of positive law from living legal systems, 'European Integration and the Uniqueness of National Legal Cultures' in *The Common Law of Europe and the Future of Legal Education* ed. Bruno De Witte & Caroline Forder (Deventer: Kluwer Law and Taxation Publishers 1992), pp. 721–733 [METRO] {reprinted in his *Law and Philosophy* [note 3], pp. 399–411}.

# COMPARATIVE LEGAL CULTURES?*



## 1. Legal Comparativism Challenged

Human thinking is not only uninterruptedly continuous, but even when viewed as a process, it cannot be described otherwise than as a kind of oscillation. In this oscillation, besides power concentrations alternating with each other and adding up to wave crests and wave-troughs, any prevailing movement arises as a result of the ceaseless whirl of currents—and thereby drifts—coming from various directions. Routine and practical experience provide us some help from the past—forming a framework for our everyday action and, moreover, holding out promises of a perspective, a kind of illusory security—, however, in our presence at any given time, it is us who define fixed points for ourselves, in order to be able to arrange the entities at our disposal, as well as our concerns, into a kind of order at all. Therefore, when perceiving our ongoing occupations either as problem-solving or as acts of creative power, we have to be aware that, considered from a future perspective, all this may seem nothing other, or more ambitious, than just one of the episodes of stumbling from one blind alley into another.

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What is, then, the proper way of cultivating scholarship at all? While looking for continuity from the past and for identity in the present, we are understandably conservative in designating our interest. When referring to our specific subject, we still speak of 'legal theory' in educational contexts, while we mention 'philosophy of law' at our biannual world congresses as accustomed since the founding act of the International Association for Philosophy of Law and Social Philosophy in Berlin in 1909; although the topics of subjects we teach and of scholarly papers we present do not recall, even in the way they pose a question or in their conceptual culture, the tradition acquired from previous generations in our youth. Namely, instead of "the system of legal sciences", of "legal axiology" or the "theory of legal relations", fashionable in the past decades, nowadays "semantics", "hermeneutics" and "legal reasoning" or "logical analysis of law" are customarily dealt with. For the issues related to the "concept of law" or "legal ontology and epistemology" have all become, if you like, outdated, archaic and irrelevant as traditional fields: the question of philosophical foundation has, for decades now, been replaced by the thrill of the social construction of reality[1] that may lurk behind the scenes of manipulative applications we are nowadays driven to incessantly search for. For what else could the way of scholarly interest be? All we can try is to respond to renewed challenges which—alongside new considerations, methodologically proven statements and conceptual distinctions—launch new waves and provoke currents, while the actors in the debates among the various positions emerging within these mostly turn back only very rarely and randomly to viewpoints, considerations and arguments dismissed as unworthy of further debate earlier in the discussion, and which viewpoints, consequently, had drifted away from the mainstream.

[1] For the term, see Peter L. Berger & Thomas Luckmann *The Social Construction of Reality* A Treatise in the Sociology of Knowledge (New York: Irvington 1966) vii + 203 pp. Questions not properly considered up to the present are why and how the philosophical perspective and the requirement for thorough foundation have disappeared from our legal thinking over the past few decades, and what they have been or are going to be replaced by, if at all. From the British analytical jurisprudence (e.g., H. L. A. HART, JOSEPH RAZ and NEIL MACCORMICK) to the American and Western European theories of reasoning (e.g., RONALD M. DWORKIN, on the one hand, and AULIS AARNIO, ROBERT ALEXY and ALEKSANDER PECZENIK, on the other), law is simply taken as given in an unquestioned culture, as are the social values and the culture of reasoning, held as specifically characteristic of a given community. By supposing their having been accepted from the very start, the task of legal theory now seems to be simply confined to raising awareness to, by explaining and developing also in details of interrelations, the human manipulative practice shaping the law in action. As a particularly telling panorama, see *The Law in Philosophical Perspectives* My Philosophy of Law, ed. Luc J. Wintgens (Dordrecht, Boston, London: Kluwer 1999) xix + 272 pp. [Law and Philosophy Library 41].

The same holds true of the c o m p a r i s o n o f l a w s which emerged as part of the comprehensive movement of comparativism by the advent of the "age of comparison", as NIETZSCHE once rightly noted.[2] When the inquiry into the various particularities of human construction, community language, national law (etc.) proved too limited to develop further towards the end of the 19th century in the cult of positivism, "comparative anatomy", "comparative linguistics" and "comparative jurisprudence" emerged as a result. Of course, this could only imply a radical change away from the normal course of development, where also the self-closing retirement into the subject's own particularity was most determinedly pushed to the extreme. Accordingly, it is not by chance that it was France, the native land of national chauvinism, to become the centre of comparative jurisprudence, and the European continent became preferred as its number one field of investigation. However, all the comparative movement in law has proved to be a non-recurrent task. In its turn, the very mention of such non-recurrence involves the recognition that, in the history of thinking, "isms" in general are inevitably bound to be assimilated step by step into and eventually absorbed by human thought in formation: as soon as the revolting breakthrough is made and reformatory thought is accepted, it ceases to survive as a separate entity. Just as present-day debates do not use terms of, e.g., PLATONism or structuralism any longer, there is no specific need to explain why we resort to and call for—among others—comparison in our scholarly work. It is enough to note that it is no longer usual for any monographic treatment of legal topics to be done without a genuine comparative-historical approach in the background.

Well, as far as the association of qualifying terms 'comparative' and 'historical' is concerned, only our once characteristic narrow-mindedness and our self-closing into national boundaries in legal scholarship can explain why our Civil Law predecessors on the European continent had to emphasise, in their one-time breakthrough, the necessity of comparison (and not that of historicity) as being most in need of development. For historical jurisprudence, evolving around the middle of the 19th century within the Common Law as a follow-up of legal development generated by the practice of judicial decisions (having been cumulated one upon another as judicial precedents), on the one

[2] Friedrich Nietzsche *Humain, trop humain* Un livre pour esprits libres [Menschliches, Allzumenschliches, ein Buch für freie Gester, 1878] trans. Robert Rovini (Paris: Gallimard 1988), pp. 49–50 [Oeuvres philosophiques complètes 3].

hand, was an entirely natural outcome;[3] moreover, due to the shift of emphasis in the practical life of law to the search for judicial reason that arrives at declaring what the law is through a specific methodology of problem-solving, jurisprudence was not urged to transcend national borders, as it already achieved to carry out free search for similar sources in its quest for meaning. On the European continent and especially in France, on the other hand, the emphasis had for long been centred on the legislator as the representative and symbol of a national will and, therefore, any legal development could only be considered a national accomplishment. This is the reason why, with us, historical interest was gradually left out of the topicality of positive law, to form some complementary and additional subject as a separate discipline, both external to and irrelevant for everyday practice.

As noticed above, having achieved the breakthrough, legal comparativism has lost its specific function. For a moment, let us contemplate: if every analysis is already based on a historico-comparative approach, who would need a particular movement suitable just to force open doors? Continental positivism as the scholarly stand based upon the exclusive moment of statutory text-enactment became to a certain extent antiquated by the first third of the 20th century anyway and, by the middle of the same century, the emphasis shifted firmly to the judicial process which was also to involve moments of social and cultural conditioning, thereby opening the gates to textual hermeneutics. Step by step, the text-positivism of the one-time legislatory definition of the law[4] and also the sociologism relating to the law's social environment[5] have eventually been replaced by the open-chanced pondering of

[3] Cf. *Historical Jurisprudence* ed. József Szabadfalvi (Budapest: Osiris 2000) 303 pp. [Philosophiae Iuris], especially with the editor's introduction and a postface by the present author, pp. 14–35 and 281–285, respectively.

[4] Cf., e.g., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), viii + 391 pp., especially ch. V. paras. 2/a and 4, introducing on the example of the classic type-framing *Code civil* (1804), how the definition of the law through legislatorial text in the juridical exegesis, characteristic of the early 19th century, has become gradually reduced to the role of providing a merely referential framework and disciplinary medium for the otherwise growingly free judicial declaration of what the law should be and/or is.

[5] It is remarkable that anything in germ of a sociology of law had been heralded in parallel with the theoretical assertion of legal positivism, when two professors with same backgrounds in Vienna, HANS KELSEN, formulating in theory the self-defining self-identification of positive law, on the one hand, and EUGEN EHRLICH, appointed to the new university of Czernowitz and theorising upon his new experience relating to the mess of co-existing folks and laws in Bukovina and Galicia in order to finally realise the empirical justifiability of some "living law" with no official support whatsoever in the background, on the other, contrasted sociologism and posi-

any (con)texture of the present, in which the questions "from where?" and "what?" are increasingly substituted by the ones of "how?" and "to what?".[6]

Even in the field of law, the scene of our everyday life no longer seems to be just a case of determinations, but the starting point of creative and decisive switchings actually effected by each of us at any moment in those several roles we play, and thereby also the free medium for the manipulation of everything we have appropriated from our environment. As a consequence of all the above, the increase in awareness of the multiple and thorough repercussions of the humanities as a scholarly tradition upon the law and the requirement of social theoretical approach in legal thinking, the examination of law in parallel with other social regulative forces, as well as the adoption of an anthropological perspective (in the light of which law seems to be just one of the possible representations of the ideal of order required for any social formation)—well, all these have led to a change in the search for specificity in law more powerfully in the context of culture as a whole (or, more precisely, in the context of the cultural response we offer in law to the various challenges, characteristic of the given human community and civilisation).[7]

tivism in legal thinking. For the debate in *Archiv für Rechts- und Wirtschaftsphilosophie* from 1916 to 1917, see *Hans Kelsen und die Rechtssoziologie* Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber, hrsg. Stanley L. Paulson (Aalen: Scientia 1993).

[6] For the theoretical background, cf., by the author, 'An Investigation into the Nature of the Judicial Process' in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. Raimund Jakob, Lothar Philipps, Erich Schweighofer & Csaba Varga (Münster, etc.: LIT Verlag 2009), 177–184 [Austria: Forschung und Wissenschaft – Rechtswissenschaft 3] & [abstract] in <http://www.univie.ac.at/RI/IRIS2006/papers/varga.pdf> and, in monographic treatment, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp., as well as 'The Context of the Judicial Application of Norms' in *Prescriptive Formality and Normative Rationality in Modern Legal Systems* Festschrift for Robert S. Summers, ed. Werner Krawietz & Neil MacCormick & Georg Henrik von Wright (Berlin: Duncker & Humblot 1994), pp. 495–512 [for paras. i–ii], and 'Law, Language and Logic: Expectations and Actual Limitations of Logic in Legal Reasoning' in *Verso un sistema esperto giuridico integrale* ed. C. Ciampi & F. Socci Natali & G. Taddei Elmi, I (Padova: Cedam 1995), pp. 665–679 [for para. iii].

[7] For a theoretical justification and background, cf., by the author, 'A jog mint kultúra?' [Law as culture?] *Jogelméleti Szemle* 2004/3 <http://jesz.ajk.elte.hu/varga11.html> as well as 'Macrosociological Theories of Law: From the »Lawyer's World Concept« to a Social Science Conception of Law' in *Soziologische Jurisprudenz und realistische Theorien des Rechts* ed. Eugene Kamenka, Robert S. Summers & William Twining (Berlin: Duncker & Humblot 1986), pp. 197–215 [Rechtstheorie, Beiheft 9] & 'Macrosociological Theories of Law: A Survey and Appraisal' *Tidskrift för Rättssociologi* [Lund] III (1986) 3–4, pp. 165–198 {reprinted in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994), 43–76 [Philosophiae Iuris]}.

## 2. Comparative Legal Cultures *versus* Comparative Law

As a consequence, the starting point is no longer either the law of a nation or its sectoral history, but the cultural medium in continuous formation, in which references, as the fixed and fixing points of human thinking and action—beliefs and values, preferences and aims, traditions and skills, methods and procedures—, may have developed in a given (and not another) way, that is, the medium in which a certain (and not another) notion of order and the associated (and not another) store of instruments (with a proper conceptual scheme and the role it may attribute to abstract logic) could evolve. If, in an inverse move, we start thinking from the endpoint, this explains why the comparative study of legal cultures neither supposes any kind of codified list, nor any set of questions, nor taxonomy, nor previously established methodology, regarding (or following) which the discipline of comparative legal cultures and its focus on the whole variety of cultures and ages should provide a response. Just to the contrary. According to its inherent approach, out of itself and through its in-built learning processes, each culture generates proper (general and sectoral) formations, frameworks and schemes, often ones and in manners characteristic exclusively of it—approaches and problem-sensitivities, organisational principles and notional distinctions, institutionalisations and procedural paths, methods and skills—, which are suitable, in their systemic totality, to define the specific character of an order which is going to be described by us *a posteriori* as a legal one, particular to the given culture.

By this point, we can claim to have indeed arrived, from the classical movement known as 'comparative law', at the cultivation of 'comparative legal cultures'. For our inquiry neither stays within the boundaries of law, nor does it start from an analysis of the available store of positive legal instruments, nor is it determined by the latter. For the most part, it concentrates neither on our ongoing present, nor wishes to contrast the formalised institutions—provided that they can be related at all—of certain nations to those of others. Instead, it attempts, with a cultural anthropological focus, to examine different possibilities (potentials and availabilities) as historically formed alternatives from a civilisational developmental perspective. The question here is exactly why a particular (and not another) legal idea and institutionalisation emerged in a given medium. And the question it intends to answer is: why and how a certain (and not

another) store of instruments has developed in the given place and time from all of this?[8]

'Comparative legal cultures'? How did we arrive at this very term? The linguistic expression itself is obviously a derived further development from the disciplinary term of 'comparative law' as widely accepted today. For this very reason, justified criticism for the former relates and applies to the latter as well. For it should be admitted that in their literal senses both the basic term and its derivation are, properly speaking, meaningless (and entirely alien to the very spirit of language), as contrasted to the properly compounded French terms *droit comparé* ['compared law' = 'law that is compared, i.e., taken in comparison'] and *cultures juridiques comparées*. Despite this all, it is still capable of easy identification, and it is obvious for everyone that it is, by its very meaning, nothing other than a simplified and shortened version for the complex expression of the 'comparative study of law [and, respectively, of legal cultures]'.

Apart from the rudimentary recognition of the obvious truth according to which "every national law should be explained as a proper part of human culture",[9] the movement of c o m p a r a t i v e l a w neither sought nor realised anything other than its own release from the national seclusion of domestic legal positivisms. Although the worldwide leading classic of legal comparativism from our recent past rightly claimed that

> "the comparison of laws is an important general cultural means for the lawyer, without which—and without the historical background serving as its completion and homologue—one cannot arrive at conclusions beyond the sphere of the given law and thus at a universality required of any genuine scholarship",[10]

the discipline has not subsequently become anything more than a sheer method—however necessary it may be for any scholarly result to be rea-

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[8] As a former research project proposal by the author, see his 'A jog és történelmi alternatívái' [Law and its historical alternatives] [1982] in his *Útkeresés* Kísérletek – kéziratban [Searches for a path: unpublished essays] (Budapest: Szent István Társulat 2001), pp. 127–131 [Jogfilozófiák].

[9] Josef Kohler 'Über die Methode der Rechtsvergleichung' *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* XXVIII (1901), pp. 273–284.

[10] René David 'Le droit comparé, enseignement de culture générale' *Revue internationale de Droit comparé* II (1950), pp. 682–685. Cf. also Zoltán Péteri 'Some Aspects of the Sociological Approach in Comparative Law' in *Droit hongrois – droit comparé* Études pour le VIII[e] Congrès international de droit comparé, ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1970), pp. 75–94.

ched—, selected from the obviously desirable methodological complexity. In addition to the fact that bi- and multilateral comparisons of national laws have since (and largely due to this very movement) become accepted in scholarship, its fundamental and imperishable merits include having drawn up the actual[11] and intellectually processed and historically developed[12] global map of the world's legal systems;[13] having taken the pioneering initiative of elaborating categories used for classifying (by drawing "family resemblances" for) the various legal orders and arrangements, together with having undertaken a largely static, descriptive presentation of the laws and

[11] See, e.g., H. J. Randall 'Law and Geography' in *Evolution of Law* Select Readings on the Origin and Development of Legal Institutions, ed. Albert Kocourek & John H. Wigmore, III: *Formative Influences of Legal Development* (Boston: Little, Brown & Co. 1918), ch. 6; John H. Wigmore 'A Map of the World's Law' *The Geographical Review* 19 (1929), pp. 114–121 [starting from the statement that nine-tenth of the Earth's population is governed by a dozen of laws, among which the Anglican, the Germanic, the Hindu, the Islamic, the Japanese, the Chinese, the Romanesque and the Slav ones continue exerting mass influence, while the Egyptian, the Greek, the Hebrew, the Canon, the Celtic, the Mesopotamian, the Roman and the maritime laws have in their original quality disappeared since]; Marc Desserteaux 'Droit comparé et géographie humaine' *Annales de Géographie* LVI (avril–juin 1947), No. 302, pp. 81–93 [mostly identifying European legal ideas with their Christian roots "at present actually extant too" (p. 83, note 2, as well as p. 85); and placing, in a remarkable way, the "mixed Roman method" between the "German" deductivism and the "English" inductivism, which, in case the statutory solution is deficient, applies, in addition to the deductivity of inferences from statutory dispositions, subsidiary empirical constructions inductively (in French, Spanish or Swiss law) or relies on French *jurisprudence* as a suppletive source (in Belgian or Rumanian law) (p. 86); foreseeing a joint intermediate method as the proper future solution for Europe (p. 92)]; René David 'La Géographie et le Droit' *La Revue de Géographie humaine et d'ethnologie* 2 (1948), pp. 78 et seq.; Peter H. Sand *Current Trends in African Legal Geography* The Interfusion of Legal Systems (New York: Columbia University African Law Center [1971]) 27 pp. [African Law Studies 5]; E. S. Easterly, III 'Global Patterns of Legal Systems: Notes Toward a New Geojurisprudence' *Geographical Review* 67 (1977), pp. 209 et seq.; L. Guelke 'The Role of Laws in Human Geography' *Progress in Human Geography* 1 (1977), pp. 376 et seq.; Kim Economides, Mark Blacksell & Charles Watkins 'The Spatial Analysis of Legal Systems: Towards a Geography of Law?' *Journal of Law and Society* 13 (Summer 1986) 2, pp. 161–181.

[12] See, e.g., John H. Wigmore *A Panorama of the World's Legal Systems* I–III (St. Paul, Minn.: West Publ. Co. 1928).

[13] For a historical overview, cf., by the author, '*Theatrum legale mundi* avagy a jogrendszerek osztályozása' in *Ius unum, lex multiplex* Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy) ed. István H. Szilágyi & Máté Paksy (Budapest: Szent István Társulat 2005), pp. 219–242 & 'On the Classification of Legal Systems [Abstract]', pp. 243–244 [Jogfilozófiák / Philosophiae Iuris // Bibliotheca Iuridica: Libri amicorum 13].

orders on both a universal and especially on a European level.[14] This way, it has succeeded in raising the awareness of the relativity, the uniqueness as well as the considerably accidental character of the various national legal orders, taken as the exclusive subject of jurisprudence since the classical age of the codification of national laws.

For the luck of us all, introduction to the main legal systems of the world under the heading of "comparative law" has become almost a *sine qua non* of legal education; as an independent scholarly trend, however, it soon became exhausted. Scholars and critics have for decades now been constantly complaining of its being "obstinately repetitive and sterile",[15] of its having a "precarious character"[16] of a "mediocre quality",[17] resulting in "disappointing"[18]

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[14] E.g., Rudolf B. Schlesinger *Comparative Law* Cases and Materials (Brooklyn & London: Foundation Press 1950) 552 pp.; René David *Traité élémentaire de droit civil comparé* Introduction à l'étude des droits étrangers et à la méthode comparative (Paris: Librairie Générale de Droit et de Jurisprudence 1952) vi + 556 pp.; Pierre Arminjon, Boris Nolde & Martin Wolff *Traité de droit comparé* I–III (Paris: Librairie Générale de Droit et de Jurisprudence 1950–1952); Adolf Schnitzer *Vergleichende Rechtslehre* (Basel: Verlag für Recht und Gesellschaft 1945) xii + 497 pp. [I–II, Zweite Aufl. (Basel 1961)]; René David *Les grands systèmes de droit contemporains* (Paris: Dalloz 1964) 630 pp. [Précis Dalloz]; *An Introduction to Legal Systems* ed. J. Duncan M. Derrett (London: Sweet & Maxwell 1968) xix + 203 pp.; Konrad Zweigert & Hein Kötz *Einführung in die Rechtsvergleichung* auf dem Gebiete des Privatrechts, I [Grundlagen] – II [Institutionen] (Tübingen: Mohr 1971–1969) viii + 457 and xv + 447 pp.; L[eontin] J[ean] Constantinesco *Rechtsvergleichung* I–III (Köln: Vandenhoeck & Ruprecht 1971–1972); *International Encyclopedia of Comparative Law* ed. René David et al. (Tübingen: Mohr 1973–1985); Max Rheinstein *Einführung in die Rechtsvergleichung* (München: Beck 1974) xvi + 236 pp.; Gyula Eörsi *Comparative Civil (Private) Law* Law Types, Law Groups, the Roads of Legal Development (Budapest: Akadémiai Kiadó 1979) 651 pp.; René Rodière *Introduction au droit comparé* (Paris: Dalloz 1979) 161 pp.; Rudolf B. Schlesinger, Hans W. Baade, Mirjan R. Damaska & Peter E. Herzog *Comparative Law* Cases – Text – Materials, 5th ed. (Mineola, N.Y.: The Foundation Press 1988) lv + 926 pp. [University Casebook Series]; Michael Bogdan *Comparative Law* (Deventer & Cambridge, Mass.: Kluwer 1994) 245 pp.; M. Fromont *Grands systèmes de droit étranger* 2e éd. (Paris: Dalloz 1994) 154 pp. [Mémentos Dalloz].

[15] Myres S. McDougal 'The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order' in *The American Journal of Comparative Law* I (1952) 1, pp. 24–57 at p. 29.

[16] Jerome Hall *Comparative Law and Social Theory* (Baton Rouge: Louisiana State University Press 1963) vii + 167 pp. on p. 6.

[17] François Rigaux in *Revue du Droit international et de Droit comparé* XXX (1978) 1, p. 73.

[18] Martin M. Shapiro *Courts* A Comparative and Political Analysis (Chicago: The University of Chicago Press 1981) ix + 245 pp. at p. vii.

"theoretical misery",[19] ending in "marginalisation"[20] and "superficiality",[21] all in all, in methodological and theoretical "failure",[22] rightly "plagued by the absence of any sustained theoretical reflection on […] that comparative law is nothing more or less than a methodology".[23] As an expression of this depreciation through external evaluation, it has recently been omitted from a collective representation of social sciences, not being listed as one of the many international comparativisms taken into account.[24] In addition to rewriting the above mentioned map time to time and to promoting legal borrowing and the law's adaptation,[25] the most important of its tasks today is to serve the harmonisation and the prospective unification of laws and also the codification of a common European private law. In its turn, all this reinforces the discipline exactly in its standing decisive features, namely, at a focus on prevailing (valid and effective) regulations, its reliance upon positive law and handling the law as a given and ready-made instrument.

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[19] L.-J. Constantinesco *Traité de droit comparé* III (Paris: Économica 1983), p. 21.

[20] Gunter Frankenberg 'Critical Comparisons: Re-thinking Comparative Law' *Harvard International Law Journal* 26 (1985) 2, pp. 411–455.

[21] Alan Watson *Legal Transplants* An Approach to Comparative Law, 2nd ed. (Athens, Georgia: University of Georgia Press 1993) xvi + 121 pp. on p. 10.

[22] Pierre Legrand 'Comparative Legal Studies and Commitment to Theory' *Modern Law Review* 58 (1995) 2, pp. 262–273 at p. 262.

[23] Geoffrey Samuel 'Comparative Law' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland 1999), p. 137 [Garland Reference Library of the Humanities, vol. 1743].

[24] The special issue of *La Revue européenne des Sciences sociales* / *European Review of Social Sciences* XXIV (1986), No. 72 mentioned only anthropological, economic, linguistic, psychiatric, religion-historical and sociological comparativisms as living. For the above criticism of comparative law, see especially Pierre Legrand *Le droit comparé* (Paris: Presses Universitaires de France 1999) 127 pp. [Que sais-je? No. 3478], passim particularly at p. 8.

[25] "Borrowing from abroad has become a recognised legislative practice in most contemporary states." Sand *Current Trends…* [note 11], p. 24. We have widely recognised since the elaboration of "cultural patterns" by Claude Lévy-Strauss—*Tristes tropiques* (Paris: Plon 1955) 462 pp. [Terre humaine 3]—that "the comparatively rapid growth of human culture as a whole has been due to the ability of all societies to borrow elements from other cultures and to incorporate them into their own." R[alph] Linton *The Study of Man* An Introduction (New York: D. Appleton-Century Co. 1936) viii + 503 pp. on p. 324. For a critical overview with a critical assessment, cf., by the author, '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), pp. 21–41 & shortened as 'Reception of Legal Patterns in a Globalising Age' in *Globalization, Law and Economy* / *Globalización, Derecho y Economía* Proceedings of the 22nd IVR World Congress, IV, ed. Nicolás López Calera (Stuttgart: Franz Steiner Verlag 2007), pp. 85–96 [ARSP Beiheft 109].

In contrast to the classical stance of comparative law, the c o m p a r a t i v e s t u d y o f l e g a l c u l t u r e s has from the very start been interested in the genesis and formation of the law's various phenomena and operations, that is, in how law evolved within various civilisations, producing various cultural responses in human efforts at problem solving, with varying moral and religious foundations and value preferences in successive ages in a way rebuilding again and again. Or, this is also an interest in the history of ideas, manifesting itself in the general frame of the history of civilisations, dedicated to societal problem-solving capacity even when we are making formal and homogenised instruments and institutions, to arrive at a picture of the evolutionary progress sometimes taken as traditional history, characteristic of the given civilisation(s),[26] or to arrive at a cultural anthropological explanation of the legal choices we make,[27] or to arrive at the construction of a comparative functional representation of the actual state that can be concluded from the practical appearance, utilisation and enforcement of the law through the sociological description of the medium by, and within, which law is conditioned and operated.[28]

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[26] E.g., *Entstehung und Wandel rechtlicher Traditionen* ed. Wolfgang Fikentscher, Herbert Franke & Oskar Köhler (Freiburg & München: Alber 1980) 820 pp. [Veröffentlichungen des Instituts für Historische Anthropologie]; Jesús Lalinde Abadía *Las Cultures represivas de la humanidad* (H. 1945) I [Adat y otras (pueblos infraevolucionades), Darma (Sudeste asiático) Chíng (Extremo Oriente), Meecharu (Oriente Medio), Maat (Antiguo Egipto), Díke (Antigua Grecia), Ius (Roma-Biyancio), Torá (Judíos), Charía (Árabes)] – II [Directum (Europa latina e Iberoamérica), Reht (Europa germánica), Jog (Hungría), Prawo (Europa eslava), Common law (Mancomunidad anglo-sajona)] (Zaragoza: Prensas Universitarias 1992) x + 1352 pp.; and, most recently, H. Patrick Glenn *Legal Traditions of the World* Sustainable Diversity in Law (Oxford: Oxford University Press 2000) xxiv + 371 pp. For the last title, cf. also, by the author, 'Legal Traditions? In Search for Families and Cultures of Law' in *Legal Theory / Teoría del derecho* Legal Positivism and Conceptual Analysis / Postivismo jurídico y análisis conceptual: Proceedings of the 22nd IVR World Congress Granada 2005, I, ed. José Juan Moreso (Stuttgart: Steiner 2007), pp. 181–193 [ARSP Beiheft 106] & [as a national report presented at the World Congress of the Académie internationale de Droit comparé] in <http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf> & *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>.

[27] In addition to the first title in note 29, cf. also *Changing Legal Cultures* ed. Johannes Feest & Erhard Blankenburg (Oñati: International Institute for the Sociology of Law 1997) 226 pp. [Oñati Pre-publications 2]; *Comparing Legal Cultures* ed. David Nelken (Aldershot: Dartmouth 1997) viii + 274 pp. [Socio-legal Studies]; *Adapting Legal Cultures* ed. Johannes Feest & David Nelken (Oxford: Hart 2001) x + 282 o. [Oñati International Series on Law and Society].

[28] E.g., by Erhard Blankenburg, 'Legal Cultures Compared' in *Laws and Rights* ed. Vincenzo Ferrari (Bologna: Giuffrè 1991), pp. 93–101 [Seminario Giuridico della Università di Bo-

Obviously, another ethos, another interest and another problem-sensitivity are at work here when they are related to the ones employed in the pioneer age of comparison. The path is evidently not already paved, and—instead of mere intellectual arguing—a new trail can only be broken if we set out on it. "Those who can, do it, those who cannot, explain it"—despite its one-sided injustice, this traditional wisdom tells a lot about the one-time Prussian pattern, so deeply ingrained in the socialist regime imposed upon us, thoroughly over-ideologised. For we know: in huge parts of Moscow-dominated Eastern and Central Europe, cultivation of scholarship was virtually impossible, yet lengthy explanations introducing emptied textbooks proudly declared the abstract aspiration for a scholarly quality in the foursome of subject, method, structure, and purpose, which were set in stone. "Too much argumentation kills the deed"—every thinker is expected to assume personal conviction and humility so that even if he is quite uncertain or formulates sheer presumptions, he shall cover the entire path of cognition.

An open question is, therefore, what the students of comparative legal cultures can achieve in the long run. Another question is the assessment of the reserves inherent in the bulk of fragmented studies comparing legal cultures, which have been published so far. A number of papers, coming from the discipline of 'comparative law' strictly taken and, labelled as irrelevant, neither collected, nor studied by genuine comparativists, have, all that notwithstanding, investigated certain culturally relevant legal issues.

## 3. Contrasting Fields

Interestingly enough, the route I have tried to explore[29] has received confirmation (thought-provoking themselves, and opening up new prospects as well) from most unexpected quarters in the recent past. In an attempt to describe the legal systems of Central and Eastern European countries now

logna, Miscellanee 10], 'Culture juridique comparative' in *Dictionnaire encyclopédique de théorie et de sociologie du droit* 2e éd. André-Jean Arnaud (Paris: Librairie Générale de Droit et de Jurisprudence 1993), pp. 141–142 and 'Civil Litigation Rates as Indicators for Legal Cultures' in *Comparing Legal Cultures* [note 27], pp. 41–68.

[29] *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 and Legal Theory, Legal Cultures 1], as well as, by the author, 'Comparative Legal Cultures: Attempts at Conceptualization' *Acta Juridica Hungarica* 38 (1997) 1–2, pp. 53–63.

on the path of their transition to the rule of law,[30] on the one hand, and in an effort to challenge the allegedly spontaneous convergence of the historical blocks of Civil Law and Common Law development, to be completed anyway through the European legal *rapprochement*,[31] on the other, it has been noted that the "dogmatically entrenched and thoughtlessly transmitted preconceptions" of classical comparative law (which "often operate as false generalisations and universalisations of what are, in fact, little more than localised, western-liberal perspectives"[32]), owing to their "epistemological barrier",[33] actually close down and block the way to cognition, instead of opening up and paving—by substantiating—it. For reducing law to mere rules not only transmits an image which falsely represents legal experience[34] but, by its search for rationality, foreseeability, certainty, coherence, and clarity at any price, it also "strikes a profoundly anti-humanist note".[35] By reducing the complexity of the law's actual operation to the static and abstract formalism of one given official state doctrine,[36] classical comparative law can at the most reproduce such complexity only in a superficial and simplifying way.[37]

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[30] Bogumila Puchalska-Tych & Michael Salter 'Comparing Legal Cultures of Eastern Europe: The Need for a Dialectical Analysis' *Legal Studies* 16 (July 1996) 2, pp. 157–184.

[31] Pierre Legrand 'European Legal Systems Are not Converging' *The International and Comparative Law Quarterly* 45 (January 1996) 1, pp. 53–81.

[32] Puchalska-Tych & Salter 'Comparing Legal Cultures…' [note 30], p. 159.

[33] Legrand 'European Legal Systems…' [note 31], p. 60. For the concept of "*obstacle épistémologique*", see Gaston Bachelard *La formation de l'esprit scientifique* Contribution à une psychanalyse de la connaissance objective, 14e éd. (Paris: J. Vrin 1989) 256 pp. [Bibliothèque des textes philosophiques].

[34] Cf. Michael Salter 'The Idea of Legal World' *International Journal of the Legal Profession* 1 (1994), pp. 291–295.

[35] Puchalska-Tych & Salter 'Comparing Legal Cultures...' [note 30], p. 179, as well as Legrand 'European Legal Systems...' [note 31], p. 60.

[36] Since its classical European definition—in Max Weber *Rechtssoziologie* (posthumous ed. 1960) and Hans Kelsen *Reine Rechtslehre* (1934)—, the very concept of legal formalism has acquired a function of constituting criterion also in American theoretical literature. Cf., e.g., Ernest J. Weinrib 'Legal Formalism' *The Yale Law Journal* 97 (1988) 6, pp. 949–1016; Frederick Schauer 'Formalism' *The Yale Law Journal* 97 (1988) 4, pp. 509–548; Doreen McBarnet & Christopher Whelan 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' *Modern Law Review* 54 (1991) 6, pp. 848–873; Robert S. Summers & P. S. Atiyah *Form and Substance in Anglo–American Law* A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutins (Oxford: Clarendon Press & New York: Oxford University Press 1987) xx + 437 pp.

[37] Puchalska-Tych & Salter 'Comparing Legal Cultures…' [note 30], p. 183.

*a) The Historical Understanding of Socialist Law*

As far as s o c i a l i s t l a w is concerned, 'comparative law' had—as the above mentioned British comparatists claim—generated a quite artificial concept upon the basis of an ideal type that had never actually existed anywhere. For it reduced various national legal systems with differing historical backgrounds and developmental abilities to one common denominator[38] upon the basis of Muscovite-type imperialism alone (while formulating, in a sanctimonious way, an implicit theoretical justification for the then convenient Western politics of submissiveness). Ironically—we shall add—the collapse of communism was necessary for Western complacency eventually to realise that Westerners had seen something of themselves in socialism, while they easily ignored the features that had made communism so inhumane, destructive, unbearable and fatal as it was. For instance, never having been able to overcome its own domestic everyday routine in due time, the West used to consider outward appearances (of mere verbal declarations in the law of posited texts) as actually effective and legally enforced normative contents of socialist law.[39] Therefore, it did not believe the conceptual attempts either which criticised socialism upon the recognition of its nature as a culture built on sheer lying, i.e., on dictatorial deception and lip-service. Referring to such experience, among other scholars in the region, I repeatedly tried to call the attention of international professional fora to the facts that, f i r s t l y, in contrast to the worldview of the traditionally self-closing legal positivism, the genuine nature of law can only be identified outside itself; s e c o n d l y, the formalism of modern law is only a part of

[38] *Ibid.*, para. 2, pp. 164–174.

[39] For the stubborn dominance of such a non-realisation and non-awareness having done, with its blindness, serious harms to the peoples in the Central and Eastern European region until the change of regimes controlled by the West was effected, see, by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] as well as 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Humankind adrift] ed. Katalin Mezey (Budapest: Széphalom [2000]), pp. 61–93; with a theoretical explanation, 'Rule of Law – At the Crossroads of Challenges' *Iustum, Aequum, Salutare* [Budapest] I (2005) 1–2, pp. 73–88 & <http:www.jak.ppke.hu/hir/ias/20051sz/20051.pdf> & in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 167–188; and for western papers with the same realisation (as translated into Hungarian), also *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] ed. Csaba Varga (Budapest: [AkaPrint] 1998) 122 pp. [A Windsor Klub könyvei II].

the ideology of the legal profession of the West from the 18th to 20th centuries; consequently, t h i r d l y , extending the scope of formalism as a criterion from the internal sphere of professional deontology to the overall ontology of the legal phenomenon will necessarily conceal the distinctive features of those arrangements that are based on other principles (e.g., on divine revelation in Islamic and Jewish law) or which refer to formalism (e.g., in socialisms) mostly out of mere political-ideological motives.[40] Or, as the same British comparatists propose (with reference to my own attempt),[41] the solution is "the multitextuality of the legal cultures" as opposed to the "decontextualised picture" of 'comparative law', that is, to rely on "an entire contextual matrix in which the state law operates" (and, in it, also on the "micro-social level of grass-root lived-experience") within the "widely acknowledged […] field of legal scholarship" of 'comparative legal cultures'; bearing the lesson in mind that

> "a living body of law is not a collection of doctrines, rules, terms and phrases. It is not a dictionary, but a culture; and it has to be approached as such."[42]

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[40] See, by the author, as a clearly theoretical argument, 'Is Law a System of Enactments?' in *Theory of Legal Science* ed. Aleksander Peczenik & Lars Lindahl & Bert van Roermund (Dordrecht, Boston, Lancaster: Reidel 1984), pp. 175–182 [Synthese Library 176]; for questions raised in socialism, 'Law as a Social Issue' in *Szkice z teorii prawa* i szczególowych nauk prawnych Professorowi Zygmuntowi Ziembinskiemu [Outlines for legal theory: a festschrift for Prof. Zygmunt Ziembinski] ed. Slawomira Wronkowska & Maciej Zielinski (Poznan: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu 1990), pp. 239–255 [Uniwersytet im. Adama Mickiewicza w Poznaniu: Seria Prawo, nr 129]; and as the pathology of Socialism and, therefore, also as a claim for laying the foundations for a specifically issue-sensitive legal ontology, 'Liberty, Equality, and the Conceptual Minimum of Legal Mediation' in *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy, ed. Neil MacCormick & Zenon Bankowski (Aberdeen, Aberdeen University Press 1989), ch. 11, pp. 229–251 {reprinted in *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1993), pp. 501–523 [International Library of Essays in Law & Legal Theory, Schools 9]}. As to the modern law's formalism, seen as a proper professional deontology, that is, as the very form of the law's ontological existence (instead of the merely epistemological perspective of assessing it ideologically, or sheerly ideology-critically as a false consciousness, only motivated by the juristic world-concept ["*juristische Weltanschauung*"]), see, also by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 193 pp., passim.

[41] *Comparative Legal Cultures* [note 29], p. xvii.

[42] Puchalska-Tych & Salter 'Comparing Legal Cultures…' [note 30], p. 183; p. 181, note 114; p. 182 and note 118, as well as p. 182, referring to Roger Cotterrell 'The Concept of Legal Cultures' in *Comparing Legal Cultures* [note 27], pp. 13–32 and David Nelken 'Who can

*b) Convergence of Civil Law and Common Law*

As to the c o n v e r g e n c e of European legal systems, a French-Canadian professor teaching at the *Sorbonne* in Paris gave voice to his doubts,[43] which later stirred up an aggressive yet all the poorer international debate,[44] in response to two resolutions taken by the European Parliament on the commencement of the preparation, respectively actual drafting, of a Common European Code of Private Law,[45] about which enthusiastic reports

you Trust? The Future of Comparative Criminology' [a lecture presented at the workshop entitled *Comparing Legal Cultures* {Macerata, May 18–20, 1994}], to *Comparative Legal Cultures* [note 29], pp. xv–xxiv as well as Lucia Zedner 'In Pursuit of the Vernacular: Comparing Law and Order Discourse in England and Germany' *Social & Legal Studies* 4 (1995) 4, pp. 517–535. Cf. also Lawrence Friedman 'Some Thoughts on Comparative Legal Culture' in *Comparative and Private International Law* Essays in Honour of John Henry Merryman on his 70th Birthday, ed. David S. Clark (Berlin: Duncker & Humblot 1990), pp. 49–57.

[43] Cf., by Pierre Legrand, 'Europen Legal Systems...' [note 31], passim, as well as his 'Sens et non-sens d'un Code Civil Européen' *Revue internationale de Droit comparé* 48 (1996) 4, pp. 779–812, 'Against a European Civil Code' *Modern Law Review* 60 (1997) 1, pp. 44. et seq., and 'Le primat de la culture' in *Le droit privé européen* ed. P. de Varaeilles-Sommières (Paris: Économica 1998), pp. 1–5. It is to be mentioned that Basil S. Markesinis—'Why a Code is not the Best Way to Advance the Cause of European Legal Unity' *European Review of Private Law* V (1997) 4, pp. 519–524—, acknowledging the unfeasibility of a common code yet wishing to substantiate the convergence, introduced the German law of contracts in English in a series of collective works, adapting the method of 19th-century German pandectism—"first deconstruct and then reconstruct"—to English conditions. This laudable initiative was, however, qualified by its critic—Pierre Legrand 'Are Civilians Educable?' *Legal Studies* 18 (1998) 2, pp. 216–230, particularly at p. 227, note 63—as the "trivialisation" of German law. Markesinis, in return, gave way to a rejoinder of a personal tone in his 'Studying Judicial Decisions in the Common Law and the Civil Law: A Good Way of Discovering Some of the Most Interesting Similarities and Differences that Exist between these Legal Families' in *The Harmonisation of European Private Law* ed. Mark van Hoecke & François Ost (Oxford & Portland, Oregon: Hart Publishing 2000), pp. 117–134, especially p. 133 [European Academy of Legal Theory Monograph Series].

[44] Cf., just for one example, Mark van Hoecke 'The Harmonisation of Private Law in Europe: Some Misunderstandings' in *The Harmonisation*... [note 43], pp. 1–20 [relying rather idealistically solely on measures of education and socialisation] and, especially, Anthony Chamboredon 'The Debate on a European Civil Code: For an »Open Texture«' in *ibid.*, pp. 63–99 [giving a post-modern expression to ancient wisdoms gained from the European experience of codification by combining legislatorial moderation, as well as from raising awareness of the use of flexible concepts and systematic interpretation]. All this was accompanied by such overtones in the overall debate that Geoffrey Samuel—'English Private Law in the Context of the Codes' in *ibid.*, p. 47—felt prompted to state: "Weak theorising, simplistic metaphors and the arrogant dismissal of opponents' arguments do Europe no favours."

[45] 'European Parliament's Resolution on Action to Bring into Line the Private Law of the Member States' *Official Journal* C158/400 (26 May 1989) and 'European Parliament's Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States' *Official Journal* C205/518 (6 May 1994).

were at once released, concluding from the signs of "converging" and "a continual *rapprochement*" that "a new *ius commune* is thus in the making".[46]

What are, then, these daring allegations? The description of living complexes in terms of mere rules results in "thin description" at the most, excluding "thick description" the more so as the rules are—just as the concepts—only the outcome of some feasible mental representation.[47] Thus, any exclusive reliance upon or over-emphasis of them may only contribute to the dissolution of existing interrelations by atomising and fragmenting their organic components.[48] Since in case of any law "you have to know where it comes from and what its image of itself is",[49] we can only conclude that there is a difference between Civil Law and Common Law, which is both irreducible and irresolvable at the same time. For it is made up of the difference between mentalities and worldviews with their implied presuppositions and attitudes, aspirations and empathies, which all constitute the deep structure and local rationality of thinking in terms of all the above and serve as the indispensable key to their cognition. This is why our classical hero of studies in Roman law once spoke (as if of the HEGELian *Volksgeist*)

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[46] Gerard-René de Groot 'European Education in the 21st Century' in *The Common Law of Europe and the Future of Legal Education* ed. Bruno De Witte & Caroline Forder (Deventer: Kluwer 1992), p. 11 [Metro], H. Patrick Glenn 'La civilisation de la common law' *Revue internationale de Droit comparé* 45 (1993) 3, pp. 559–575 on p. 567, as well as Basil S. Markesinis 'Bridging Legal Cultures' *Israel Law Review* 27 (1993) 3, pp. 363–384 at p. 382.

[47] Gilbert Ryle 'The Thinking of Thoughts: What is »Le Penseur« Doing?' in his *Collected Papers* II: Collected Essays, 1929–1968 (London: Hutchinson 1971), p. 480, as well as Isabelle Stengers 'Le pouvoir des concepts' in Isabelle Stengers & Judith Schlenger *Les concepts scientifiques* Invention et pouvoir (Paris: La Découverte et Unesco & Strasbourg: Conseil de l'Europe 1991), pp. 63–64. It is to be remarked that the "*praesumptio similitudinis*"—proposed by Konrad Zweigert & Hein Kötz in their *An Introduction to Comparative Law* 2nd rev. ed., trans. Tony Weir (Oxford: Clarendon Press & New York: Oxford University Press 1992) xliii + 752 pp. on p. 36, according to which even radical differences in conceptualisation may result in similar functional solutions in practice, as once expressedly observed by Konrad Zweigert in his 'Solutions identiques par des voies différentes (Quelques observations en matières de droit comparé)' *Revue internationale de Droit comparé* XVIII (1966) 1, pp. 5–18—does not offer a refuge, because it indicates exactly the unsuitability and the barriers of text-formalism.

[48] "We have put into people's heads that society is a creature of abstract thought when it is constituted by habits and customs. When you submit habits and customs to the grindstone of reason, you pulverize ways of life based on longstanding traditions and reduce human beings to the state of anonymous and interchangeable atoms." Claude Lévy-Strauss & Didier Eribon *De près et de loin* (Paris: O. Jacob 1988) 252 pp. at p. 165.

[49] John Merryman 'Civil Law Tradition' *The American Journal of Comparative Law* 35 (1987) 2, pp. 438–441 on p. 441.

something of a secret intellectuality,[50] recalling the original idea of MONTESQUIEU: "It is not the body of laws that I am looking for, but their soul!".[51]

## 4. Concluding Remarks

With this, we have returned to the self-closure of 'comparative law'. Although the programmatic methodological requirement according to which "the comparativist must eradicate the preconceptions of his native legal system"[52] is well known, actually it is the Western concepts of order, ethos and rationality that are usually asserted as universal claims under the veil of "a non-transparent and taken-for-granted Western ideology of value-free scientific approach to research".[53] This is what manifests itself in the global sanctioning of the Western ideal of law[54] and especially in the service of current Atlantic and European endeavours which deliberately restrict the chances for survival of other ideals of order and legal arrangements,[55] and

[50] Fritz Pringsheim 'The Inner Relationship between English and Roman Law' *Cambridge Law Journal* (1933–1935) 5, pp. 347–365 at p. 348.

[51] Montesquieu 'Dossier de l'*Esprit des Lois*' in his *Oeuvres complètes* ed. Roger Caillois, II (Paris: Gallimard 1951), p. 1025 [Bibliothèque de la Pléade]. Legrand 'European Legal Systems…' [note 31], pp. 55 et seq. explains in more detail the impossibility of convergence by the example of the radical differences both in legal reasoning and systematisation, the use of rules and the role of facts, as well as the meaning of entitlements and the varying presence of the past.

[52] Zweigert & Kötz *An Introduction…* [note 47], p. 32.

[53] Puchalska-Tych & Salter 'Comparing Legal Cultures...' [note 30], p. 160.

[54] For a stand taken by legal philosophy, see, e.g., Surya Prakash Sinha 'Non-universality of Law' *Archiv für Rechts- und Sozialphilosophie* 81 (1995) 2, pp. 185–214. According to his radical conclusion, "law itself is parochial to Western civilisation", therefore "transforming non-legal cultures into legal societies", as forced by the majority of international organisations, is both harmful (as it evacuates cultural patterns) and subversive for the larger part of the world (pp. 209 and 211).

[55] One of the fields of such fights today is the question of the universalisability, without a cultural loss, of human rights, taken as an ideal and as a store of instruments enacted by Atlantic documents in accordance with the Western legal ideal. See, e.g., *Human Rights* Cultures and Ideological Perspectives, ed. Adamantia Pollis & P. Schwab (New York: Prager 1979) xvi + 165 pp.; Surya Prakash Sinha 'Human Rights: A Non-western Viewpoint' *Archiv für Rechts- und Sozialphilosophie* 67 (1981) 1, pp. 76 et seq.; Riffat Hassan 'On Human Rights and the Qur'anic Experience' and Kana Mitra 'Human Rights in Hinduism' *Journal of Ecumenical Studies* 19 (1982) 3, pp. 51–65, resp. 77–84; Jan Hjärpe 'The Contemporary Debate in the Muslim World on the Definition of »Human Rights«' in *Islam* State and Society, ed. Klaus Ferdinand & Mehdi Mozaffari (London: Curzon Press & Riverdale, MD: The Riverdale Company 1988), pp. 26–38 [Studies on Asian Topics 12]; *Asian Perspectives on Human Rights* ed. Claude E.

also in the competition for patterning the future European law through the re-writing of its past history[56]—in short, which manifests itself in all prefer-

Welch, Jr. & Virginia A. Leary (Boulder: Westview Press 1990) vii + 310 pp.; Ann-Belinda S. Preis 'Human Rights as Cultural Practice: An Anthropological Critique' *Human Rights Quarterly* 18 (1996) 2, pp. 286–315; Marie-Bénédice Dembour 'Human Rights Talk and Anthropological Ambivalence: The Particular Contexts of Universal Claims' in *Inside and Outside the Law* Anthropological Studies of Authority and Ambiguity, ed. Olivia Harris (New York & London: Routledge 1996), ch. 2, pp. 19–40; Gerhard Luf 'Peace and Human Rights as Seen by the Churches' in *Peace for Humanity* Principles, Problems and Perspectives of the Future as Seen by Muslims and Christians, ed. Andreas Bsteh (New Delhi: Vikas 1996), pp. 143–157 and, for the debate, pp. 158–177; Lone Lindholt *Questioning the Universality of Human Rights* The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique (Aldershot, Burlington USA, Singapore, Sydney: Dartmouth 1997) xii + 307 pp.; Annette Marfording 'Cultural Relativism and the Construction of Culture: An Examination of Japan' *Human Rights Quarterly* 19 (1997) 3, pp. 431–448; Michael J. Perry 'Are Human Rights Universal? The Relativist Challenge and Related Matters' *Human Rights Quarterly* 19 (1997) 3, pp. 461–509; Boaventura de Sousa Santos 'Toward a Multicultural Conception of Human Rights' *Sociologia del Diritto* XXIV (1997) 1, pp. 27–45; Jan Hjärpe *Some Problems in the Meeting between European and Islamic Legal Tradition* Examples from the Human Rights Discussion [multipl.] ([Lund] [n.y.]) 21 pp. The set of questions naturally involves interference through exerting political or economic pressure or via so-called humanitarian aid. For Central and Eastern Europe, see the titles in note 39 and, for an example distant but touching upon so called "Westernisation strategies", Wai Man Sin & Chu Yiu Wai 'Whose Rule of Law? Rethinking (Post-)Colonial Legal Culture in Hong Kong' *Social & Legal Studies* 7 (1998) 2, pp. 147–169.

[56] After remarkable historical foundation—above all, by Paul Koschaker *Europa und das römische Recht* (München: Biederstein 1947) xii + 378 pp. and Franz Wieacker *Privatrechtsgeschichte der Neuzeit* unter besonderer Berücksichtigung der deutschen Entwicklung (Göttingen: Vandenhoeck & Ruprecht 1952) 379 pp. [Jurisprudenz in Einzeldarstellungen 7]—and serials—first of all, *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte* hrsg. Helmut Coing (München: Beck 1973–1988) and *Ius commune* I– (1973–)—, accompanied by theoretical overviews—e.g., Franz Wieacker 'Foundations of European Legal Culture' *The American Journal of Comparative Law* 38 (1990) 1, pp. 1–29, André-Jean Arnaud *Pour une pensée juridique européenne* (Paris: Presses Universitaires de France 1991) 314 pp. [Les voies du droit], as well as Volkmar Gessner, Armin Hoeland & Csaba Varga *European Legal Cultures* (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 568 pp. {TEMPUS Textbook Series on European Law and European Legal Cultures 1}—, a discipline called 'European legal history' was born. For its outlines, see, e.g., *Europäische Rechts- und Verfassungsgeschichte* Ergebnisse und Perspektiven der Forschung, hrsg. Reiner Schulze (Berlin: Duncker & Humblot 1991) ix + 255 pp. [Schriften zur Europäischen Rechts- und Verfassungsgeschichte 3] and Reiner Schulze 'European Legal History: A New Field of Research in Germany' *The Journal of Legal History* 13 (1992) 3, pp. 270–295. According to critics—e.g., Douglas J. Osler 'The Myth of European Legal History' *Rechtshistorisches Journal* (1997), No. 16, pp. 393–410—, all this endeavour dedicated to erecting a 'European legal history' has only been conceived as to re-write history according to present-day interests, so as to conclude, by justifying the alleged past existence of a *ius commune* by the one-time allegedly dominant intel-

ences called ethnocentrism in scholarship, cultural imperialism in politics, and neo-colonialism in practice. In fact, in the absence of any theoretically elaborated or methodologically founded opposing force, all such impacts have recently been marshalled mostly under the banner of 'comparative law' or at least with its active support.

Nevertheless, we have to bear in mind that no kind of formalism can serve as an excuse for any restrictions on human entirety and cultural diversity, as well as on the professional responsibility to be taken for these.[57] Accordingly, in our approach to legal institutions we also have to recognise individual and collective accomplishments in all human attempts at creating order, and provided they have produced values, we have to appreciate and try to preserve these as such.[58]

lectual performance of today's major European powers, to the advent of a *ius commune* in the European Union with a hegemonic role to be played in its framing by a German–Dutch–French bloc. For the pitfalls (with underlying methodological biases) of such a new Euro-historicism, see, among others, Anton Schuurman 'Globalisering, geschiedenis en ruimte' *Tijdschrift voor sociale en economische geschiedenis* 3 (2007), pp. 15–35; Michael Borgolte 'Vor dem Ende der Nationalgeschichten? Chancen und Hindernisse für eine Geschichte Europas im Mittelalter' *Historische Zeitschrift* (2001), Nr. 272, pp. 561–596; and Michael E. Hoenicke Moore 'Euro-Medievalism: Modern Europe and the Medieval Past' *Collegium* [Bruge] (Summer 2002), No. 24, pp. 67–79.

[57] Cf. *Democracy* Some Acute Questions [The Proceedings of the Fourth Plenary Session of the Pontifical Academy of Social Sciences, 22–25 April 1998] ed. Hans F. Zacher (Vatican City 1999) 450 pp. [Pontificiae Academiae Scientiarum Socialium Acta 4] and *Democracy* Reality and Responsability [The Proceedigns of the Sixth Plenary Session of the Pontifical Academy of Social Sciences, 23–26 February 2000] ed. Hans F. Zacher (Vatican City 2001) xxxviii + 422 pp. [Pontificiae Academiae Scientiarum Socialium Acta 6].

[58] For a number of further related questions, cf. *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot [2003]) xi + 139–531 pp. [*Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn].

# *THEATRUM LEGALE MUNDI*
# On Legal Systems Classified*



## 1. Preliminaries

Applying a theatrical metaphor characteristic of the Baroque age, it is LEIBNIZ' ambition (1667) regarding the early recognition of the need to describe the "theatre of the legal world" that was transmitted to us, informing us that the more humanity's intellectual world broadened throughout history, the more pressingly humanity felt the need to classify its diverse elements. For example, the English SAINT GERMAN perceived the difference between

| Roman | English |
|---|---|

laws, while also presenting the correlation between their development, as early as in 1531, pointing out that what is *jus naturale* in case of the former recurs as *reason* in the latter.[1] Seventy years later, in 1602 WILLIAM FULBECK described a legal world rooted in three laws,[2] such as the

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[1] Christopher Saint German *Dialogus de fundamentis legum Anglie et de conscientia* The Dialoges in English betwene a Doctor of Diunity, and a Student in the lawes of England (Londini: In ædibus R. Tottelli 1528) {*St. Germain's Doctor and Student* ed. T[heodor] F[rank] T[homas] Plucknett & J[ohn] L. Barton (London: Selden Society 1974) lxxvi + 346 pp. [Publications of the Selden Society 91]}, quoted—remarking that we remember now the moment underlying such development as the need of r e a s o n a b l e m a n —by A. G. Chloros 'Une interprétation de la nature et de la fonction de la philosophie juridique moderne' in *Archives de Philosophie du Droit* III: Le rőle de la volonté dans le droit (Paris: Sirey 1958), p. 189.

[2] William Fulbeck *Parallele or Conference of the Civill Law, the Canon Law, and the Commn Law of this Realme of England* Parts I–II (At London: Printed by [Adam Islip for]

| Anglo-Saxon | Continental | canon |
|---|---|---|

ones; and a century later, in 1701 Lord HOLT wrote that "the principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things".[3] This reflects Europe's view of itself in the early modern age, which with respect to the worlds beyond the countries on the two sides of the Channel scarcely perceived anything more than the papacy's somewhat comprehensive influence. Yet the above division is typologically correct and valid up to the present day.

Almost two centuries later, in 1880 GLASSON proposed[4] a tripartite classification derived from h i s t o r i c a l o r i g i n s again, namely, laws developing

| from barbarian customary law (English, Scandinavian, Russian) | from Roman law (Italian, Romanian, Portuguese, Spanish) | from the former two's amalgamation (French, German, Swiss) |
|---|---|---|

, a grouping that, not being based primarily on extant and actually prevailing features, has remained worthy of being taught up to our day. In a typologically characteristic manner, GLASSON perceives, when mapping Europe's inner division, the particularity of the Nordic and the Russian Plateau. Remarkably, the classification also draws the English and the Scandinavian legal systems within a single category while putting the French and the German together, differentiating both from the actual Romanist heritage.

## 2. Proposals

Drawing up a legal map of the Earth—by classifying the various legal systems according to the lasting features of f a m i l y r e s e m b l a n c e ( s )

Thomas Wight 1601–1602) [12] + 104 + [9] & [8] + 74 + [8] leaves. Cf. also <http://en.wikipedia.org/wiki/William_Fulbecke>.

[3] In *Lane v. Cotton*, 12 Mod. 472, 482 (1701).

[4] Ernest-Désiré Glasson *Le mariage civil et le divorce* dans les principaux pays de l'Europe, précédé d'un aperçu sur les origines du droit civil moderne: Études de législation comparée (Paris: Pedone-Lauriel 1879) cxli + 273 pp.

expressed by their basic mission, form, structure and mode of operation—would be a task for 20th century comparative law, matured enough to have become a genuine movement by then.

When we look at such attempts from closer quarters, some standing representatives of the laws' variety will be conspicuous from the beginning, placed in the centre as constant members that launch our interest in mapping at all, by defining the typification's entire contexture and final orientation. When the mapping is completed, further members will be attached mostly as additional items, exemplifying the law's diversity, the effect of which is rather to testify to some loose interest in remote countries (by naming their species) than to cognise the world's richness in actual depth and describe it exhaustively.

So, in the early 20th century ESMEIN (1905) thought, for instance, that l a n g u a g e and s p e c i e s would constitute the most appropriate basis of the *divisio*[5] —

| Romanist (French, Belgian, Italian, Spanish, Portuguese, Romanian) Central & South-American) | Germanic (Scandinavian, Austrian, Hungarian) | Anglo-Saxon (English, American, English-speaking colonies) | Slavic | Muslim |
|---|---|---|---|---|

— which, despite being rather influential for a while as an early attempt, proved to be too sketchy and limited in outlines. However, at the peak of European imperialism or politico-economic expansion, this analysis theoretically encompassed the world through the historical prism of Europe. Interestingly enough, it also involved Arabic culture—having in mind its presence in the Hispanic Peninsula for centuries in the Middle Ages—as a partner on an equal footing.[6] We see here for the first time the Germans separated as a block from the Roman legal tradition, perhaps owing to the clashes with which the German Empire, with the Austro-Hungarian Monarchy in the background, confronted the rest of the world. At least, there can scarcely be any other explanation in that allusion was also made to Hungarian law.

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[5] Adhémar Esmein 'Le droit comparé et l'enseignement du droit comparé' in [Congrès international du droit comparé tenu à Paris du 31 juillet au 4 août 1900] *Procès-verbaux des séances et documents* I (Paris: Librairie Générale de Droit et de Jurisprudence 1905), pp. 445 et seq., on pp. 451 et seq.

[6] Cf., e.g., Rémi Brague *Europe* La voie romaine (Paris: Criterion 1992) 188 pp. [Idées].

In another attempt at grouping, SAUSER-HALL (1913) accepted the exclusive criterion of r a c e as the principle for classification, in a manner not alien to the dominant spirit of the age[7]—

| Aryan, Indo-European<br>• Hindu–Iranian<br>(Persian, Armenian)<br>• Celtic<br>(Celtic, Gallic, Irish, Gaelic)<br>• Greco–Latin–Iranian<br>(Greek, Roman, Canonic, neo-Swiss)<br>• Germanic<br>• Anglo-Saxon<br>English, Anglo–American, new Saxon)<br>• Lithunian-Slavic<br>(Russian, Serbo–Croatian, Slovenian,<br>Czech, Polish, ancient Prussian, Lithuanian, Ruthenian, Slovak, Bulgarian) | Semitic<br>(Amir Egyptian, Jewish, Arabic-Muslim) | Mongoloid<br>• Chinese<br>(Chinese, Indo-Chinese Tibetan)<br>• Japanese | barbarian customary<br>(Nego Melanesian, Indonesian, Australian, Polynesian, American<br>& Hyperborean native) |
|---|---|---|---|

—, and his categorisation remains of a revealing force in several respects notwithstanding the fact that it keeps silence about the specific similarities and differences in the legal nature of the arrangements that he grouped so. Nevertheless, he undoubtedly provided a pioneer attempt at describing the known totality of legal regimes in both their historical development and actual diversity on the globe. Actually, he drew a comprehensive picture of the popular force that may have generated known cultures, inserting for the very first time a "closing category" of visibly "mixed" contents in his scheme. He was also pioneering in drawing a broad and overall framework, albeit he too had a start from his own regime (labelled as the historical performance of peoples, to be identified as "Western" in a cultural sense later on). In this endeavour, he may have been guided by a logically inspired "aesthetical" wish that the borders of his own legal regime should not be defined too narrowly in separating it from the rest of the world.

[7] Georges Sauser-Hall *Fonction et méthode du droit comparé* [Leçon inaugurale faite à l'Université de Neuchâtel le 23 octobre 1912] (Genève: A. Kündig 1913) 113 pp.

In the interwar period, LÉVY-ULLMANN (1922) was the first to divide laws, acknowledged as civilised, along the lines of their respective d e v e l o p m e n t[8]—

| Continental | English-speaking | Muslim |
|---|---|---|
| [written law, with parliaments & codification in the background] | [customary law, developing through legal practice] | [on a religious basis & with an almost absolute immobility] |

—with a conciseness that may increase posterity's suspicion that he (like so many before and after him) actually made the only distinction between his home arrangement, accepted in the natural course as serving as a starting point, on the one hand, and everything else separated from the former, on the other. Or, he proceeded as if for him anything else could be nothing but embellishment, decoration or flourish, with the sheer aim of aesthetic completeness. — From the vast three volumes of the historico-comparative tableau WIGMORE (1928)[9] drew for the American legal profession, one simply cannot ascertain whether or not the author indeed wished to classify or simply alluded to items by exemplification, when in an all-inclusive overview—

| | | | | |
|---|---|---|---|---|
| Egyptian | Mesopotamian | Hebrew | Chinese | Hindu |
| Greek | Roman | Japanese | Muslim | Celtic |
| Slavic (Czech, Polish, Yugoslavian, Russian) | | German | marine | |
| Papal | | Romanesque | Anglican | |

—he presented the huge variety of past and contemporary legal systems. — Finally, MARTÍNEZ PAZ (1934) took alleged g e n e t i c r o o t s (with a quite telling progressive gradation) as the basis for his division[10]—

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[8] Henri Lévy-Ullmann 'Observations générales sur les communications relatives au droit privé dans les pays étrangers' in *Les transformations du droit dans les principaux pays depuis cinquante ans* (1869–1919) [Livre du cinquantenaire de la Société de législation comparée] I (Paris: Librairie Générale de Droit et de Jurisprudence 1922), pp. 85–87.

[9] J[ohn] H[enry] Wigmore *A Panorama of the World's Legal Systems* I–III ([Chicago] Saint Paul: West Publishing Co. 1928).

[10] Enrique Martínez Paz *Introducción al estudio del derecho civil comparado* (Córdoba: Imprenta de la Universidad 1934) 238 pp., on pp. 154 et seq.

| barbarian customary (English, Swedish, Norwegian) | barbarian-Romanist (German, Italian, Austrian) | barbarian-Romanist-canonic (Spanish, Portuguese) | Romanist-canononic-democratic (Swiss, Latin American, Russian) |
|---|---|---|---|

—in a European developmental perspective, while any other arrangement remained simply unnamed.

In the historical sequence of classifications, the categorisation of Anglo-Saxon and Nordic developments as members of a single group emerges as a recurrent feature, while the separation of Latinic–German Central Europe from Western Europe proper within the Romanist coverage is a novel recognition.

The series of classifications produced during the half-century following World War II was opened by a magnificent theoretical conspectus, authored by a triad in France. As is well known, the primary aim of ARMINJON, NOLDE and WOLFF (1950) was to lay the theoretical-methodological foundations of legal comparatism rather than to accomplish any description of the extent of the legal world. Accordingly, these authors excelled in elaborating private law as a group with criteria of categorisation given in a most promising manner. As an unavoidable by-product, however, they disregarded ideals of order (e.g., of the Far East) where any conceptualisation was abhorred. Eventually, they saw the historical evolution of private law in Europe as stemming from, and represented by, seven independent types. All in all, their classification[11]—

| French | German | Scandinavian | English | Russian |
|---|---|---|---|---|
| Islamic | | Hindu | | |

—has (with its separation of the Nordic region[12]) remained an exceptionally mature accomplishment for a long time.

DAVID (1950), whose work in due course became the number one classic of the international comparative law movement, paved a somewhat different road. Although starting, too, with a dedication to civil law, he extended

[11] Pierre Arminjon, Baron Boris Nolde & Martin Wolff *Traité de droit comparé* I (Paris: Librairie Générale de Droit et de Jurisprudence 1950), p. 49.

[12] "Regarding its origins and development, the Scandinavian law is neither Roman, nor French, nor German." *Ibid.*, p. 50.

his research interests from the civil law technical instrumentality to entire legal arrangements as unities organised into a system, with various components gaining specific roles. In parallel with the rise of the Iron Curtain between East and West in Europe and the threat of nuclear devastation with the increased sense of danger through the menace of a Third World War, the ideology or philosophical worldview underlying the given legal regime became his primary concern for classification, only to be seconded with the technique of law in supplementation.[13] His proposition—

| Western<br>• French<br>• Anglo–American<br>[Based on moral rules of Christianity, the political & social principles of liberal democracy & the economic order of capitalism] | Soviet<br>[based on the Socialist economy & related political, social & moral principles] | Muslim<br>[on a religious basis] | Hindu<br>[on a specific philosophical basis] | Chinese |
|---|---|---|---|---|

—has exerted a long-standing influence through the basic polarisation implied, despite its elementary simplicity in structure. Or, it constituted a plain reflection of the Cold War ideology raging at the time, whose basics were defined by the opposition of the Western European and Atlantic world to the Third Rome, the Muscovite Empire. And again, as already seen elsewhere, the occasional reference to one or two remote cultures from faraway peripheries (which were starting to loom on the horizon) could only serve as sheer complementation. — DAVID's subsequent analysis (1961) did in fact alleviate the harshness of this categorical opposition. Following its own path—he admitted—the West might also be inclined to move towards Socialism; moreover, even Africa and Asia (without Christianity in their past) might commit themselves to the same direction.[14] Ironically enough, the

[13] René David *Traité élémentaire de droit civil comparé* Introduction à l'étude des droits étrangers et à la méthode comparative (Paris: Librairie Générale de Droit et de Jurisprudence 1950) vi + 556 pp., on pp. 8 and 214–226.

[14] "By the way, the nations of the West are to different extents all committed to the road of socialism, moreover, I think they can make much progress on this way without having to renounce belonging to the system of Western law at the same time. After all, a number of non-Christian countries of Africa and Asia could adhere to the system of Western law without adherence to the principles of Christian morality." René David 'Existe-t-il un droit occidental?' in *XXth Century Comparative and Conflicts Law* Legal Essays in Honor of Hessel E. Yntema, ed. Kurt H. Nadelmann, Arthur T. von Mehren & John N. Hazard (Leyden: Sythoff 1961), p. 59. [„Les nations de l'Occident sont toutes engagées par ailleurs, dans des mesures diverses,

deadly menace by the Soviet superpower (accompanied by the West's growing slump into the pragmatism of *realpolitik,* having relinquished Hungary in the dramatic days of 1956) made Soviet ambitions respected worldwide, compelling the West to cowardly submission. Finally, the very cause of Socialism as a method of building a global system could obtain worldwide acknowledgment by granting its own typological locus to itself, while the Soviet terminology renamed its counter-pole, the "Western" law, as "bourgeois" one.

It is by no mere chance, therefore, that SOLA CAÑIZARES (1954) would propose a version resulting in minor corrections while exhibiting extreme simplification[15]—

| Western [Christian but not authoritative] | Soviet [atheist & collectivist] | religious<br>• derived from religious principles (canonic, Hindu, Muslim)<br>• Chinese [with a pseudo-religious philosophy in which the law is ethically coloured] |
|---|---|---|

—, almost reminiscent of the tripartite vision by LÉVY-ULLMANN during the earlier peace time in 1922.

It is by no mere chance, either, that the Romanist sociologist LÉVY-BRUHL (1961) would come forward, with an outsider's ambitions, to propose a new theoretical scheme—

| Western | Soviet | Theocratic<br>• ancient Jewish<br>• Muslim | feudal | primitive |
|---|---|---|---|---|

dans la voie du socialisme, et je crois qu'elles peuvent aller très loin dans cette voie sans répudier leur appartenance au système du droit occidental. De nombreux pays non-chrétiens d'Afrique et d'Asie, enfin, ont pu adhérer au système, sans adhérer aux principes de la morale chrétienne."]

[15] Felipe de Sola Cañizares *Iniciación al derecho comparado* (Barcelona: Consejo Superior de Investigaciones Científicas, Instituto de Derecho Comparado 1954) 330 pp. [A: Estudios sobre al derecho comparado 2], quoted by René Rodière *Introduction au droit comparé* (Strasbourg: Faculté Internationale pour l'Enseignement du Droit Comparé 1963), p. 13.

—, applying his typological model in order to outline a legal sociological panorama with a historical approach in the background.[16] Albeit being otherwise conservative as permeated by respect for traditional values, this typology may astonish us by presenting both the West and the anti-West, i.e., Bolshevism, with equal taxonomic weight, moreover, in a way mixed sublimely with arrangements originated in world religions that had in their time set our civilisational path for millennia. However, assessing the atmosphere of cosmic threats with expectations of a coming cataclysm, such western submissiveness still needs to be explained in terms of social psychology rather than in cool detachment with some apparent objectivity.

Yet, in the meantime the world opened itself up to the Western mind, and theoretically inspired attempts at a philosophical classification emerged. In a classical manner, NORTHROP's typification (1959)[17]—based on an understanding of the specifically Far Eastern—discerned the following groups:

| | | |
|---|---|---|
| "intuitive mediational" (CONFUCian, Buddhist, Taoist, non-Aryan Hindu) | accorded to natural history (classic China, MANU, ancient Indian Aryan conquerors, Islamic law codes, those preceding the Stoic Roman law) | abstract contractual |

—, in terms of which, in the Far Eastern arrangement denominated as i n t u i t i v e m e d i a t i o n a l ,

> "[t]he procedure […] is to push legal codes into the background, preferably dispensing with them altogether, and to bring the disputants into a warm give-and-take relationship, usually by way of a mediator, so that previously made demands can be modified gracefully, and a unique solution taking all the exceptional circumstances of the case into account is spontaneously accepted by both disputants. Codes there may be, but they are to be used only as a last resort, and even then recourse to them brings shame upon the disputants. […] Not only is there no resort to a legal rule; there is also no judge. Even the mediator refuses to give a decision. Instead, the dispute is properly settled when the disputants, using the mediator merely as an emissary, come to mutual agreement in the light of all the existential circumstances, past, present, and future. […] Not the abstract universals of a

[16] Henri Lévy-Bruhl *Sociologie du droit* (Paris: Presses Universitaires de France 1961) 127 pp. [Que sais-je? 951], p. 116.

[17] F[ilmer] S[tuart] C[uckow] Northrop *The Complexity of Legal and Ethical Experience* Studies in the Methods of Normative Subjects (Boston: Little, Brown & Co. 1959) 331 pp., on p. 184.

> legal code, but the existential particularity of the concrete problematic situation […] is the criterion of the just and the good."[18]

By contrast, in an arrangement developed in accordance with n a t u r a l h i s t o r y in a naive realistic way—

> "Its codes […] are expressed in the syntactical grammar of the language of common-sense objects and relations […;] the codes describe the biologically conceived patriarchal or matriarchal familial and tribal kinship norms of the inductively and sensuously given status quo."

—, realistic universals are applied.[19] Finally, in a law according to an a b s t r a c t c o n t r a c t u a l i d e a l, there is some

> "technical terminology […] permitting the construction of legal and social entities and relations […while...] its identification of the ethical and the socially legal with abstractly and imaginatively constructed […] human norms and relations […] makes possible ethical and legal reform." Because "[b]efore this code all men are equal; they are instances of the same universals; their existential particularity is ethically irrelevant." "Thereby [...] a contractually constructed norm cannot be regarded as ethical unless if it holds for any one individual it also holds for any other."[20]

At just about the same time a new upswing occurred also, due to reform initiatives addressed at classical comparative law. SCHNITZER, as the pioneering first, claimed (1961)[21]—after having revised his earlier suggestion (1945)[22]—that there were five great blocks of civilisation—

| | | | | |
|---|---|---|---|---|
| primitive peoples | antique cultural peoples (Egypt, Mesopotamia Hellas, Rome) | European–American • Romanist • Germanic • Slavic • Anglo–American | religious • Jewish • Christian • Islamic | Afro-Asian • Asian • African |

[18] *Ibid.*, pp. 184–185. As he remarks on p. 186, all this is akin to the radical empiricism and nominalism of DEWEY, KIERKEGAARD, and SARTRE as well, as "behind this intuitive, mediational type of law in Asia there is a CONFUCian, Buddhist and pre-Aryan Hindu epistemology which affirms that full, direct and exact empirical knowledge of any individual, relation or event in nature reveals it to be unique".

[19] *Ibid.*, p. 186.

[20] *Ibid.*, pp. 188, 188 and 189.

[21] Adolf F. Schnitzer *Vergleichende Rechtslehre* I, 2. erweit. & neubearb. Aufl. (Basel: Verlag für Recht und Gesellschaft 1961), pp. 133. et seq.

[22] Adolf F[riedrich] Schnitzer *Vergleichende Rechtslehre* (Basel: Verlag für Recht und Gesellschaft 1945) xii + 497 pp., on pp. 86 et seq.

—, within which each and every "great cultural circle" [*große Kulturkreise*] could generate a corresponding "c i r c l e o f l a w " [*Rechtskreis*]. Accordingly, the respective cultures are to be separated historically in a way that encompasses the whole of legal development. Probably only this can explain why the Nordic region was not differentiated within a Euro–Atlantic civilisation taken as a coherent block.

It is remarkable that the classification by ZWEIGERT, published about the same time (1961), concentrating on the present when distinguishing variations in the middle-term of "circles of law",[23] repeated almost word for word the scheme once formulated by ARMINJON, NOLDE and WOLFF in 1950, while exclusively adding the Far-Eastern variant to it.[24] His division—

| | | | | |
|---|---|---|---|---|
| Romanist | German | Nordic | Anglo-Saxon | Communist |
| Eastern (non-Communist) | | Islamic | Hindu | |

—is not only conclusive but also justified, in as much as he clarifies his presuppositions. Avoiding unifactorality (but presuming that differing results will ensue depending on whether public law or private law has been taken into consideration), the s t y l e of the overall legal system is selected as the basis of classification, which is a compound of its (1) h i s t o r i c a l o r i g i n and (2) characteristic m o d e o f t h i n k i n g , as well as of its (3) l e g a l i n s t i t u t i o n s (especially in case of developed Western law) and (4) s o u r c e s o f l a w , taken together with their i n t e r p r e t a t i o n (especially in case of Islamic and Hindu laws), and, finally, also of the (5) i d e o l o g i c a l a t t r i b u t e s underlying the ideal of the respective legal order (especially in case of laws with religious background or socialist roots).[25]

As already remarked once, the S o c i a l i s t (or, in its original inspiration, the S o v i e t) l a w appeared as a separate type in the work of

[23] Konrad Zweigert 'Zur Lehre von den Rechtskreisen' in *XXth Century Comparative and Conflicts Law* Legal Essays in Honor of Hessel E. Yntema, pp. 48–54.

[24] *Ibid.*, p. 55.

[25] Konrad Zweigert & Hein Kötz *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* I: Grundlagen (Tübingen: Mohr 1971), pp. 69 and 74.

DAVID, the first author of the Cold War, as early as in 1950, and remained a recurrent component until the fall of the Socialist world system.

Moreover, the term would also be utilised—in addition to instances of over-ideologisation or over-politicisation—through theoretical generalisation. For example, KULCSÁR (1961)[26] would suggest a dichotomic division from the outset—

| Exploitative | Socialist |
|---|---|
| [protection of the *status quo,* affecting external behaviour only by setting limits to it] | [also building a new society with targeted education transforming the whole man] |

—, which would consolidate as precisely an expression of timely need.[27]

Even if from some opposite starting point—based not on the futurism of forming man according to Socialist utopianism, but on exactly that which Socialism denies from the Western achievements of several millennia of civilisational development—, Western thinkers arrived at a similar result in a typological sense. Thus, according to the Indian BOSE (1962), the only criterion of division cannot be but the nature and degree of "adherence to the rule of law".[28] Accordingly, there are two opposing poles and various transitions distinguished—

[26] Kálmán Kulcsár *A jog nevelő szerepe a szocialista társadalomban* [The educative role of law in a socialist society] (Budapest: Közgazdasági és Jogi Könyvkiadó 1961) 367 pp., on pp. 9–12.

[27] As a doubtlessly number one authority, SZABÓ remarks that "it is the discrepancy of characteristics that prevails over formal similarities"—Imre Szabó 'Ellentmondások a különböző társadalmi rendszerek joga között' [Contradictions between the laws belonging to different social systems] *Állam- és Jogtudomány* VI (1963) 2, pp. 155–167, on p. 160 {also as 'Les contradictions entre le droit des différents systèmes sociaux' *Dialectica* Revue internationale de philosophie de la Connaissance [Neuchâtel] 14 (1964), pp. 351–371}—, therefore "there is no basis for legal comparison between the two types of law that would theoretically »stand beyond« this extent of class determination"—Imre Szabó 'Az összehasonlító jogtudomány' in *Kritikai tanulmányok a modern polgári jogelméletről* [Critical studies about modern western legal theory] ed. Imre Szabó (Budapest: Akadémiai Kiadó 1963), pp. 39–88 at p. 72 {also as 'La science comparative du droit' *Annales Universitatis Budapestinensis de Rolando Eötvös nominatae* Sectio juridica 5 (1964), pp. 91–134}.

[28] Justice Vivian Bose 'Legal Education as a Basis for the Rule of Law in Africa and Eastern Countries' *Columbia University Law Alumni Bulletin* VII (1962) 2.

| Western | transitions | Communist |
|---|---|---|
| [so solid that no change in foundations is conceivable] | • West-related<br>(India, Malaysia, Jordan, partly Africa)<br>• partial<br>(Burma, Pakistan, Turkey)<br>• dictatorship behind a mere legal *façade*<br>those preceding the Stoic Roman<br>(Indonesia, Guinea)<br>• total chaos<br>(Congo) | |

—, in which the dynamism of the intermediate sphere (with the value-orientation of the tendencies of development that may forecast recent directions) seems to be the most progressive element.

GORLA (1963) substantiated the world's division into two, taken as the hegemony of one definite standard expected to be a force capable of suppressing anything else, while introducing in his typological foundation the concept that the opposition between the capitalist and the Socialist law overwhelms the one between the Civil Law and the Common Law. As he explicates by a lucid distinction—

| *formal difference* | | *difference of substance* |
|---|---|---|
| Continental | Anglo-Saxon | Socialist |

—, "The difference between »continental (or Romanist) law« and »common law« is certainly rather formal, i.e., drawn by a criterion that distinguishes and approaches forms (structures, techniques and concepts), rather than »substance«."[29]

The debate addressing the issue for a quarter of a century as to how much the distinctive features are expected to stem from a common basis and their ideological background—in addition to the separation of the distinctive ones from within a single entity—compelled the French master of post-war legal comparatism to change his stand definitely. Having left be-

[29] Gino Gorla 'Intérêts et problèmes de la comparaison entre le droit continental et la Common Law' *Revue internationale de Droit comparé* 15 (1963) 1, pp. 5–18, at p. 9: "Certes, le critère »droit continental (ou romaniste) – common law« peut sembler plutôt formel, un critère qui distingue et rapproche les formes (structures, techniques et concepts) plutôt que la »substance«."

hind the community of ethos indicated by the category of "Western law", DAVID then proposed (1964) the introduction of two mutually supplementing criteria, namely, "l e g a l t e c h n i q u e" (including vocabulary, concepts, hierarchy of the sources of law and juridical methods) as well as "p h i l o s o p h i c a l , p o l i t i c a l o r e c o n o m i c p r i n c i p l e s d e s i r e d t o b e i m p l e m e n t e d" —only providing that "[t]he two criteria are to be used subsequently and not in isolation."[30] Accordingly, he re-formulated his taxonomy, using the middle term of "legal family" [*famille de droit*] in the following way:

| Romanist–German | Socialist<br>• Soviet<br>• peoples' democracies | Anglo-Saxon<br>• English<br>• USA | religious or traditional<br>• Muslim<br>• Indian<br>• Far-Eastern<br>(Chinese, Japanese)<br>• African & Madagascan |
|---|---|---|---|

Albeit this separates what is obviously distinct from within the diverse formations (or Soviet deformations) of Western civilisation, yet in a scholarly indefensible manner it relegates everything non-Western into one single and improperly defined notional category. For indeed, any reference to "philosophical, religious or traditional"[31] laws is hardly more in the final analysis than a mere pretext for separating what is "other" or "different". Following such logic, any comparatist—from the Far East via the Muslims to the *Malagasy* and *Hova* tribes in Madagascar—might arrange a *cliché* to group Berlin, Paris, Rome, London and New York into the same category of esoterica alongside with Moscow and Tirana.

So it is not by chance that critical self-reflection had to continue. For instance, RODIÈRE (1963) responded to the challenge by narrowing the circle of legal regimes to be classified. He opined that as to the prospects of foreseeable future harmonisation, there is no common basis of comparison be-

[30] René David *Les grands systèmes de Droit contemporains* (Paris: Dalloz 1964) 630 pp. [Précis Dalloz], p. 16. „Les deux critères doivent être utilisés cumulativement, et non isolément."

[31] DAVID is also inconsequent in that his Table of contents indicates *„droits religieux et traditionnels"*, while the text relates to *„systèmes philosophiques ou religieux"* (*ibid.*, p. 23), albeit some justification will follow in his presentation, for "These systems, quite independent from each other, are not to qualify as genuine families. […] Even the claim whether they are to mean law at all can be doubted." *Ibid.*

yond the reach of CHRISTianity.[32] Accordingly, only a threefold partition—with the types of

| French | Angol-Saxon | Soviet |
|---|---|---|

—is suitable for comparison. Moreover, he even remarked that regarding terminology, it is French and Soviet laws, and regarding principles, French and Anglo-Saxon laws, that are genuinely comparable to one another. And he added: Soviet law seems to harmonise with western continental law in formal tradition with well-developed solutions and techniques defining a common direction; Anglo-Saxon law differs from the French one solely by its specified techniques; and the Soviet law sharply separates from the French and the Anglo-Saxon ones mostly by their guiding principles.[33]

Following this line of thought, grouping in terms of the variations of a definite correlation amongst the above elements had by then become the standard pattern. The classification put forward by MALMSTRÖM (1969), based principally upon historical characteristics with varying subdivisions[34]—

| Western (European–American) | Socialist (Communist) | Asian (non-Communist) | African German |
|---|---|---|---|
| • continental<br>• Latin American<br>• Nordic<br>• Angol-Saxon | • Soviet<br>• peoples' democracies<br>• Chinese | | • Anglophone<br>• Francophone |

—proposed the most enlarged version since DAVID's early attempt in 1950, as the very first to grant the laws of Latin America a named status, while he grouped distinct civilisations under one bland collective notion to typify regimes in Africa that have managed to survive as faint copies of their English or French colonisers' law. The other variation produced at that time was the typology improved by ZWEIGERT & KÖTZ (1971)[35]—

[32] Rodière *Introduction...* (1963), pp. 26–27.

[33] *Ibid.*, pp. 14–16.

[34] Ake Malmström 'The System of Legal Systems: Notes on a Problem of Classification in Comparative Law' *Scandinavian Studies in Law* XIII (1969), pp. 127–149.

[35] Konrad Zweigert & Hein Kötz *Introduction to Comparative Law* I, trans. Tony Weir (Oxford: Clarendon Press 1987). The first edition in German in 1971 (note 25, p. 74) still empha-

| Romanist | German | Anglo–American | Nordic | Socialist |
|---|---|---|---|---|
| Far Eastern | | Islamic | Hindu | |

—, which in fact is a version of the proposition by ZWEIGERT in 1961, scarcely modified but expressly worsened, as the Scandinavian law, put in-between the Anglo–American and the Socialist arrangements, is definitely cut from both its Romanist and Germanic roots.[36]

The proliferation within a few decades of attempts bearing the marks of fashion may have discredited the undertaking itself and the merits of the whole enterprise; at least no new proposal could be heard about during the subsequent quarter of a century. EÖRSI's distinction with sensitivity to civil law (1973)[37] represented again a MARXist historical perspective, while adding to KULCSÁR's typology ("exploitative / Socialist") framed a decade ago—

| natural communities | capitalist<br>• English & Nordic<br>• French<br>• Germanic<br>• Central & Southeast-European | Socialist |
|---|---|---|

—, and excelling by the presentation of Anglo–American and Scandinavian laws in one common category as well as by the very naming of the Central and Southeast-European region.

sised that "Common historical sources which exist at the beginning of the evolution, lose their importance with regard to the »style« of the legal systems when later events exert a more determining influence on them". A sharp and justified criticism of such a separation of Romanist and Germanic arrangements up to their roots is provided by Imre Zajtay 'Reflections on the Problem of Grouping the Families of Law' [1973] in his *Beiträge zur Rechtsvergleichung* Ausgewählte Schriften, hrsg. Karl F. Kreuzer (Tübingen: Mohr 1976), pp. 70–73 [Materialen zum ausländischen und internationalen Privatrecht 25].

[36] It is not by chance that the British critic sees in such a grouping more of chaos than of systemic taxonomy. See William Twining 'Globalization and Comparative Law' *Maastricht Journal of European and Comparative Law* 6 (1999) 3, pp. 217–243, at p. 232.

[37] Gyula Eörsi 'On the Problem of the Division of Legal Systems' in *Inchieste di diritto comparato* 2, ed. M[ario] Rotondi (Padova & New York: CEDAM & Oceana 1973), pp. 179–202, on p. 196.

The other comparatist endeavours at the time mostly contributed to the clarification of the fact that Common Law is a genuinely faithful heir of the richness of Roman law, nurturing exactly both from, and further on, its roots. (Ironically enough, this realisation coincided with the gradual relocation of the scholarly cultivation of Roman law from its one-time exclusivity in the Latin–Germanic region of Middle Europe to the English-speaking areas, calling for common law mentality as local sensitivity.) Accordingly, SCHLESINGER (1960) pointed out that "in spirit and method, and also in many particulars, classical Roman law is closer to the Common Law than to the modern civilian codes." Or,

> "in a common law system the case law, made binding by the doctrine of *stare decisis*, represents an element of stability, and [...] change is brought about mainly by statutory law. [...] In the civil law, on the other hand, the codes provide some certainty (at least verbal certainty) and structural stability, while judicial »interpretation«, unfettered by a formal rule of *stare decisis*, constitutes an element of flexibility."[38]

[38] Rudolf B. Schlesinger *Comparative Law* Cases – Text – Materials, 2nd ed. (London: Stevens 1960) xliv + 635 pp., on p. 174 & p. 187, note 2. Even if striking by its lucidity, probably all this is by far not new. Ernst Rabel asserted as early as sixty-five years ago—'Schriften aus dem Nachlaß: Vorträge – Unprinted Lectures' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 50 (1986) 1–2, pp. 322–323—that

> "English and Roman [...] analogies in their policies of building an empire, and also in basic qualities of their legal habits. Customary law is paramount; the case law method, progress from case decision to case decision, prevails; a cautious tradition forms crude beginnings into refined justice, supported by the dualism of customary strict law and equitable practice of magistrates—*jus civile* and *praetorium*, common law and equity—and the entire doctrine is devoted to the question of what action or defense a party has in court; whereas we now ask with JUSTINIAN: what is a party's right without any litigation?"

This is a basic truth according to which "The common law establishes its general principles by considering how a reasonable man would act in particular circumstances while the natural law method is to state general principles and then to assume that the reasonable man would act in accordance with them." Arthur L. Goodhart *English Contributions to the Philosophy of Law* (New York: Oxford University Press 1949) 44 pp. [Benjamin N. Cardozo Lectures 1948], p. 35.

It is to be noted how much the characterisation building on the Anglo–American reconstruction of the Roman legal tradition is more sophisticated and alive, compared to continental approaches exhausted by inductivity contrasted to deductivity. For instance, POUND's opinion that the "essential difference between the civil law and the common law is one not of substance but of method" was not interpreted simplistically by F[rederick] H[enry] Lawson *A Common Lawyer Looks at the Civil Law* (Ann Arbor: University of Michigan Law School 1953) xvii + 238 pp. [Thomas M. Cooley Lectures 5], p. 46 (whereas "a code is not a necessary mark

In the last decade of the second millennium, some faint attempts at providing at least some didactic indication amongst altered conditions eventually re-emerged. The Czech KNAPP was among the first to dispense with Socialism (1991) and to acknowledge Western law had survived in its old dual form after the collapse of the Soviet empire—

| continental | Anglo–American | canon |
|---|---|---|

—, remarking that Civil Law and Common Law, in company with the Islamic legal culture, are now the global systems developed enough to be worthy of dedicated jurisprudential analysis.[39] – At Lund, BOGDAN (1994) was even more cautious and pragmatic, as if pondering: why talk about more than is worthy of introduction at a certain depth anyway? His specification and treatment in a Swedish textbook—

| French | German | Scandinavian | English | Russian |
|---|---|---|---|---|
| Islamic | | Hindu | | |

—did not waste space with Nordic generalisation but saw Socialist law surviving in peripheries, and even proposed Chinese law for analysis.[40]

Conceptions following in time were scarcely more than variations on traditions brought about by predecessors. Thus, for example, VAN HOECKE & WARRINGTON (1998) openly re-proposed the scheme dividing "u s" from "o t h e r s"[41]—

| Western | other<br>• Asian<br>• Islamic<br>• African |
|---|---|

of a civil law system nor the absence of one a mark of a common law system") but all this is to signify a difference in the "type of mind", meaning that "a civil law system is favorable to codification", a circumstance "more important than codes" themselves.

[39] Viktor Knapp *Základy srovnávací právní vidy* [Outlines of comparative jurisprudence] (Praha: Aleko 1991) 125 pp. [Prameny a nové proudi právny vidy 5], pp. 52–53 and 58.

[40] Michael Bogdan *Comparative Law* (Stockholm: Kluwer & Norstedts Juridik & Tano 1994) 245 pp.

[41] Mark van Hoecke & Martin Warrington 'Legal Cultures, Legal Paradigms and Legal Dogmatics: Towards a New Model for Comparative Law' *International and Comparative Law Quarterly* 47 (1998) 3, pp. 495–536.

—, linking (without any originality of thought as simply identified by geographical areas) immensely diverse, vast cultures that have nothing in common beyond merely being "non-Western", with the rest of human culture simply amalgamated. – GLENN's grouping (2000)[42] also met a call for practicality —

| | | | |
|---|---|---|---|
| chtonic | Talmudic | of civil law | Islamic |
| common law | Hindu | Asian | |

—with the additional feature that, by referring to genuine traditions, (a) he intended to separate philosophically clearly identifiable historical patterns of thought, within the framework of which (b) he started with the *chthonic* (i.e., ancient, primitive, organic [*chthōn* = earth]) model of order, notwithstanding the fact that hardly any institutional law could have developed within it.

Approaching the new millennium, typological experiments re-appeared in a renewed guise that associated the dedication of legal mapping with the present, while including historical developmental overviews. At the same time, they enriched the static reflection of the past or present with an indication of the formation's dynamic motion from somewhere to somewhere. All this may have been motivated by the realisation that everything momentarily prevailing can only be interpreted as the section given at a single moment of ceaseless formation. At the same time, there is a practical need to find comprehensively substantive categories expressing the directions and limits of globalising legal effects, both actual and potential. For instance, MATTEI, the Italian comparatist active in the United States, made a proposition (1997) to amalgamate politics, law, and philosophical and religious tradition in one scheme of classification,[43] suitable to provoke passionate debates. In the final analysis, this scheme—

[42] H. Patrick Glenn *Legal Traditions of the World* Sustainable Diversity in Law (Oxford: Oxford University Press 2000) xxiv + 371 pp. Cf. also, by the author, 'Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline' *Acta Juridica Hungarica* 48 (2007) 2, pp. 95–113 & <http://akademiai.com/content/gk485p7w8q5652x3/fulltext.pdf>.

[43] Ugo Mattei 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' *The American Journal of Comparative Law* 45 (1997) 1, pp. 5–44, on p. 19.

| professional law | political law | traditional law |
|---|---|---|
| (Western legal tradition) [separation of legal & political decision making, secularisation of law] • British & American • Roman & Germanic • Nordic • mixed | (law of development) [unstable] (ex-Socialist, Southeast European, Cuban, unestablished African & South American) | (oriental view) • Islamic • Indian and Hindu • other Asian / CONFUCian (Chinese {diverging towards the political} & Japanese {developing towards the professional},[44] post-Soviet-Asian, ex-Socialist Asian) |

—contrasted the West to the East, that is, the law of secular autonomous p r o f e s s i o n a l i s m to the law of t r a d i t i o n a l i s m, rigidified in its past, both standing for permanence and stability as benchmarks of conceivable alignment, only in order to insert in-between that which is in flux, which is instable and dependent, dominated by mere p o l i t i c s, yet able to evolve in either of the above directions. In addition, MATTEI did not even consider his scheme as a system of commensurable subjects but rather as a viewpoint or a recommendable notional approach for possible grouping. This is so because its components are seen to be in constant movement, as subjects that are not homogeneous entities but sets strained by inner conflicts, bound to diverge in various directions. For

> "[t]he same system may belong to the rule of traditional law if we consider family law, while belonging to the rule of professional law as far as commercial law is concerned, and to the rule of political law when we look at its criminal justice system."[45]

In the ethos and drift of debates induced by MATTEI, the Finnish HUSA (2004) presented the available configurations in a cross-referential frame. His grouping of a double division[46]—

| | *strengthening/established* | *weakening/unestablished* |
|---|---|---|
| *Western* | • civil law • common law | • Socialist |

[44] *Ibid.*, p. 16.

[45] Jaakko Husa 'Classification of Legal Families Today: Is It Time for a Memorial Hymn?' *Revue internationale de Droit comparé* 56 (2004) 1, pp. 11–38.

[46] *Ibid.*, p. 30.

| | | |
|---|---|---|
| *non-Western* | • Islamic<br>• Hindu | • African<br>• Asian |
| *mixed* | (Israeli, of Québec) | (Scottish, Louisianan) |

—polarised about the centrifugality of becoming established and the centripetality of being unestablished, and the substantiation through Western and non-Western models or impacts, at the same time. It treated Socialism as a transitional phase from the outset, an inherent product of the West, for "socialist law is culturally a European innovation [...] of European MARXism", independently whether taken as generation or degeneration.[47] As to the Eastern tradition, only the Muslim and Hindu laws were specified as sufficiently established and worthy of analysis. Or, Korean, Chinese and/or Japanese CONFUCIanism were portrayed as weakening and vanishing in law, therefore relegateable to a category with the uncertainties of Africa, and as left without doctrinal analysis. Finally, in his mixed category it is reassuringly realistic to encounter Scottish law as foreseen to change (certainly reviving again its Roman roots), Louisiana (presumably weakening in resistance to Americanisation), and Israel (as settled in multiculturality).

## 3. Impossible Taxonomy, or the Moment of Practicality in Legal Mapping

While in theoretical legal thinking one may notice the progressive historical accumulation of philosophical-methodological foundations, legal comparatism needs, apparently as part of each step, to be restarted anew, although a major part of its literature has ever been engaged in resolving the riddle of what comparison may mean at all in law.

The expressive simile that the laws' classification still "finds itself in the condition of botany and zoology before LINNAEUS and of anatomy before CUVIER"[48] highlights the unsettled nature of the preliminary issues of legal mapping. For natural objects exist as evolved timelessly and autonomously, with underlying structures forming the principle of sensible separation, de-

[47] Ibid., p. 30.

[48] L[éontine]-J[ean] Constantinesco *Traité de droit comparé* 3: La science des droits comparés (Paris: Economica 1983), p. 21, note 5. "se trouve dans la situation de la botanique et de la zoologie avant Linné et de l'anatomie avant Cuvier".

scribable by some physicality. In contrast, legal systems are historically forming objectivations. They evolve in various communities belonging to separate civilisations, contextualised by various cultural media, scarcely featuring anything in common. Their common denominator (or *genus proximum*) can only be the need for, and organisational force of, abstracting human conceptualisation on the social ideal of *ordo*. Or, from the variety of ways in which human organisations can be arranged with the help of various (religious, ethical, economic and political) means, that which our conventionality calls 'law' or phenomena 'embodying the law' will be selected—as *differentia specifica*—from the realisation that (a) the law is a global phenomenon by embracing the whole of society when (b) it settles (resolves) society's basic conflicts of interests (c) in its quality of serving as society's final regulatory and controlling force.[49] Consequently, being a heterogeneous set resisting any taxonomy, it is exclusively the practical human need that may, if at all, force it to be classified, in order that minor groups of components can be characterised as some kind of unity. Therefore, stating that grouping "[f]or some comparatist […] may serve […] a utility […] similar to […] taxonomies."[50] or that it is resorted to "above all, for taxonomic reasons"[51] can at most be a figurative expression. We get closer to a feasible answer by simply declaring that "classifications are made for the purpose of simplification",[52] that is, that conglomerations will be dissected into minor units with the view of rendering their heterogeneous components more manageable in practice.

Literature is clear in realising that "it is impossible to establish a uniform system of classification which is ideal from every point of view and implies a clear distinction between »families« or groups".[53] In conclusion, it is not our knowledge, or initiation into scholarship, that is insufficient—even if this was the case before CAROLUS LINNAEUS or GEORGES CUVIER, or (in describing the set of elementary material components) DMITRI IVANOVICH MENDELEEV. What is at stake here is the brutal fact that our object can only

[49] For further explication, see, by the author, *The Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999), para. 6.1, p. 204.

[50] Jaakko Husa 'Legal Families in Comparative Law – are they of any Real Use?' *Rettfærd* [Copenhagen] 24 (2001), Nr. 95, pp. 15–24, at p. 18.

[51] Zweigert & Kötz, p. 63.

[52] Esin Örücü 'Mixed and Mixing Systems: A Conceptual Search' in *Studies in Legal Systems* Mixed and Mixing, ed. Esin Örücü, E. Attwooll & S. Coyle (The Hague: Kluwer Law International 1996), pp. 335–351, on p. 335.

[53] Malmström 'The System...' (1969), p. 138.

be seen as a section of incidental sets, emerged from incidental processes with incidental components, that may, its being in constant formation notwithstanding, yet be projected notionally as a fixed block, stable enough to be subjected to systematic investigation without, however, any self-closing theory being justified.

Whether the notional designation of a historical epoch, an artistic style, a group of legal systems or the implementation of any other artificial human ordering principle is at issue, this can only be the middle category of some comprehensive socio-cultural description, which is most suited for c h a r a c t e r i s a t i o n rather than for definition.[54] Any such notional designation is the conventionalised issue of classifying objects, a generation of human culture to project some sensible order. As to such designations, the dilemma whether they represent a real or an ideal type is not to be resolved by them. Likewise, it is not a *sine qua non* characteristic whether or not they have a reference in reality. In the sense of epistemological reflection (or correspondence), they are not necessarily either true or false, nor need they be without alternatives. Instead, they are suitable for purposes of comprehensive typological characterisation, thanks to the classification performed. Any such description is open-ending as "there can never be any final proof of what is »important« or »essential«"[55] in a grouping. Therefore, the obvious fact that all such operations "are generally embedded in local cultural and social systems, and serve various social functions"[56] is neither an auxiliary

[54] E.g., Ernst Cassirer *The Logic of the Humanities* [Logik der Kulturwissenschaften] trans. Clarence Smith Howe (New Haven: Yale University Press 1961) 217 pp., on p. 140 separates the c u l t u r e - c o n c e p t s from the n a t u r e - c o n c e p t s with reference to the pioneering groundwork of Heinrich Wölfflin *Kunstgeschichtliche Grundbegriffe* Das Problem der Stilenentwicklung in der neueren Kunst (München: Hugo Bruckmann Verlag 1915) xv + 255 pp. {*Principles of Art History* The Problem of the Development of Style in Later Art, trans. E. D. Hottinger (New York: Dover Publications 1950) xvi + 237 pp. [Dover Books on Art History]}, by stating that the former "characterize but [...] not determine; for the particulars which they comprehend cannot be deduced from them." The same conclusion is reached in logic by distinguishing c o n c e p t s o f o r d e r (suited for characterisation exclusively) from c l a s s - c o n c e p t s (which define inclusion in a conceptual extent), by Carl G. Hempel & Paul Oppenheim *Der Typusbegriff im Licht der neuen Logik* (Leiden: Sijthoff 1936) vii + 130 pp.

[55] Arthur Spiethoff 'Die Allgemeine Volkswirtschaftslehre als geschichtliche Theorie' in *Festgabe für Werner Sombart* zur siebenzigsten Wiederkehr seines Geburtstages 19. Jänner 1933, hrsg. Arthur Spiethoff (München: Duncker & Humblot 1933), p. 57. [Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche 56:6], quoted by Zweigert & Kötz, p. 69.

[56] <http://en.wikipedia.org/wiki/Taxonomy>.

feature nor mere historical coincidence but the expression of their plain practicality.

Even though categories like "cultural and legal circles" with varying "styles" may seem somewhat rudimentary,[57] nevertheless all this embodies a decisive step departing from the false objectivity of rule fetishism[58] to arrive at the law's inner understanding as a basically cultural phenomenon. This is an elementary conjecture of the recognition of law as culture, culture of thought, of ordering, etc., to foster also, among others, an interest in the comparative judicial mind.[59]

In sum, in order to speak distinctively about past and present legal systems, as arranged in some groupings that may allow us to characterise their minor sets in a generalising way, first we have to reckon what we are talking about at all. That is, we have to re-construct them within a typology set up for exactly such a purpose, that is, as subordinated to (quasi) class-concepts in a (quasi) logical form. This very form still will remain empty as, in want of any meta-culture suitable for derivation, there is no criterion or framework that could serve as a bridge between differing cultures. Consequently, the result of any classifying enterprise can only be some characterisation fluctuating in terms of more or less, in the course of which we commeasure independent phenomena by provoking them to respond to questions that are alien to their specifics—even if making sense from some practical point of view. Or, the criticism as to the necessary deficiency of classification is in the final analysis nothing but self-criticism of the presuppositions generated by the Western Utopia of rationalism, ready to logify everything within its one principled perspective. Eventually it tells

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[57] Cf., e.g., by L[éontin]-J[ean] Constantinesco, 'Die Kulturkreise als Grundlage des Rechtskreise' *Zeitschrift für Rechtsvergleichung* 22 (1981), Nr. 80, pp. 161–178 and 'Über den Stil der »Stiltheorie« in der Rechtsvergleichung' *Zeitschrift für vergleichende Rechtswissenschaft* 78 (1979), pp. 154 et seq.

[58] This recognition as an intuition is hardly formulated expressly in comparatism yet. Even the harsh criticism by Hoecke & Warrington 'Legal Cultures...' (1998), p. 502 stops at stating that "It is doubtful whether the traditional »law as rules« is able to offer sound basis for »legal family« classifications".

[59] Cf., e.g., *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992), Part IV: Comparative Legal Methods, pp. 331–447 [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] and *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), Part II: The European Legal Mind, pp. 87–166 [Tempus Textbook Series on European Law and European Legal Cultures I].

less about its subject than about ourselves: the predomination of our thought by logifying rationalism and natural-science-patterned theoretical epistemology.

This is one of the cases of enchantment in scholarship. For, in the final analysis, we all live with some "us"-consciousness[60] and—using a double standard in classifications—we put "Western legal culture at the top of some implicit normative scale".[61] By the same gesture, in fact, we deprive ourselves of the "critical potential"[62] of any objective evaluation. Nevertheless, this very bias is not blameworthy. We are mapping legal systems precisely for the sake of perceiving them as contrasted to our familiar one, in the specific characteristics and direction that distinguish them as differing from the one we are accustomed to. Frankly speaking, it is neither a critical distance proposed by the objectivity of scientific description nor an external observer's position by which we approach such arrangements that we deem to be different. Quite to the contrary, we do so in order to cognise our own better, that is to say, to c o m p a r e the latter with the former, upon the basis of our own culture. So we are neither neutral nor in want of sympathy but, contrariwise, we wish simply to cognise, for ourselves, on the basis of knowledge we have acquired so far. Consequently, in the meantime, in order to know the other, too, we have to act "against the natural tendency to use without reflection the ideals of one's own system as the normative measure".[63]

Considering the extent to which the Soviet/Socialist law could come into focus during the Cold War epoch through also predominating the efforts to group legal arrangements during that period,[64] we can now regard it either as a historical accident or as a contingency of politico-scholarly considerations that almost no typology proposed that the laws of the Bolshevism,

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[60] Husa 'Classification…' (2004), p. 17.

[61] Gunter Frankenberg 'Critical Comparisons: Re-thinking Comparative Law' *Harvard International Law Journal* 26 (1985) 2, pp. 411–455 at p. 422.

[62] Anne Peters & Heiner Schwenke 'Comparative Law Beyond Post-modernism' *International and Comparative Law Quarterly* 49 (2000) 4, pp. 800–834, at p. 821.

[63] John C. Reitz 'How to Do Comparative Law' *The American Journal of Comparative Law* 46 (1998) 4, pp. 617–635, on p. 623.

[64] Cf., as a Hungarian case study by the author, 'A szocializmus marxizmusának jogelmélete' [Legal philosophy of the Marxism of socialism] *Világosság* XLV (2004) 4 [Marxizmus és jogelmélet], pp. 89–116, in para 1.3.d [A Hungarian overview: Institutionalisation accompanied by relaxation (from the 1960's: Comparatism on the international scene, the legitimisation of socialist law as a *sui generis* type and, in Hungary, the professionalisation (in rehabilitation) of law taken as a separate scholarly subject ], pp. 96–97.

Fascism and National Socialism be recognised between the two World Wars, notwithstanding the fact that their expansion was spectacular, and their self-identity, rejecting and surpassing the Roman ideal of law, combative and firm. Maybe the torpidity of comparatism's classifying inclination and the alarm generated by the interwar Bolshevik/Fascist/NationalSocialist experiments—or, in brief, *realpolitik* alone—can explain the selectivity in terms of which at given periods of time, certain phenomena may actually be filtered through conceptual generalisation to become a general category of classification, while others may perhaps not. Therefore, in social matters, the reason why certain features become conceptualised does not lie necessarily and exclusively *in se* and *per se* but, in part at least, also in our desire to make them be classified.

## 4. Diversity as a Fundamental Quality of Human Existence

Extremities such as the dichotomisation separating "us" from "them" (standing for what is different) may easily lead to subjection by the prevailing mainstream, which frequently changes, by the way. The very threat of World War Two might have let the world's diversity be seen as a potential danger itself, in which even the national particularisation of laws could seem irrational—

> "the diversity of laws [...] is an obstacle to commerce and communications, created by misunderstandings of all kinds, which does not correspond to the economic and spiritual interdependence of the modern world"[65]

—, while we today, after the liberally rooted dogma of humankind's unity and uniformity has broken up, easily tend to antagonise the different as enemy. As a result of this, even a simplifying conclusion drawn from the c l a s h  o f  c i v i l i s a t i o n s [66] may potentially expose the legal map's

[65] Adolf F. Schnitzer *De la diversité et de l'unification du droit* Aspects juridiques et sociologiques (Bâle: Verlag für Recht und Gesellschaft 1946) 111 pp. [L'Institut Universitaire de Hautes Études Internationales {Genève} 24], p. 1. "La diversité des droits […] entrave le commerce et les communications, crée des malentendus de toutes sortes et ne correspond point à l'interdépendance économique et spirituelle du monde moderne".

[66] Samuel P. Huntington 'The Clash of Civilizations' *Foreign Affairs* 72 (Summer 1993) 3, pp. 22–28.

variegation as foreshadowing some "clash of legal families".[67] True, such fears and aversions may have indeed been supported by the Western law's rule-fetishism, forced to sense its own multiplication when it encountered the plurality of non-western laws.

However, once we recognise behind alienating reifications the strength of culture in law, and in the law's specificity the relative autonomy of how to find ways and paths to the order (re-)established,[68] we may come closer to understanding why it is necessary that the world's civilisational and cultural diversity be seen as a prerequisite of human existence, fundamental to survival.

[67] Heinrich Scholler 'Vorwort' in *Die Bedeutung der Lehre vom Rechtskreis und der Rechtskultur* hrsg. Heinrich Scholler & Silvia Tellenbach (Berlin: Duncker & Humblot 2001), pp. 7–11 [Schriften zur Rechtstheorie 201].

[68] Cf., e.g., by the author, *Jogfilozófia az ezredfordulón* Minták, kényszerek – múltban, jelenben [Philosophy of law at the millennial turn: Patterns and coercions in the past and present] (Budapest: Szent István Társulat 2004), »Comparative Legal Cultures«, pp. 9–66 [Jogfilozófiák].

# LEGAL TRADITIONS?
## In Search of Families and Cultures of Law*



The epoch of the ingeniously simple conception of the universe, offered by classical physics, seems to have been waning for a long time. For our reality can be pictured, from NEWTON almost to today, as consisting of sets of particles, bound together in an endless interconnection by the chain of causality or quasi-causality. Albeit this image had been temporarily shaken by thermodynamics a century ago, a sort of replica, broken down to elementary particles this time, re-emerged as again restored, with material aggregates re-organised at a molecular or atomic level. Well, until we could believe in the material entities and their given interrelations suggested by a naturalistic human approach to basic things, we also had an easy job in law. We could perceive rules with a mechanism destined for their enforcement, which in our intellectuality could be integrated into an all-comprehensive causality as an independent active force.

By now, our reference points, taken for granted so far as secure, have been shattered. Consequently, law is no longer what it used to be for us. Its supposed solidity has disappeared and started to slip out of our hands like sand. It is by no mere chance that topical subjects for professional interest and research of the type "law and…" started to appear a few decades ago (at first linked to such obvious companions as "society" and "economy", and then, "logic", with the connections becoming more sophisticated by linkage to "language", and arriving finally at "culture", "patterns of thought" and "communication"), to such an extent that nowa-

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days interest and research sometimes seem to take an exactly opposite direction. We no longer study the environment around law in order to explore it more completely (through more of its contexts). Instead, we focus our examination on the latter, that is, on the "and…" elements, hoping to acquire more profound knowledge perhaps about law as well if we start out from them. This is how the living culture (while also substantiating its corresponding ideal of order) is entering into our primary sphere of vision as the factor conditioning the law (instead of the reified view of mere rules); and the very thought of a rigidly formal, conceptual application, reduced to some merely mechanical logicism, is on the way to being replaced by the very idea of human problem-solving, pondering in a responsible way and eventually aiming at an optimum and disciplined balancing among mostly contradictory interests and values, through channelling the entire process to given paths.

All this has not left the chances of comparison unaffected either. It could indeed even strengthen its historical dimension, because forms of thought apparently obsolete, or made esoteric and often forgotten, could as a result of this become current again, supporting various kinds of search for a way out.

## 1. Comparative Law and the Comparative Study of Legal Traditions

By transcending the limits legal positivism has set on itself, the law's internal self-description is replaced by a description within an external (socio-historical or sociological or cultural anthropological) framework. Confronted today, on the threshold of the new millennium, with the recurrent job of rewriting textbooks inspired by the pattern of RENÉ DAVID's classic *Les grands systèmes de Droit contemporains*, one is faced with a dual choice: either to accept DAVID's loosened positivism by overviewing various legal families, or to take a wider socio-historical framework as a starting point. According to the trends that have evolved so far, opting for the second alternative offers again two paths to choose from: either grounding one's approach in the underlying c u l t u r e , as the law's natural medium, or, by unfolding the roots of various (legal) cultures, starting the investigation through (legal) t r a d i t i o n s themselves.

Summarising the valuable results of several decades devoted to comparative study in a novel global synthesis, H. PATRICK GLENN, lecturing on comparative Civil Law and Common Law at McGill University in Montreal,

undertook the task of surveying and philosophising upon the various traditions that have survived and are still living in our diversified legal world.[†] In fact, he mapped out the typifiable legal civilisations alive today in some coexistence with one another. Having completed a largely comprehensive analysis, his expressed purpose was to consider the strength of traditions underlying legal arrangements as parts of the intellectual treasure and social experience of mankind, their facility for change, renewal and association with other traditions, on the one hand, and the sustainability of their diversity and the synergy of traditions formed by different sorts of logic in both their development and functioning, on the other.

The *opus*, awarded the Grand Prix of the International Academy of Comparative Law in 1998, while captivatingly rich in ideas with countless enlightening discourses and conceptual developments relating to partial issues as well (not only processing the abundance of literature as well as data on law, development of ideas, diversity of cultures, etc., but also elaborating them analytically), also offers a uniquely fascinating piece of reading. The reader may find a most integrative presentation of the kinds of law and legal thinking in the overview of the Chthonic, Talmudic, Civil Law, Islamic, Common Law, Hindu, and Asian legal traditions. All this is done in a way worthy indeed of its subject, reading like an essay and impressive, at the same time in a charmingly philosophical engagement, so that the reader rejoices to encounter the finest virtues of English legal historical writing, showing not merely the law's irreducible cultural historical embeddedness but also the collective impact of intellectual and moral traditions on doctrinal and practical, belief-laden and values-focussed problem solving.

At the same time, the suspicion may arise that it is primarily through the author's essayism and his challenging way of opening stimulating new vistas that the old positivistic description of legal families expands to the treatment of legal traditions. His developments are, no doubt, integrated into one unified view. Starting from an analysis of tradition as such, taken as the originating source of inspiration and framework of imagination, the book introduces traditions underlying the various arrangements of law as case studies (worth monographic consideration in themselves), to arrive at a thorough pondering upon the commensurability and sustainability of diversity. The venture is novel on the whole, but without the force that would convince us that he has actually surpassed the culturally grounded histo-

[†] H. Patrick Glenn *Legal Traditions of the World* Sustainable Diversity in Law (Oxford & New York: Oxford University Press 2000) xxiv + 371 pp.

rico-comparative ideal at work behind the style of positivistic description already linked to RENÉ DAVID's one-time endeavour. The introductory and concluding chapters assess the force of traditions with powerful accents. However, his attempt to draw a panorama presenting all the diversity of legal arrangements in our present world as derived from identified legal traditions does not reveal characteristics of traditions that could not be traced back to what we commonly call legal families. All in all, his *captatio benevolentiae* interest in identifying legal cultures as traditions and categorising the diversity of legal arrangements as differing traditions may hold the promise of a truly remarkable innovation, albeit the question of how and in what respect, why and with what results he innovates is not answered. More precisely, the job is tacitly confined to drawing the evolutionary map of the diversification of legal development, which will, however, keep silence even in the (more implied than manifest) criticism of the category of 'legal family'. Moreover, the issue of whether or not legal tradition is a synonym of legal culture and how they are related is left unanswered.

## 2. 'System', 'Family', 'Culture', and 'Tradition' in the Classification of Law

After all, what conceptualisations do we have recourse to when we speak about the world's legal systems in general and their various groupings in particular?[1]

The distinction of 'system of law' and 'legal system' spread (in English-language literature, first of all) after the emphatic separation of positivistic and sociologistic approaches. 'System of law' seems to refer rather to the normative stuff seen in its mutual correlations (mostly as a textual aggregate, or at least as derivable from the textuality, of positivations, regulations and official expectations), while 'legal system' to focus on the functioning (actually assessed as a usually coerced) whole. (It is to be noted that, expressed

[1] It is indicative of the general uncertainty about methodological foundations that when the classifying characterisation of phenomena is at stake, it may be considered as a new realisation—as, e.g., in Jaakko Husa 'Legal Families and Research in Comparative Law' *Global Jurist Advances* I (2001) 3, p. 4, if we take it as unfolding from a given substance and perceivable in varying forms of social constructions gradually conceptualised as mutually related members of the same entity, growing from the millennium-long co-existence and mutual impact of in-themselves merely historical accidents—that, at the most, a proposition of a WEBERian ideal type can achieve at all.

in common terms, this does not imply another theoretical message than the conceptual duality of 'law in books' and 'law in action', once proposed by American pragmatic legal sociology.[2]) Due to the notion of system, both 'system of law' and 'legal system' do differ from 'law' [or '*droit*' or '*Recht*', but not 'a law' or 'the law'] in that they emphasise law as a whole in one organised unity. Or, they are certainly not used to describe either optional fragments or partial manifestations of the law. However, the categorial distinction between these possessive and attributive expressions has not become widespread beyond English professional usage. (In Hungarian, '*jogi rendszer*' [standing for 'legal system'] sounds quite artificial and is therefore less used than '*jogrendszer*' ['system of law'] and '*jog*' ['law'] itself, which are taken almost as synonyms.) This may be the reason why both (as 'les grands systèmes de droit', and 'the major legal systems') can appear in a most widespread generic sense, without revealing in the textbooks themselves anything more about the specific motivation to opt for one or the other expression as the right title.

The term 'legal family' ['*Rechtskreis*'] has fortuitously become integrated into our scholarly language,[3] as it suggests a kind of resemblance and relatedness (albeit not specified in detail), which is mainly (but not exclusively) based on common origins. It is by no mere chance that 'legal family' is a neutral descriptive notion, assuming no special dynamism or activity about its subject. This arose as a key word in the comparative law movement, searching for an intermediate classifying category between individual (domestic) arrangements and their total aggregate in mapping out the world's laws (once formed in history or still extant). Therefore, in itself it suggests hardly anything more than the term 'family resemblances' does in linguistic philosophical analysis:[4] certain similarities factually common to varied entities, interrelated in one way or another. Accordingly, 'legal family' is a category of law in so far as specific distinguishing features [*differentia specifica*], suitable for classification [*classificatio*] amongst various legal orders, are to be emphasised.[5]

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[2] Roscoe Pound 'Law in Books and Law in Action' *American Law Review* 44 (1910) 1.

[3] E.g., Hein Kötz 'Abschied von der Rechtskreislehre?' *Zeitschrift für Europäisches Privatrecht* 6 (1998), pp. 493–505.

[4] Cf., e.g., Renford Bambrough 'Universals and Family Resemblances' in *Proceedings of the Aristotelian Society* New Series LXI (London: Harrison 1961), pp. 207–222.

[5] For more in details, cf., by the present author, '*Theatrum legale mundi* avagy a jogrendszerek osztályozása' [Theatrum legale mundi, or the classification of legal systems] in Liber Amicorum to Professor Zoltán Péteri *Ius unum, lex multiplex* Essays in Theory of Law and State, and of Comparative Law, ed. István H. Szilágyi & Máté Paksy (Budapest: Szent István Társulat 2005), pp. 219–242 [Philosophiae Iuris].

By contrast, the term 'legal cultures' ['*cultures juridiques*', *'Rechtskulturen'*] stands for an operative and creative contribution, through social activity rooted in underlying social culture, to express how people experience a legal phenomenon, conceived as a kind of objectified potentiality; how and into what they form it through their co-operation; how and in what way they conceptualise it, and in what spirit, frame and purpose they make it the subject of theoretical representation and operation. In the beginning, it was sociological interest that brought the conceivability of such an interest into jurisprudential thought. As the first step, sociological jurisprudence described the entire process by concluding, i.e., ending with 'law in action' as discerned from 'law in books',[6] then jurisprudential analysis revealed the "enchantment" and "transformation" between the end-poles, to characterise law as a factor and medium of exerting influence from the point of view of its operation mechanism, i.e., its specific make-up and way of functioning, that is, as expressed figuratively, its "thinking" and "logic".[7] Accordingly, in an exclusively descriptive sense, confined to the value-free factuality of sociology, it can carry any general or particular (e.g., professional) ideology and conceptual culture (presuppositions, sensitivity, and diversity), as well as determination, skills and professional socialisation within its "world outlook". Thus, dedicated to the mere description of underlying conditions, conceptually the term lacks any developmental or derivational perspective, excludes comparison and evaluation, even as much as eventual regression or degeneration. As opposed to such a sociological sense, its cultural anthropological understanding stems from the idea of some common social origin; and by gradually (historically and professionally, i.e., in a LUHMANNian sense, differentiatingly) narrowing this—taking legal culture as a general mode of thinking, underlying world-view, motivation and purposefulness, as well as skills—, it arrives at a given (state of) professional culture. At the same time, this sense presupposes a certain amount of dynamism with the mechanism of effects in

[6] The definition by Mark Van Hoecke & Martin Warrington 'Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law' *The International and Comparative Law Quarterly* 47 (1998) 3, p. 498 is quite insufficient, because characterising law as culture merely by reference to the social practice by the legal community is stuck at the conceptualisation of ROSCOE POUND.

[7] In one of its first formulations, "cognitive structure" in Pierre Legrand 'European Systems are not Converging' *The International and Comparative Law Quarterly* 45 (1996) 1, pp. 52–81, especially at 60, and in his subsequent works, more and more definitely taking it as an entire established "mentality".

mutual relations in reverse directions. On the one hand, as a part always remaining a component of a broader whole, legal culture too is inevitably embedded in the general social culture, being formed in interaction with it. On the other, the parts and the integrating whole are themselves the momentary issue of a complex total movement with varying potentialities of evolutionary derivation and connection, and, as such, can be evaluated in light of their originally decisive qualities as showing, as the case may be, degeneration and retrogession. There is a feature common to them all, namely, that 'legal culture' addresses not so much law but the social intellectuality underlying (as a usual expectation towards) law, in the spirit of which legal phenomena at any time happen to emerge and be used in both theory and practice. Or, 'culture' builds a bridge between man's disanthropomorphising objectifications and his increasingly socialising ideology, taking the former back within the realm of the specifically human.[8]

'Legal tradition' as a concept can be interpreted exclusively within legal culture.[9] Tradition is the awareness of an earlier inherent pattern of culture, taken as the source of and inspiration to community identification, with the demand for continuity as an encouraging or justifying power. Thus, 'legal tradition' itself is a relational concept, the issue of a specific relation. For tradition as such is neither a piece nor an aspect of the past. Moreover, in itself it is not a longing for external or internal certainty, nor a search for confirmation nor showing of a way out. It is just the encounter of the two sides involved, notably the selection of a segment of the past or the qualification of a

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[8] For its contrasted understandings, cf., by the author, '[Comment to The Notion of Legal Culture]' in *Changing Legal Cultures* ed. Johannes Feest & Erhard Blankenburg (Oñati: Internatonal Institute for the Sociology of Law 1997), pp. 207–217 [Oñati Pre-publications–2] [reprinted as 'Comparative Legal Cultures: Attempts at Conceptualization' *Acta Juridica Hungarica* 38 (1997) 1–2, pp. 53–63] as well as 'Összehasonlító jogi kultúrák?' [Comparative legal cultures?] in *Jogtudományi Közlöny* LVI (2001) 10, pp. 409–416, both reflecting upon the disciplinary choice raised by the differing paths of *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 [The International Library of Essays in Law & Legal Theory: Legal Cultures 1] and *European Legal Cultures* ed. Volkmar Gessner & Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 [Tempus Textbook Series on European Law and European Legal Cultures I], respectively.

[9] At a conceptual level, this was already pointed out by J. H. Merryman *The Civil Law Tradition* An Introduction to the Legal Systems of Western Europe and Latin America (Stanford: Stanford University Press 1969), p. 2, where he states that "The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system in to a cultural perspective".

feature attributed to it, in order that the present, viewed from a future's perspective, can be linked to the past as worthy of continuation, because of the latter's inherent values. By the way, exactly in the manner of a fact that can only be 'established',[10] tradition can only be referred to, providing that we need and thereby can also realise its extended impact and axiological continuity. Accordingly, there is not much use in proclaiming that, for example, "chthonic societies did not function in terms of culture. They functioned in terms of tradition."[11] For, in addition to logical inclusion, the two poles represent conjunctivity in reciprocity, which simply excludes any disjunctivity. Or, in a more sophisticated formulation, all we can claim is that in some societies there indeed has been (or was) a culture of cultivating tradition, while in others—perhaps—something else is (or was) practised.

Consequently, the bare fact that the comparatist undertakes a thorough investigation into the *Legal Traditions of the World* scarcely means anything more or other than—correctly—identifying, as a feature rather typical of law, a special adherence to past patterns (in a way sometimes reified to the extreme, through erecting wholly artificial—artefactual—formalisms and automatisms, at times guaranteed by expressly alienating mechanisms). And the very circumstance that by implementing culture exactly this way we are "failing to identify any particular factors that can be seen to be making a difference"[12] may only imply that the notions of culture and tradition present law in the medium and perspective of the consciousness of man's social action.

Well, in such broad outlines, the culture of observing traditions is an uninterrupted creative process, in the course of which the recognition of human necessity will select, with a force normative to the entire community, from the store (dead in itself) of lessons drawn from the past.[13] And this tells

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[10] Cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

[11] Glenn, p. 66.

[12] Roger Cotterrell 'The Concept of Legal Culture' in *Comparing Legal Cultures* ed. David Nelken (Aldershot, Brookfield [Vt.], Singapore, Sydney: Dartmouth 1997), p. 20 (Glenn, p. 143, note 99).

[13] "Things […] do not speak […] so a particular receptivity is called for in learning of the past from its capture in things." Glenn, p. 7. – "Tradition is never acquired, it is always being acquired." L. Wieseltier *Kaddish* (New York: Knopf 1998), p. 259 (Glenn, p. 9, note 28). – "Law is essentially a tradition, that is to say something which has come down to us from the past". A. W. B. Simpson *Invitation to Law* (Oxford: Blackwell 1988), p. 23 (Glenn, p. 12, note 35). – "Traditions are not self-created; they are consciously chosen […]. We tend, therefore, to choose that which suits our present needs". R. Thapar 'Tradition' in his *Cultural Transaction and Early India* Tradition and Patronage (Delhi: Oxford University Press 1994), p. 23 (Glenn, p. 13, note 38).

us about the roots of thinking rather than about its eventual outcome, as in point of principle it does embrace the factors breeding change in continuity too.[14] Or, tradition is not a passive medium but the social construction of man (constantly building as his second nature), in which he contextualises his uninterrupted creative presence on the terrain of his self-identity within the boundaries of his self-discipline in the dual pressures of continuance and change.[15] For exactly this reason, it serves as the final basis for any comparison and judgement. Therefore no further foundation is required. Whatever may be regarded as a criterion, its acceptance can only be ensured by the culture of tradition.[16]

## 3. Different Traditions, Differing Ways of Thinking

The survey in question has offered a more comprehensive picture of various legal families and their underlying legal cultures, owing to the fact that the author himself has been primarily interested in exploring the ways of thinking that operate the legal arrangements concerned. How does the power of tradition manifest itself in those various legal cultures?

In chthonic regimes, the priority of collective interest over the individual interest with an emphasis upon consensus (instead of enforcement) has developed a pattern of thought that operates in concrete terms bound

[14] It is "procreative of change" {Carl J. Friedrich *Tradition and Authority* (New York, Washington, London: Praeger 1972), p. 39 [Key Concepts in Political Science]}, as "legal tradition is not conservative in principle" ["La tradition juridique n'est pas conservatrice par principe"] {Christian Atias 'Présence de la tradition juridique' *Revue de la recherche juridique* 22 (1997), p. 387 (Glenn, p. 22).}

[15] It is no mere chance therefore to describe it as retroprojection, because in tradition "we choose what we say determines us and we present ourselves as heirs of those we have made our ancestors". L. Muñoz 'The Rationality of Tradition' *Archiv für Rechts- und Sozialphilosophie* 67 (1981), pp. 197 et seq., quote on 203. Consequently, in it "The past is mobilized to invent a future" ["mobiliser le passé pour inventer un avenir"]. A. Tourraine *Pourrons-nous vivre ensemble?* Égaux et différents (Paris: Fayard 1997), p. 49. – This explains its proximity to social self-identity. For according to the classical outline of sociology, "above all it is the idea that it has of itself" which is constitutive of society [Émile Durkheim *The Elementary Forms of the Religious Life* trans. J. Swain (London: Allen and Unwin 1915 {5th impr. 1964}), p. 422], which, in present-day view, is mostly rooted in connections suitable to comparison. Glenn, pp. 31–33.

[16] "There is no view from nowhere, no possibility of judgment from without a tradition, in reliance on ultimate, non-traditional criteria." Glenn, p. 43.

to situations.[17] It is not to be used as a weapon by anyone,[18] even less so because the chief's "power" is hardly more than his ability to create consensus, if only because his "power" can only be asserted until it successfully fulfils this very responsibility.

By contrast, legal arrangements with similarly early roots but inspired by d i v i n e r e v e l a t i o n face the dilemma of how to bridge the gap between the historically unique and closed source of the law and its use extended over the changing challenges of a number of millennia and civilisations. Therefore, their basic issue is whether or not their "gate is closed",[19] that is, whether there are techniques available to allow some degree of openness, loosening and re-consideration, in order to answer the new challenges. This is why the question emerges: what role can logic, if any, play in this? Whether it can or not the concreteness of various cases (as opposed to abstraction, characteristic of any theoretical reasoning) appear in the law of such a religious regime? Does it offer any room for human hesitation, pondering upon the merits of the underlying situation, as well as for the clash of opinions and for the moment of responsive decision, normatively projected from the personal stand taken by the judge as the master of the case? And, to begin at the beginning, may any idea of a personified creator-divinity (legislator in law) become exclusive in such laws, whose will is to be explored and executed as the only source of the law?

On the European continent, this very pattern of legal thought, drawing on divine inspiration in its origin, conceived of law as a contractual form (following the openly postulated philosophico-political concept of social

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[17] Glenn, p. 67, note 43. Cf. W. Ong *Orality and Literacy* The Technologizing of the World (London & New York: Methuen 1982), pp. 51–52.

[18] Kéba M'Baye 'African Conception of Law' in *International Encyclopedia of Comparative Law* II, ed. Konrad Zweigert & Ulrich Drobnig (Tübingen, The Hague, Paris: Mohr & Mouton 1975), pp. 138–139 (Glenn, p. 67, note 44).

[19] "The Talmud was never completed"— writes A. Steinsaltz *The Essential Talmud* trans. C. Galai (New York: Basic Books 1976), p. 47—, for what was ever put down in it covers both the past and the entirety of future. Or, "Of course every interpretation that ever will be was known at Sinai, was intended by God". *Back to the Sources* Reading the Classic Jewish Texts, ed. B. W. Holz (New York: Summit Books 1984), p. 15 (Glenn, p. 96, note 42). – For a similar presupposition by Islamic law, cf., e.g., Wael B. Hallaq 'Was the Gate of Ijtihad Closed?' *International Journal of Middle East Studies* 16 (1984), pp. 3–41, what is expressly confirmed by *Rahman v. Begum* (1995) 15 BLD 34 in Bangladesh (Glenn, p. 187, note 157). – Hindu legal thought does not even raise the issue as it relies on the all-comprehensive cultural practice of the community, experiencing a continuity, instead of mere abstractions and barely human formalisations. Glenn, p. 270.

contract, while presuming the tacit establishment of a political connection), that is, as the expression of someone's will, derived (or logically concluding) from an official source, from the Roman Empire to modern exegesis. For, on the one hand, there are cultures implementing logicism (based on the axiomatic ideal of *mos geometricus*), as, for instance, the Civil Law. On the other hand, there are cultures precautious of logic, otherwise speaking, of processing textual representations of the law as theoretical propositions in an epistemological context as premises to conclusions to be drawn with logical necessity. In cultures with religious traditions and advances in logification as a scientific ideal in the background (e.g., Jewish and Islamic cultures), the field of logic may turn out to be a less emphatically relevant sphere of legal thought, which doesn't let a thoroughly human definition with logically justifiable generalisations through individual applications replace the originary divine determination. As we can at the most strive to explore divine intentions, without being entitled to close them back into a categorial certainty, the solution of moral and legal issues remains necessarily a human dilemma in such cultures, by no means excluding the equally defensible conceivability of differing opinions. In secular cultures, in which law is either conceived of as part of the natural world order (e.g., in the Far East) or taken as the value-centred harmonisation of justifiable human reactions (as, e.g., in the Common Law), the emphasis is not on a complete and seamlessly comprehensive foresight but on the optimum solution for conflicting situations in everyday life. It is precisely in the gift of human case-bound problem solving that they experience the mystery of order and the presumption of human righteousness, as well as the trust placed in that careful examination of past instances (taken as a closed set or assessing their actuality in light of the historical particularity of past challenges) may indeed contribute to shaping the future, without predetermining and anticipating, by way of past patterns, its present and coming course and incidental features.

These are sometimes different cultures of thought—in addition to underlying traditions—with no specific religious, geographical or meteorological conditions, levels of development or organisations of production (etc.) in the background to explain their actual differences. At the same time, as to their out-puts, the respective outcomes may prove to be largely commensurable or (as when the Civil Law and Common Law are contrasted) even similar, while both the normatively framework-driven in-put and the set of operations taking place in the black box of the specifically juridical elaboration of the case—complying with the official expectations accepted in the

given culture (as asserted by the prevailing ideology of the legal profession)—may differ from one another, bearing witness to diverging routes.

How is all this possible? And what is it that takes actually place in law, irrespective of any appearance and alleged formal definition? How then are our expectations of unambiguity, safety, foreseeability and calculability fulfilled? Or, putting it exaggeratedly, in the last resort is it law at all that works under the name of the law, through the agents of law? Or, perhaps, do we merely weaken and cover the arbitrary moment of our irreducibly final power to reach a decision as to some tolerably viable measure through various mediations (called 'law' in all-covering social institutionalisation), by channelling it on definite paths and routes?

## 4. Different Expectations, Differing Institutionalisations in Law

Well, how can we sum up all this in the examination of various legal traditions?

First of all, the burden to be borne by the legal set-up is different in differing civilisations. Where law is part of community life, it serves for the benefit of the community. Where it is integrated into the salvation history cementing a whole society together, it is not even featured as distinctive. Therefore, the debates, formalisations, and divisions as to "rites" in law hardly mean anything more than the ones in theology or moral philosophy. Otherwise, the law is not differentiated: what it demands is demanded by the overall normativity, and that which fulfils it is not simply o u t e r c o n f o r m i t y (exhausted by the mere restraint from infringements) but a genuine human incentive implementing its spirit, prompted by i n n e r i n i t i a t i v e . In the beginning, this was a feature of all regimes of law, never questioned in chthonic and Asian laws, and continued in Hindu, Jewish and Islamic law up to the present day,[20] with only Civil Law and, then, Common Law, breaking away from it in historical time, and thus reviving the common Roman tradition in a different mode. Remarkably, all along, this break correlated with the spread of an individualistic view of so-

[20] In Sanskrit, there is no word for 'law', and what the so-called Laws of MANU concern is only the smaller part of Hindu life to be formed from inner ethical motivation [*a'tma tushti*]. – In Jewish law, *halakhah* [do not act outside the law] is necessarily complemented by the expectation of *aggadah* [to act inside the law]. – In Islam, acts recognised as compulsory, rewarded, indifferent, disapproved and forbidden are distinguished from the outset. Glenn, pp. 26, 96 and 185–186.

ciety and, at a later time, with the growingly fetishising and assertive deduction of rights out of the body of the law—which, it is to be noted, appeared for the first time in English law in the 20th century.[21]

Classical Jewish jurisdiction was from the outset built on the parties reconciling themselves to the decision to be made, as declared in advance. This is why no doctrine of legal force has developed, as the parties, if discontented, may well go to court again. At the same time, the decision is addressed only to them, so no decision is published or collected. As a result, neither law-reporting nor precedential reference to earlier decisions is known in that system. This way, judicial reasoning is mostly fully adjusted to the conflicting situation, to the particular facts of the case.[22]

In Islamic law, a specific culture of chain-references was to develop in order to give the Prophet's historically finite manifestations a force that provides orientation under changing conditions and jurisdictions.[23] Although the Muslims have had a highly developed logic in philosophical and scientific reconstruction, they could only recognise canons of judicial argumentation that prevent the law from further extension through human generalisation, a danger that under the plain pretext of logical generalisation would diverge from the Prophet's divine revelation, which was obviously not permissible with respect to the Divine Word.[24]

As to the roots of Continental law—*"siamo tutti Bartolisti"*,[25] or, in the final account, we are all committed to refining and continuously

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[21] F. H. Lawson '»Das subjektive Recht« in the English Law of Torts' in his *Selected Essays* I (Amsterdam & New York: North-Holland 1977), pp. 176 et seq., especially on 179–182, as well as Geoffrey Samuel '»Le droit subjectif« and English Law' *Cambridge Law Journal* 46 (1987), pp. 264 et seq., especially on 267–286 (Glenn, p. 220, note 50).

[22] Glenn, pp. 92–93, as well as Bernard Jackson 'Jewish Law or Jewish Laws?' *Jewish Law Annual* 8 (1988), p. 25.

[23] Let us quote a typical chains of *hadith*: "According to BUKHARI (Chapter 30, Tradition 26) »ABDAN related to us [saying]: HISHAM related to us saying: IBN SIRIN related to us from ABU HURARIA from the Prophet […] that he said […]«." A. R. I. *Doi Shari'ah* The Islamic Law (London: Ta Ha Publishers 1984), pp. 24 et seq. (Glenn, p. 161, note 18).

[24] Opposing even analogical reasoning, seen as leading to more general rules and categories which would allow subsequent deduction or subsumption, this being an objectionable "expression of human initiative". B. Weiss *The Spirit of Islamic Law* (Athens, Ga. & London: University of Georgia Press 1998), pp. 67–68. Cf. also J. Makdisi 'Formal Rationality in Islamic Law and the Common Law' *Cleveland State Law Review* 34 (1985–1986), p. 97 et seq. (Glenn, p. 176, note 99).

[25] W. Rattigan 'Bartolus' in J. MacDonell & E. Manson *Great Jurists of the World* (London: John Murray 1913), p. 45 (Glenn, p. 123).

adapting a single idea (organised as a school) from the almost unlimited depths of the store of techniques and potentialities developed by the Romans—, it is of utmost interest to realise that, as the author writes, "[f]or centuries, those who wrote the glosses on Roman law seemed more Talmudic than civilian. They were more interested in questions [*quaestiones*] than answers; more interested in accumulating opinions than choosing among them; more interested in debate than action." For "[q]uestions are more important than answers (which may change); understanding is more important than coherence; social contact is more important than precision".[26]

However, it is exactly in this circle, the medium of practice-bound rationalising confrontation with distinctively legal problems, that a culture rooted in the recognition that "[t]he Form is the Message"[27] had once arisen, having spread over the European continent and then among those South American (and, to some extent, even Far Eastern) cultures that in modern times became affected by the impact of Latin and German-language civilisations. And the centuries of polishing work by the same glossators and their successors would form—out of the inherent lack of any idea of systemicity and even of conceptualisation in Roman law[28]—a strictly conceptual system, with notions in fact empty but indispensable for their technical class function, like the principle of equality, which ordains what is considered "similar" to what is taken as "similar", without, however, providing for an actual or legal criteria of "similarity" (while if the law had provided for it, the provision itself would obviously—conceptually—render the principle pointless and perfectly redundant).[29]

It is typical that where the law is identified with the observance of Divine commandments (as in Jewish and Islamic law) or serves as the case-based declaration of what the law is (as in Anglo-Saxon law), there is no appeal possible.[30] Or, the Anglo-Saxon law transmits the ancient uses of

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[26] Glenn, pp. 123 & 128. It must have been this approach shared in many ways about which the English legal historian wrote that "What the judgment was, nobody knew and nobody cared".

T. F. T. Plucknett *Early English Legal Literature* (Cambridge: Cambridge University Press 1958), p. 104 (Glenn, p. 219, note 48).

[27] David Daube *Ancient Jewish Law* Three Inaugural Lectures (Leiden: Brill 1981), Lect. III: 'The Form is the Message' (Glenn, p. 127, note 41).

[28] A. Cock Arango 'El Derecho Romano se formo a base de realidades objetivas no por teorias o sistemas' in *Studi in onore di Vincenzo Arangio-Ruiz* (Napoli: Jovene 1953), in particular p. 31 (Glenn, p. 136, note 72).

[29] P. Westen 'The Empty Idea of Equality' *Harvard Law Review* 95 (1982), p. 537.

[30] Cf. Glenn, p. 92.

Roman tradition to the British Isles: a jury instead of lay *iudex*, judge instead of an instructing *praetor*, a writ instead of *edictum* allowing a procedure; moreover, Inns next to a church, just as *madhahib* near the mosque. Everything is but a procedure: writ construed as an artificially erected pigeon house with holes providing an action form that does allow a certain type of proceedings to be commenced. This is to say that each and every issue in law had once been expected to fit into one of the (altogether) 50 writs during the period from around 1250 and about 75 writs during the period from around 1850 (until their abolition in 1932), and exclusively in terms of the selected writ.[31] *No remedy, no wrong*: legal quality, that is, qualification of an action in terms of the law, can be done, if at all, only provided that a proceeding is available to elaborate it in the closed store of writs codified previously. Thus, substantive law does not even appear;[32] the decision will be made by the lay jury; and the judge—with his "artificiall reason"[33] (embodied by the law's professionally developed doctrine)—is only authorised to examine whether or not all this complies with the action form. So, law is confined to procedure to such an extent that even basic terms like formalism, casuistry and logic will gain additional meaning in classical English law. On the one hand, "[i]n the common law, no one knew what law the jury applied, yet the jury functioned in a highly formal setting." On the other, "[t]he process was necessarily casuistic, since it disposed of cases, but cases did not make law and cases were therefore not in conflict." Or, the actual decision will necessarily remain outside the law, and its merits, treated as mere factuality, outside logic. This is why the Common Law has been "floating" up to the present day,[34] in the verbal culture in which even questions like whether a 'rule' of decision is predisposed and if so, whether a 'norm' can be formed out of the 'rule', have never been clarified.[35]

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[31] F. W. Maitland *The Forms of Action at Common Law* (Cambridge: Cambridge University Press 1954), p. 5 (Glenn, p. 211, note 20).

[32] For "whatever substantive law existed was hidden by it, »secreted« in its »interstices«" – writes H. S. Maine in his *Dissertations on Early Law and Custom* Lectures delivered at Oxford (London: John Murray 1883), p. 389 (Glenn, p. 211, note 21).

[33] "Equity and Lawes, an artificiall Reason and Will" in Thomas Hobbes *Leviathan*… (London: Andrew Crooke 1651), The Introduction in <http://oll.Libertyfund.org/Texts/Hobbes>.

[34] It is only the jury's decision to have a legal force without, however, affecting the law or rendering it unchangeable. Glenn, (quotations) p. 60, note 17, pp. 235 and 233, as well as (note above) p. 219.

[35] Cf., by the author, 'Codification on the Threshold of the Third Millennium' *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–119 {or 'Codification à l'aune de troisième millénaire' in Mé-

## 5. Different "Rationalities", Differing "Logics"

We may accept that rationality itself is by no means more than one of the many traditions,[36] moreover, that it is a "mistake […] to suppose that there is or must be a single (best or highest) perspective from which to assess ideal rationality"[37] and, therefore, in the end, we also have to admit that "different types of logic and semantics may be appropriate in different contexts and for different theories".[38] If and in so far we have done so, then we have—based upon the normative foundations of the order in question and the terms we are bound by—either to presume its regulatory c o m p l e t e n e s s (assuming the informality of a decision taken after the consideration of the case, weighing, balancing and pondering upon its merits, by recognising its unrepeatable complexity), or to resort to a r e d u c t i v e p r o c e d u r e (in the expectation of safety in law and of the guaranteed repetition of the complexity of its cases). The former employs an indiscernible and unclosed variety of sources and approaches (with varying aspects and methodologies, normative criteria and types of argumentation taken in the judicial assessment), while the latter pre-selects from all of them—by officially codifying and thereby also closing—that which it can then derive, as a logical inference, from them in its axiomatism, as necessarily concluding from its premises. Reductive procedure presupposes a deductive logic which, if it fails in practice, may just pass over into its opposite, namely, its stochastic, statistical or perhaps probability-based substitution by some fuzzy logic at the most. In case completeness is presumed, logic (taken to its mathematical ideal) will either simply be considered non-applicable or take on polyvalent forms, uninterpretable from an axiomatic point of view because operating with more than two values, thereby transcending the dichotomy of true and false, lawful and unlawful, by wedging

*langes pour l'hommage de Monsieur le Professeur Paul Amselek* dir. Patrick Wachsmann et al. (Bruxelles: Bruylant 2004), pp. 745–766} and, in theoretical outlines, 'Rule and/or Norm, or the Conceptualisibility and Logifiability of Law' in *Effizienz von e-Lösungen in Staat und Gesellschaft* Aktuelle Fragen der Rechtsinformatik (Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005) hrsg. Erich Schweighofer, Doris Liebwald, Silvia Angeneder & Thomas Menzel (Stuttgart, München, Hannover, Berlin, Weimar, Dresden: Richard Boorberg Verlag 2005), pp. 58–65.

[36] Karl Popper 'Toward a Rational Theory of Tradition' in his *Conjectures and Refutations* 3rd ed. (London: Routledge Kegan Paul 1969).

[37] D. C. Dennett *Darwin's Dangerous Idea* Evolution and the Meanings of Life (New York: Simon and Schuster 1995), pp. 502–505 (Glenn, p. 44, note 39).

[38] D. Pearce *Roads to Commensurability* (Dordrecht: Reidel 1987), p. 9 (Glenn, p. 333, note 40).

in intermediate values that induce uncertainty (by generating jumps and unforeseeability) in logic.

In addition, it is to be noted that classifying judicial argumentation as part of the domain of "practical reasoning" has turned out to be a master model for ousting adjudication in law from the notional sphere of "application" (with the underlying idea of logical "deduction") in the present-day Anglo–American theoretical reconstruction that, just like the theory of "argumentation" proposed by CHAÏM PERELMAN in Continental law some decades ago, puts the whole process in a logically uninterpretable range.[39]

How then do such alternative solutions appear in the various ancient regimes of law?

For example, in Jewish law, the simultaneous recognition of diverging (and, ultimately, contradictory) standpoints while excluding any systemicity exhausts the entire culture of the practice of reasoning to such an extent that the *Talmud* itself would appear as if "many texts and many authors [...] spoke [...] all at once" yet with opacity. "It's just in there somewhere." Apparent self-reproach may even describe it as "a terribly frustrating book [...:] everything is fascinating [..., but ...] nothing can be trusted".[40] Accordingly, "preference for a concrete rather than an abstract terminology" permeates it, with 'contract' lacking the general features of the type[41] and categories used in the figurative sense rather than as a conceptual class delimitation. It is as if the forgotten wisdom were embodied therein: axiomatic thought with no reference to reality, with its self offered as its exclusive subject, and without any validity whatever beyond itself.[42]

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[39] "Practical reasoning [...] is a reasoning in transition. It aims to establish, not that some position is correct absolutely, but rather that some position is superior to some other. It is concerned, covertly or openly, implicitly or explicitly, with comparative propositions"—writes C. Taylor in his *Sources of the Self* The Making of the Modern Identity (Cambridge, Mass.: Harvard University Press 1989), p. 72. It is defined by A. Jonsen & S. Toulmin *The Abuse of Casuistry* A History of Moral Reasoning (Berkeley, Los Angeles, London: University of California Press 1988), p. 341 as follows: "Practical reasoning in ethics is not a matter of drawing formal deductions from invariable axioms, but of exercising judgment—that is, weighing considerations against one another" (Glenn, p. 43, note 37).

[40] Glenn, p. 98, the last quotation by R. Goldenberg 'Talmud' in *Back to the Sources*, p. 157.

[41] M. Elon 'Contract' in *Principles of Jewish Law* ed. M. Elon (Jerusalem: Keter Publishing House 1975), p. 247 (Glenn, p. 94, note 35).

[42] "[T]he great advantage of employing such models, as opposed to abstract concepts, lies, *inter alia*, in the ability constantly to supervise the validity of methods of demonstration [...]. [A]bstract thought [...] cannot be defined except by use of similarly abstract terms, we can never know whether they constitute a departure from the subject or are still relevant." Steinsaltz *The Essential Talmud*, p. 147 (Glenn, p. 99, note 53).

In Islamic law, the 'doctrine of diversity' [*ikhtilaf*] comes to the forefront, with the acceptance of *hadith*, which may recognise both parts of a logical contradiction as simultaneous Divine inspiration, since "[d]ifference of opinion [...] is a sign of the bounty of God."[43]

Finally, in Hindu law, "no precise definition", deduction or inclination for systematisation can be found either. For if everything and everyone shares in *Brahman* as the creator of the world, then commonness within the everlastingly given totality cannot be segmented simply by segregation; moreover, not even the appearance of any accomplished change could be more than sheer illusion.[44]

All in all, ancient cultures (within the Far-East) presuppose polyvalent logics in human matters, which can therefore regard any differentiation, extreme formulation, polarisation or discreteness in either objects or ideas exclusively as an artificial outcome of human intervention.

## 6. Mentality in Foundation of the Law

The change of emphasis in comparative interest is obviously striking here, as most of the data, explanations and contemplations abundant in this excellent overview are focussed on ways of thought rather than on institutions. Or, mentalities are at play within this context that, staring in wonder at (by experiencing) the world, also provide institutional answers in response to challenges for survival. Well, institutionalisation is already halfway to formalisation. Final consummation is provided by the axiomatism in codification—be it of posited law or of doctrine (taken as a mentally structured representation behind it)—, when law is projected as a systemic aggregate of logically arranged abstract conceptualities. In a systemic perspective, not even an institution as such can be conceived of any longer as a casual or routinised product of practical problem-solving: as an abstract formula, it is at the same time the mentally concretised representation of further conceptual abstractions. Well, comparative law in its classical understanding was the product of exactly such a scheme, born to pin the various

[43] Glenn, p. 325.

[44] P. Diwan *Modern Hindu Law* Codified and Uncodified (Allahabad: Allahabad Law Agency 1958), p. 1. Cf. Glenn, pp. 253–268.

purely logified conceptual abstracts of law to its map with the requirements of taxonomy, originally formed to classifiy nature in natural history.[45]

In sum, all the issues we have discussed within the conspectus of *Legal Traditions of the World* are focussed indeed on the human dilemma of practical problem-solving within the various cultures of order, in the interest of societal survival. This is at work in the manner of raising issues with respect to the *ordo*, in reacting to them, in the search for conceivability and appropriate techniques for this, in institution-building through standing practice and planning, in inventing and operating instruments, willy-nilly breaking away from the historical idea expressed in law yet desirably remaining within its circle of ethos—to such an extent that we could even say with some exaggeration that this is the motor, and everything else is just a cloud of dust…

Of course, we know that civilisatory development produces divides, structures and differentiations in formalisation, while successfully launching mechanisms with an effect dehumanising to such an extent that we may well feel even our creative thinking having become mostly reactive in so far as merely to fill the frameworks set by established forms.

Considering ourselves and the gardens we cultivate, it is to be seen that preserving, collecting and publishing judicial decisions, utilising and referring to arguments suitable to found them authoritatively, setting up an official expectation that justices will make decisions (with administration of justice becoming a freely accessible state service) and allow repeated consideration of the case through an appeal—all these are relatively new and particular developments, mostly characteristic of Western culture. The achievement of legal doctrine, abstracting general claims on behalf of the individual out of the body of laws, from which a general status can arise through ordaining civic rights [‘*subjektive Rechte*’] to given circles of persons, is also a product of the modern Western world. English legal culture is just about to begin assimilating (more or less and controversially) Continental culture by logifying law, at least by understanding the Continental requirement of identifying conceptualities in law that can be referred to as a source and carrier of the law, upon the basis of which the reduction (i.e., separate homogenisation, taken as a deduction in justification) of the judgement in law to formal operation(s) is at all conceivable. Or, we can see that although DESCARTES’ and LEIBNIZ’ utopia of formal rationalisation may have generated movements and effort, it could lead neither to all-compre-

[45] Firstly applied to real (living) objects in nature by Carl von Linne [Linnæus] in his *Systema naturae* [1735] (London: Trustees of the British Museum 1956).

hensive development nor to the elimination of other traditions based upon non-formal rationalisation that excludes contradictions. As a conclusion, we can scarcely tell more: although our problems may strike us as new, most of them are nevertheless still old-rooted ones.

Therewith we have arrived back at man who humanises his existence by creating culture as a second nature for and around him, as to which he draws strength from his tradition. This includes, among others, a search for the source of law through its refined deep structure. Awareness of this and of the best possible preservation of the diversity of its civilisatory forms is a never ending task for us, indispensable for any orientation in general and to substantiate decisions to be taken at historical crossroads in particular.

## 7. Defining a Subject for Theoretical Research in Law

Comparative historical inquiries usually approach potential subjects of their analyses with a certain experience in the background and open to receiving new ideas, while suggesting classification schemes only as a result of their investigations—e.g., to answer the question of what (and in what sense) can (or is worthwhile, founded, or reasonable in an analytical framework, or self-enforcing enough, to) be regarded as law in a given cultural anthropological situation or in official proceedings. However, within quite artificial theory-building (based upon an approach to law it proposes to introduce), given concepts are assumed (hypostasised or presumed), which then are treated as an axiomatic basis—i.e., as accepted without empirical evidence—throughout the entire theoretical construction.

We know that some weaker or stronger normativity prevails in our language usage and, especially in conceptual thinking; we reconstruct and thereby also construct what we only wanted to cognise from close-by. Yet, there does seem to be a difference between the results of an *analysis aimed at drawing comparative-historical experiences*, on the one hand, and of a merely *conceptual analysis*, confined to rationalising conventionalisations according to certain pre-set ideas (dogmas or prejudices), on the other. This is especially manifest both in the separation of these two attitudes and their results, which usually exclude the chance of any mutual interaction, and in the similarly differing ways in which a critical stand can work (or usually works) in them. For the former surveys, evaluates and groups *facts* by listing data from field studies or by referring to a wealth of literature. By contrast, the latter

arrives, practically without reference to sources, from certain philosophical generalisations at other (further) philosophical generalisations. Any factual argument or evidence on behalf of the former runs off the latter from the outset as ephemeral (exceptional and negligible) or as irrelevant. All the former can have is some influence on public opinion, forming the dominant paradigm in the long run as organised into a total effect; for the latter mostly gives voice to or reflects upon this (or, sometimes, proposes a theory aimed at replacing—by changing—it). The internal debates of the former are usually arranged to dispute upon facts and their possible interpretations (e.g., what criteria are likely to result in sensible outcomes while separating the law's variety in systems, cultures and traditions). By contrast, the latter—approaching, as much as it can, the axiomatic ideal—either proposes an amendment to, or revision of, the prevailing system, or rejects it, from a position (of another system) outside (and negating) the system in question. These can include, e.g., the one-time ideological criticism between socialist and non-socialist ("bourgeois" or "reformist") legal theories mutually negating each other, or present-day so-called deconstructionism, unmasking—either in the spirit of a radical hermeneutics with anarchic extremism or by some (feminist, white, etc.) division, aiming at historical rehabilitation—thousand-year-old arrangements as guises of mere routine or sophisticated social oppression.

Present-day globalising tendencies are probably of an uneven effect in various fields. Anyway, despite several attempts at mediation, these two attitudes seem to further strengthen themselves, and—curiously enough—samples of theoretical construction, aimed at merely conceptual (re)conventionalisation, can today be transformed into independent wandering forces; perhaps once drawn from English analytical tradition and subsequently organised into an American political philosophical conceptual construction, they may now arrive in continental Europe as a theoretical explanatory framework. Within their new frame of reference, they certainly gain a new domain of meanings, because their contextual presupposition has in the meantime changed, from an English pre-understanding that identifies law as a case-based announcement of what rules are at play, into a Civil Law conception, that takes law as a system of norms, with utmost conceptualisation in logical generalisation.

The path of scholarship is obviously free. However, in order to be able to assess the applicability and commensurability of scholars' various trends and claims, it is still important to raise awareness of the tacitly received foundations of their underlying legal conception.

# SOMETHING OLD, SOMETHING NEW
## in the European Identity of Law?*

The nature of the entity called 'Europe' is a sempiternal subject for the humanities, one which has challenged enquiring minds throughout history. However, neither colloquial usage nor common sense imbued with everyday practicality is necessarily backed up by genuine knowledge. The use of a word may qualify the user, but generally not underlying awareness as to possible motives. Even in everyday communication, the question of what one r e a l l y means by 'Europe' repeatedly arises. What are its historical roots? Which forces were instrumental in generating it? Which border zones have been drawn to and eventually incorporated into it? Why and how have distinct territories been united to create a sentiment of commonality amongst them and to care about the shared feeling of solidarity with them? Where are the borders? What is inside, what is outside? How have the borders actually been extended? And what happens when the entity called 'Europe' amalgamates with local experiences deriving from widely different traditions?

Raising fundamental questions like these can prove troubling indeed, for although many of us can contribute some enlightening insights, none can offer a definitive answer. After all, Europe is not a function of definition. Its identity, both intellectual and moral, axiomatic and axiological, is like a quality that can be shared, an entity that can be lived through, a prop of memory or a sign of nostalgia that cannot be shaken off, or something that one cannot help longing for. It exists undoubtedly but is neither reducible nor subject to any conceptualisation whatsoever. It defies formalistic rigour. In other words, Europe is Janus-faced, even multifaceted. It can be used equally as a yardstick and as a pattern of will. For instance, when it is strikingly present and quietly possessed, one may be tempted to simply neglect it. On the other hand, once it is absent, negated or rejected, it necessarily transforms into a kind of Utopia, projecting human aspirations on to the past or future, however distant it might be.

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* In its first version, 'On the European Identity in Law' in *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1995), pp. 3–5, introducing Part I on Common Traditions [Tempus Textbook Series on European Law and European Legal Cultures 1], addressed in its adapted version as a conclusion to the Japanese and Hungarian international workshop organised by the Nagoya Graduate Law School and the Institute for Legal Studies of the Hungarian Academy of Sciences in Budapest, July 2004.

Perhaps, on the final analysis, Europe stands for our best manifestations of humanness, intentions to realise our human selves, and nostalgia for immutable values? Or is it nothing but an economical expression of the historical memory of traditions found worthy of preservation? Or does moral commission lurk behind the term, which is perhaps the only way to explain why it has proven so resiliently capable of resurrecting itself after long periods of apparent coma and the forced imposition of brutal substitutes?

Europe is far from being a single concept on any axiomatic plane. It is neither unitary nor coherent. It can be expressed more easily as a tendency, sublimating its continued identification through the endless process of mutations. In other words, it is the ongoing process of all of us becoming, rather than arriving.

After all, what else could have been exemplified by the instance of law? To begin at the beginning, what does European law consist of? What are the features that, by defining its *differentia specifica*, distinguish it from any other legal culture and type of legal experience? What is its specific nature? Is it a skill, a manner of approaching and processing human conflicts? Or, the other way around, is it a well established tradition in conceptualisation and the mapping out of references—that is, yardsticks, alongside which one is expected to channel intellectual representations? Or is it a given menu of values and axiological reasons that are in the position of making all the above features worthy of serious consideration?

All the elements of definition relating to the identity of European law are hopelessly ambiguous and ambivalent. For instance, from the very beginning, and at least to all appearances, the plane has been structured by the Civil Law claims for axiomatism, on the one hand, and the Common Law option for pragmatism, on the other. Indeed, there can be no doubt that the procedure based on the syllogistic certainty of particulars, deduced from what has been regarded as general, differs fundamentally from the perspective of inductions made upon rules of decision individually formulated when to judge specific cases. Nevertheless, it should be noted that the origins are far from being clear here, since the traditions of both the Civil Law and the Common Law claim to have been patterned after and drawn from the same tree, Roman law. As a matter of fact, the legacy of Roman law was twofold indeed. Thanks to its Janus-faced internal composition, Roman law could and actually did originate the patterns of both Civil Law and Common Law in historical sequence. However, we have to assume that the same originator might well have born something else as well. That is to say, the internal complexity of forepatterns (spanning from Mesopotamian and Me-

diterranean antecedents to Jewish and Greek traditions) might have pioneered in any further direction as well.

Then what d o e s make European law distinct from other species of law on the legal map? Is it its actual operation in practice or its conceptual covering that will ultimately define its distinctiveness? And, turning once again to our conditions of modernity and post-modernity, what is it that may seem to be converging now? Is it the actual process, or its representation, or the ethos and the practical purport of the entire legal enterprise, that instigates and pushes European law to serve but a single end?

A coincidence can be observed in European history right now—an occurrence which has surprised even those who have been most open to watching and deciphering any sign construable as a motive leading to it—, namely, of the fact that the eventual *rapprochement* (moreover, the prospective convergence) of the two basic European legal patterns, the Civil Law and the Common Law, will, by force of the pressure of the coming new European law, also result in the convergence of the peripheria by restructuring—according to fifteen centuries-old traditional boundaries—the map of Europe. That is to say that the Eastern part to Europe which had once been shaping and defending its old *status quo* but became exiled for the post-war rearrangement in Yalta is on the threshold of, first, being welcomed back to and, then, reintegrated into Europe. And, through this addition, not only Central Europe proper, but also the entity called Eastern Europe—that is, the potentialities of a rather belated and half-developed European existence with the alternative of Byzantine statehood and Eastern types of manoeuvring under the guise of law—will eventually find the way of trying again to re-approach and (tentatively, at least) return to the common scene of Europe.

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Now, again, what is European law? As known, ambiguity and contradictoriness most often prove to be both dull and deaf. Sometimes, however, they can exert a fertilising, moreover, even thought-provoking effect. Well, not even the greatest of the living representatives of the worldwide movement to compare laws, FRANZ WIEACKER, has been in a position to transcend this level, for he argued about his chosen topic of the 'Foundation of European Legal Culture' as follows:[1]

[1] In *The American Journal of Comparative Law* 38 (1990) 1, pp. 1–29, reprinted in *European Legal Cultures,* pp. 57–62.

> "to determine the invariables in the historical evolution that give our legal culture its peculiar character, I designate the following essential constants of European legal culture: its p e r s o n a l i s m , its l e g a l i s m , and its i n t e l l e c t u a l i s m . I wish to add that none of these three tendencies is altogether alien to any developed view of the law in civilized mankind, and that they determine the peculiar character of our legal culture only in the interplay and relative weight.
>
> Its p e r s o n a l i s t i c trait is the primacy of the individual as subject, end and intellectual point of reference in the idea of law. Often invoked as the hallmark of a »timeless Europeanism« from HOMER over the Ionian thinkers to DESCARTES and KANT, that characteristic is a rather general and indeterminate turn of phrase.
>
> Its l e g a l i s m is not merely the monopoly of the modern governmental legislator to create and change the law (which on the European continent did not come about until the 18th century), but more generally the need to base decisions about social relationships and conflicts on a general rule of law, whose validity and acceptance does not depend on any extrinsic (moral, social, or political) value or purpose. The precondition of this exclusive power of the legal rule was the separation of the legal system from other social rules and sections (such as religious tenets, moral imperatives, custom, and convention).
>
> As to its i n t e l l e c t u a l i s m , it is *amor intellectualis* which, again and again, drove European legal thinking in the direction of thematization, conceptualization, and contradiction-free consistency of empirical legal materials. By articulating, conceptually and systematically, specific demands on justice in the form of a general idea of justice, this idea has played a decisive role in the ideologizing of the quest for justice by transmuting it from a matter of correct public conduct to one of intellectually cognizable judgements about truth."

With such an invitation to further meditation on what might be regarded as something old[2] and something new[3] in the European identity of law, I thank you for your attention.

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[2] For the underlying issues in a legal philosophical perspective, cf., by the author, 'European Integration and the Uniqueness of National Legal Cultures' in *The Common Law of Europe and the Future of Legal Education / Le droit commun de l'Europe et l'avenir de l'enseignement juridique* ed. Bruno DeWitte & Caroline Forder (Deventer: Kluwer Law and Taxation Publishers 1992), pp. 721–733 [METRO] {reprinted in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1994), ch. 21, pp. 399–411 [Philosophiae Iuris]}.

[3] For some specific features of a novative character, cf., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1995) 190 pp. [Philosophiae Iuris].

# FIELD STUDIES

# Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law

## Developments and the Experience of Postmodernity in Canada*



## I. Canadian Law in General

Canada has not been treated well by legal comparatists up to the present day. Compendiums like the ones mapping the legal world by René David or Rudolf B. Schlesinger or, from among present-day authors, by, e.g., Michael Bogdan,[1] do not, apart from a few commonplaces, devote much attention to it either. In textbooks, Canada is usually characterised—perhaps to emphasise even further the marginal or downright provincial role attributed to it—by some simplistic stereotypes according to which the largest part of the area, originally developed under British influence, was

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[1] René David *Les grands systèmes de droit contemporaines* (Droit comparé) (Paris: Dalloz 1964) 630 pp. [Précis Dalloz]; Rudolf B. Schlesinger, Hans W. Baade, Mirjan R. Damaska & Peter E. Herzog *Comparative Law* Cases – Text – Materials, 5th ed. [1950] (Mineola, N.Y.: The Foundation Press 1988) liii + 923 pp. [University Casebook Series]; Michael Bogdan *Comparative Law* (Dewenter: Kluwer &c. 1994) 245 pp. The classical work of Adolf F. Schnitzer—*Vergleichende Rechtslehre* (Basel: Verlag für Recht und Gesellschaft 1955) xii + 497 pp.—is genuinely outstanding in giving at least a rough outline (pp. 207–208) of the foundations and directions Canada's law has taken throughout history.

unified later on in a federation, while Quebec has retained its French law since 1663. Its geographical location neighbouring the United States has all along—and particularly from the post-WWII-years (principally in foreign policy and government administration, but as discernable in the tone of scholarly and journalistic literature as well)—served as a reason to emphasise its sovereignty; albeit, for obvious reasons, it can scarcely (and increasingly less so) withdraw itself from the dominant influence of the adjacent superpower on philosophical orientation, artistic taste, legal patterns and other aspects of life.[2] Nowadays, Canada excels in both its high living standard and openly professed multiculturalism as one of the most self-confident leading powers of the world.

Its law has indeed developed in the periphery. The English-speaking parts of the one-time dominion followed the usual development of a British colonial empire until the recent past, in both the decision-making tradition and partial codification.[3] The French-speaking part, Quebec, has retained French law irrespective of the fact that France renounced its sovereignty centuries ago. The overall legal continuity was interrupted only by the systematic codification achieved by NAPOLEON in France. This explains why the necessity of reconfirming legal contacts was given as the reason for preparing and promulgating a *Code civil de Québec* (1866), 62 years after the issuance of *Code Napoléon*. The preamble reads as follows:

> "[T]he old laws still in force in Lower Canada are no longer re-printed or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them."[4]

Of course, trying to give any kind of rough outline involves the risk of omitting details—whereas the theoretical dilemmas and structural features

[2] Having stayed in Quebec just at the time of the terrorist attack on September 11, 2001, against New York and other US-towns (about to leave for Montreal and then for Toronto), I was confronted with the fact that almost all important settlements (thus, the residence of the great majority of population) are situated in the frontier zone directly bordering on the United States (from West to East, Vancouver, Brandon, Fort William, Hamilton, Toronto, Ottawa, Montreal and Quebec, while others, like Calgary, Regina and Winnipeg, are not farther from the border than a few hundred kilometres either). Canada's population, about the same in size as that of Hungary, can find a living only in this extremely narrow zone of the territory ninety times as large as Hungary. At the same time, any event and news beyond the strictly local sphere is naturally related to the United States or mediated through its channels.

[3] E.g., *Criminal Code* (1883).

[4] Cf., e.g., Louis Baudouin 'Les apports du Code civil de Québec' in *Canadian Jurisprudence* The Civil Law and Common Law in Canada, ed. Edward McWhinney (Toronto: Carswell 1958), pp. 71–89.

mostly can be understood from precisely these. The most important feature of the legal map of Canada is that the *Quebec Act* (1774)[5] maintains the French heritage in property and civil rights, while the English tradition is followed in constitutional, administrative and criminal law. In addition, English testamentary and land law extends over English settlements and settlers. In general, it provides for English law in commercial lawsuits and evidence, and it introduces the jury system in civil cases.[6] Altogether, the French law of Lower Canada has been mixed from the beginning, in contrast to the English law of Upper Canada: "Quebec enjoys »une dualité de droit commun« and even, more structurally, a »bi-systemic legal system«."[7] It is by no mere chance that, having travelled to North America and visited courts in Quebec, ALEXIS DE TOCQUEVILLE was astonished at the vast variety of languages and traditions used in the jurisdiction. (In addition, we may add, he found the French language used there very old-sounding and outdated as regards both pronunciation and intonation.)[8] Well, it was the co-existence of these two great cultures that generated, shortly after World

[5] 14 Geo. III, chap. 83.

[6] I do not deal here with the legal status of the Indian aborigines (including their one-time customary law and their present claims), which is becoming topical in Canadian political and social public speech and also in doctrinal and practical jurisprudence. For a few theoretical indications, see, by Bjarne Melkevik, 'Question identitaire, le droit et la philosophie juridique libérale: Réflexion sur le fond du droit autochtone canadien' *Cahiers d'études constitutionelles et politiques de Montpellier* (1995), No. 1, pp. 23–37, 'The First Nation and Quebec: Identity and Law, Self-affirmation and Self-determination at Crossroads' in *Globalization in America* A Geographical Approach, dir. José Séguinot Barbosa (Québec: Institudo de Estudios del Caribe/Celat & Université Laval 1997), pp. 95–111 and 246, as well as 'Aboriginal Legal Cultures' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 1–4 [Garland Reference Library and the Humanities, 1743] {all reprinted in Bjarne Melkevik *Réflexions sur la philosophie du droit* (Québec: L'Harmattan & Les Presses de l'Université Laval 2000), part on 'Identité et Droit', pp. 35–87}; and, as practical overviews, also *Delgamuukw* The Supreme Court of Canada on Aboriginal Title, comm. Stan Persky (Vancouver, British Columbia: Greystone Books & David Suzuki Foundation 1998) vi + 137 pp., Thomas Isaac *Aboriginal Law* Cases, Text, Materials and Commentary [1995] 2nd ed. (Saskatoon, Sask.: Purich Publishing 1999) xxx + 610 pp. as well as Patrick Macklem *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press 2001) x + 334 pp.

[7] H. Patrick Glenn 'Quebec: Mixité and Monism' in *Studies in Legal Systems* Mixed and Mixing, ed. Esin Örücü, Elspeth Attwooll & Sean Coyle (The Hague, &c.: Kluwer Law International n.y.), p. 5, the first part-quotation by Louis-Philippe Pigeon *Rédaction et interprétation des lois* [1965] 2e éd. (Québec: Éditeur officiel 1978) xiii + 70 pp. on p. 50.

[8] Alexis de Tocqueville *Oeuvres complètes* Voyages en Sicile et aux États Unis, t. 5, vol. 1, 2e éd. J.-P. Mayer (Paris: Gallimard 1957), pp. 212–213.

War I, the need for Canada to show its own singularity by expressing its independent nationhood in and by the law, thereby contributing, at least with a symbolic force, to a French-Canadian identity too.[9]

This natural desire for self-determination began to bear its fruits by the time around World War II. For instance, in the early 1940s, a growing "prejudice, in the law schools and extending to the courtrooms, commencing against the use of American authorities and texts"[10] was reported. Then, in a few decades, the demand emerged for "Canadian judges developing Canadian law to meet Canadian needs".[11] This era coincided in francophone Canada with the period of ambitions for separation also in legally, but reflected an overall awakening of Canada in every respect. Genuine professors with scholarly attitudes, sometimes distinguished and committed to academic careers, started to appear in law schools, gradually replacing practising judges and lawyers who had usually shuttled between their offices and the university. They already embodied a new style, with scholarly methodology and theoretical sensitivity, able to create magisterial works. This way trends and schools soon emerged to compete with each other; an independent doctrine was formed as developed from the dedicated legal staff; and from that time on, no longer only law claimed to represent truly the nation but legal scholarship entered the scene to become widely acknowledged as an integral part of Canadian public thought, intellectual life and internationally acclaimed performance as well.[12]

The processes—results and impacts—are intertwined. What might have once seemed to be one of the causes of Canada's peripheral status, today indicates general (further) developmental directions (perspectives and availabilities)—perhaps in a way not yet obvious to us, as the entire Central and Eastern European region is in a flux of constant formation today—of universal (or at least global) (world) trends. I mean here a kind of inherent lack

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[9] „C'est par sa façon d'exprimer le Droit qu'une nation manifeste en partie son originalité"—writes A. Perrault—*Pour la défense de nos lois françaises* (Montréal: Action française 1919), p. 8—as a programme.

[10] In *Canadian Bar Review* 21 (1943), p. 57.

[11] Horace Read 'The Judicial Process in Common Law Canada' *Canadian Bar Review* 37 (1959), p. 268.

[12] As a case study, see, e.g., Sylvio Normand 'Tradition et modernité à la Faculté de droit de l'Université Laval de 1945 à 1965' in *Aux frontières du juridique* Études interdisciplinaires sur les transformations du droit, dir. Jean-Guy Belley & Pierre Issalys (Québec: GEPTUD 1993), pp. 137–183. Cf. also Bjarne Melkevik 'La philosophie du droit au Québec: développements récents' in his *Réflexions*… [note 6], pp. 177–192.

of originality as one of the features of Canada, deeply rooted in and conditioned by its past. Of course, in itself this is but the outcome of historical *donnés* that—amidst Canada's early bi-British and bi-French development—did not require or promote their own solutions to be attained. Although those remote Canadian re-formulations of English and French technicalities may have been faint replicas in law, in their new medium they were exposed to interaction in a depth never experienced by the proud and legally *chauvin* isolationisms of the 19th to 20th century England and France (sharing perhaps a single experience in common, their old disdain towards the Germans). What I mean here is the mixing and irreversible intermingling of these two main cultures of law[13] that, due to their co-existence and co-operation and, not least, to the chance of deeper knowledge resulting therefrom, offers an unprecedented experience entitling Canadian lawyers to develop a well-founded self-confidence indeed. For such an added and cumulating knowledge can hardly be gained otherwise. Notwithstanding, pluralism of the parts mixed in themselves does not inevitably imply pluralism of the entire structure.[14] Accordingly,

> "mixed jurisdictions may function as monist jurisdictions. The original sources of law may be disparate in character, yet monist state institutions may already have largely completed the task of transfiguration into a single, national, systemic structure of law."[15]

The process of interaction may have also been accelerated by the unprecedentedly enviable fact that education in both Common Law and Civil Law within the same faculties, which still offered separate (specific) degrees, began some decades ago, and now Common Law is also taught in French and vice versa.[16]

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[13] Cf., e.g., Maurice Tancelin 'Comment un droit peut-il être mixte?' in *Le domaine et l'interprétaton du Code Civil du Bas Canada* dir. Frederick P. Walton (Toronto: Butterworths 1980), pp. 1–32.

[14] See, first of all, Norbert Rouland 'Les droits mixtes et les théories du pluralisme juridique' in *La formation du droit national dans les pays de droit mixte* Les systèmes juridiques de Common law et de droit civil (Aix-Marseille: Presses universitaires 1989), pp. 41–55, especially on p. 42, quoted by Glenn 'Quebec', p. 1.

[15] *Ibidem*.

[16] At present, parallel degrees in Civil Law and Common Law can be earned at McGill University (Montreal) and the University of Ottawa; the Universities of Ottawa and Moncton offer common law programmes in French, while McGill University offers civil law course in English. Other faculties provide a variety of student exchange programmes, and the federal government arranges for inter-Canadian comparative legal studies organised every summer.

Mixed traditions also appear in scholarship with an enhanced interest in both intra- and extra-Canadian comparison of laws. A development like this is not simply the result of some practical decision. Whether we think of the experience (and the crucial theoretical message) of the mutual (un) t r a n s l a t a b i l i t y of legal texts within the European Union[17] or of their c o m m e n s u r a b i l i t y at the intersection of diverging legal cultures,[18] evidently both refer to the hermeneutic significance of the symptom "I interpret your culture through mine" (symbolised by the figurative expression of the "missionaries in the row boat" model[19]) and, thereby, to the fact that, beyond sheer textuality, law is primordially an expression of culture.[20] Accordingly, the use of another language is not simply an issue of translation (or communication technique) but the choice of another culture, that is, an issue of (re-)interpretation in another—inevitably different—medium.

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Developments in present-day Canada are of a special interest to us first of all because they involve the interaction of two leading European traditions in law, and thus highlight mutual influences from the perspective of convergence (which, in view of the unificatory Civil Law codification decided on by the European Union, has raised the topicality of *rapprochement* of Com-

[17] Cf., e.g., Gérard René de Groot 'Recht, Rechtssprache und Rechtssystem: Betrachtungen über die Problematik der Übersetzung juristischer Texte' *Terminologie et traduction* 3 (1991), pp. 279–312 {abridged trans. in *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), pp. 115–120 [Tempus Textbook Series on European Law and European Legal Cultures I]}.

[18] Cf., e.g., from H. Patrick Glenn, 'Commensurabilité et traduisibilité' in Actes du Colloque »Harmonisation et dissonance: Langues et droit au Canada et en Europe (mai 1999)« published as a double issue in *Revue de la common law* 3 (2000) 1–2, pp. 53–66 and 'Are Legal Traditions Incommensurable?' *The American Journal of Comparative Law* XLIX (2001) 1, pp. 133–146.

[19] "In this model, the missionary, the trader, the labor recruiter or the government official arrives with the bible, the mumu, tobacco, steel axes or other items of Western domination on an island whose society and culture are rocking along in the never never land of structural-funcionalism, and with the onslaught of the new, the social structure, values and lifeways of the »happy« natives crumble. The anthropologist follows in the wake of the impacts caused by the Western agents of change, and then tries to recover what might have been." Bernard S. Cohn 'Anthropology and History: The State of the Play' *Comparative Studies in Society and History* 22 (1980) 2, p. 199.

[20] Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

mon Law and Civil Law and, within it, the need to reconsider the controversy between SAVIGNY and THIBAUT in early 19th-century Germany[21]). They also outline the potential of development (or possible deformation) in the light of the Canadian experiment with experiences lived through by them. Here I recall again, as an indication of a kind of belated development, the specific feature of the Canadian past that I referred to earlier as a mere inclination to follow external patterns under peripheric conditions, accompanied by a lack of self-reliance. Around the mid-20th century, this state of mind was replaced by self-building and self-determination, set as a new objective. A lack of balance, swinging between opposites and neophytism may accompany the process. Provincial imitation is replaced by autonomous construction. At the same time, Canada's economic safety coupled with its relative political tranquillity and constitutional stability encourages kinds of experimentation that by far could not be available elsewhere (because of imperial dimensions or the want of reserves). Moreover, situations brought about by chance or provoked by empty slogans may come about due to inexperience. Needless to say, the final balance will be drawn up by the people of Canada. However, for the external observer, all this indicates a path for the future. For everything on the move in Canada develops in line with the dominant ideas of our age, mainstream but also self-fulfilling.[22]

In this overview, I undertake to analyse (1) the change in the role precedents play in the judicial process; (2) the transformation of law-application into a collective, multicultural and multifactorial search for a practical solution, assessable by international standards; (3) the practical trends of dissolving the law both in Common Law and Civil Law jurisprudence; and, finally, (4) the new prerogatives acquired by courts for their own procedures, such as a) the unfolding of principles from statutory provisions, themselves taken as mere guide-marks for the courts, b) the critical filtering of the en-

[21] Cf., e.g., by the author, 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800 and 'Codification at the Threshold of the Third Millennium' *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–117 & 'Codification on the Threshold of the Third Millennium' in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 189–214.

[22] One of my vital Canadian sources has been the oeuvre of H. Patrick Glenn *Legal Traditions of the World* Sustainable Diversity in Law (Oxford: Oxford University Press 2000) xxiv + 371 pp., a universal overview, based upon the generalising re-consideration of his observations built on comparisons focussing on Canada.

tire legal system according to the Charter's human rights by deducing legal solutions directly from the Constitution and, in conclusion, c) the courts becoming an ultimate ethical forum for debated moral issues.

## II. Canadian Legal Developments in Particular

### *1. The Transformation of the Role of Precedents*

Our thinking may prove to be ahistorical whether or not we realise it. In average cases, we tend to take any event as a preliminary to something else, by presuming the present to be given with the frameworks consolidated. We try to analyse and understand anything that merely precedes it, by forcing it into a straitjacket that is often alien and external, and thereby distorting it. In our present-day legal thought, we tend to consider the body of Common Law and the entire English legal tradition as normative material differing from continental law mostly in methodological elaboration; albeit the substantiation of the decisional patterns of English law, developed mainly through adaptation of forms of action and formulated mostly through procedural forms, is a product of initiatives taken only in the 19th century and not earlier.[23] Moreover, as a result of historical reconstruction, we may even declare that practically every feature that had once caused the tradition of Common Law to diverge from Civil Law development has by now disappeared from behind the reality of this law over the past century and a half. To wit, there are no forms of action in England any more; the institution of jury has declined; those few justices once riding circuit all through the kingdom have been replaced by an army of judges; the decisive judicial role of the first and last instance declaring what is the law in the case has disappeared from this machinery of enormous hierarchical complexity; the number of cases to be heard by a judge has increased sky-high with litigation having grown to massive proportions; the one-time exceptionalism of judicial adjudication has been degraded into a mere state-provided service and, with the solemnity of justice reduced to mere routine, the judicature has been transformed into case-managing adjudication, fulfilled as an obligatory task; substantive law defining the legal status of behaviours overshadows the once dominant procedural approach; and the exclusivity of power

[23] H. Patrick Glenn 'La civilisation de la common law' *Revue internationale de Droit comparé* 45 (1993) 3, pp. 559–575.

exercised by a handful of elect men has been challenged by the inclusion of women and candidates with all types of work experiences recruited from fellow-citizens of various colours and cultural backgrounds, eligible through mere professional qualification (and 'learned' only in this respect).[24] Even according to the self-portrayal of the Common Law, all of this has resulted in a change of character so that from now on nothing else can characterise Common Law than some vague "habits of thought".[25] In the light of our post-modern and cosmically extended universal expectations of the rule of law's service-providing state and law, it may seem almost bizarre to recall in historical contrast that even some centuries ago, the judge was not to decide out of duty but at the time when he felt he should indeed do so, because he found the parties' conflict ripe and balanced enough as to their respective legal positions that he might consider his decision was indeed needed for the dispute to end. That means that, in those earlier times, the parties were expected to co-operate in reaching a situation somewhat clear and balanced.[26]

The unification of the judicial system in 19th century England had a series of impacts pointing beyond simple institutional rationalisation. In conclusion, the one-time identity of Common Law was also done away with, as precisely the rivalry of judicial fora (referring to varying normative sources according to differing traditions) had until then defined the identity of English law, across more than half a millennium. For Equity, Admiralty and ecclesiastical law had equally received and channelled Civil Law impacts so that ideas by CUJAS, POTHIER and other (mainly French) lawyers could freely stream into the English law. True, 19th-century England did block this abundant source by that re-organisation of the judiciary. All this notwithstanding, Common Law concepts and institutions could be further fertilised by the English interest in German pandectism during the same century.[27]

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[24] Cf., e.g., H. Patrick Glenn 'The Common Law in Canada' *The Canadian Bar Review* 73 (June 1995), pp. 261–292.

[25] Lord Oliver of Aylmerton 'Requiem for the Common Law' *The Australian Law Journal* 67 (1993), p. 686.

[26] J. H. Baker 'English Law and the Renaissance' *Cambridge Law Journal* 44 (1985) 1, p. 58.

[27] E.g., Glenn 'The Common Law…', p. 278. Both the rich continental collection of classical law libraries (especially of the Inns in London or the Bodleian at Oxford) and JOHN AUSTIN's recurrent visits to Bonn and Berlin may be remembered here. For the latter, see, e.g., Barna Horváth *Az angol jogelmélet* [English legal theory] (Budapest: Magyar Tudományos Akadémia 1943), p. 256 [M. Tud. Akadémia Jogtudományi Bizottsága kiadványsorozata 13].

As to the law's structure, BLACKSTONE was of the opinion that "human laws are only declaratory of, and act in subordination to [divine law and natural law]".[28] In fact, the unthinkable dream of a judge making law (i.e., the term 'judge-made law') was only invented by JEREMY BENTHAM—and not earlier than in 1860.[29] Anyway, the formal system of precedents with the principle of *stare decisis* developed and solidified around the same time. Judicial law-making had become overtly transparent due to the growing resort to the method of distinguishing cases, while courts became accustomed to following earlier and superior decisions. All this presumed an approach of renewal. For

> "[c]ases […] could not be rules to be followed and were hence examples of the type of reasoning which had thus far prevailed […]. Since cases only exemplified arguments, there was no closure of sources".[30]

As is known, in England in 1966, the House of Lords absolved itself from compulsory compliance with its own earlier decisions.[31] This soon resulted—through the Court of Appeal's seventeen justices proceeding in panels—in what we can now call the practical desuetude of earlier decisions. (This same change of direction would lead to similar absolutions from the Supreme Court of Canada and, gradually, from all courts of the provincial Courts of Appeal.) All this amounts to an inevitable change in the law's overall operation. From now on, one has to recognise that decision-making based upon pondering principles is replaced by a "discretionary dispute resolution with a low level of predictability",[32] in which no component can be more than "relaxed" and "flexible".[33] The internal order of Common Law countries comes increasingly close to what we have learned so far about their mutually fertilis-

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[28] *The Sovereignty of the Law* Selections from Blackstone's Commentaries on the Laws of England, ed. G. Jones (Toronto: University of Toronto Press 1973), p. 51, note 31.

[29] J. Evans 'Change in the Doctrine of Precedent during the Nineteenth Century' in *Precedent in Law* ed. L. Goldstein (Oxford: Clarendon Press 1987), p. 68.

[30] G. J. Postema 'Roots of our Notion of Precedent' in *Precedent in Law*, p. 22. In a similar sense, see also Michael Lobban *The Common Law and English Jurisprudence* 1760–1850 (Oxford & New York: Oxford University Press & Clarendon Press 1991) xvi + 315 pp. and David Lieberman *The Province of Legislation Determined* Legal Theory in Eighteenth-Century Britain (Cambridge & New York: Cambridge University Press 1989) xiii + 312 pp. [Ideas in Context].

[31] 'Practice Statement (Judicial Precedent)' *Weekly Law Reports* 1 (1966), p. 1234, as well as *All England Reports* 3 (1966), p. 77.

[32] Glenn 'The Common Law…', pp. 269–270.

[33] G. Curtis 'Stare Decisis at Common Law in Canada' *University of British Columbia Law Review* 12 (1978) 1, p. 8 and, similarly, Wolfgang Friedmann 'Stare Decisis at Common Law and under the Civil Code of Quebec' *Canadian Bar Review* 31 (1953), pp. 723 et seq.

ing interconnections, taking over solutions from each other with persuasive force.[34] At the same time, "[c]itation of single cases has been replaced by search and citation methods which batch or group large numbers of cases, as indicating the drift of decisional law."[35] Accordingly, syllogisms of law-application are also substituted by "statistical syllogism".[36]

Any theoretical formulation of the doctrine of precedent implies the dual chance of an *ex post facto* arrangement with retroactive effect (as an *a posteriori* manifestation or declaration of the law)[37] and—for want of any clear ability to use formalism, due to which "[j]udges […] proceeded on the basis of law they felt they could reasonably articulate, through a »careful working out of shared understandings of common practices«"[38]—of social interests being weighed in the recourse to distinguishing. Or, the chance of law and order becoming transformed into an open-ended play of social mediation has become actual and acute.

All of this results in a new doctrine of case law, with the radical renewal of the ideal of regulation as well. Accordingly, "[t]he announced rule of a precedent should be applied and extended to new cases if the rule substantially satisfies the standard of social congruence".[39] This way, Talmudic tradition comes back into the tradition of Common Law with its distrust in logic and theoretical generalisation for moral choices, by considering both thesis and antithesis suitable to embody the word of the living God.[40] Ulti-

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[34] According to J. A. Hodgins 'The Authority of English Decisions' *Canadian Bar Review* 1 (1923), p. 470 et seq., especially at p. 483, borrowing of ideas could always take place in case the reasoning was applicable conclusively. K. MacKenzie's formulation—'Back to the Future: The Common Law and the Charter' *Advocate* 51 (1993), p. 930—is even more laconic on the decline of precedent, more rapid in Canada than in England.

[35] Glenn 'The Common Law…', p. 270.

[36] H. Patrick Glenn 'Sur l'impossibilité d'un principe de stare decisis' *Revue de la recherche juridique / Droit prospectif* XVIII (1993) 4, No. 55, pp. 1073–1081, especially on p. 1081.

[37] John Chipman Gray *The Nature and Sources of the Law* [1921] 2nd ed. (New York: Macmillan 1948), pp. 168 et seq., and pp. 174 et seq. For a more detailed exposition, see, by the author, 'Ex post facto Regulation' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 274–276 [Garland Reference Library and the Humanities, 1743].

[38] Postema 'Roots…', p. 31.

[39] Melvin A. Eisenberg *The Nature of the Common Law* (Cambridge: Harvard University Press 1988), p. 154, note 75.

[40] Suzanne Last Stone 'In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory' *Harvard Law Review* 106 (1993) 4, pp. 813–894, especially at p. 828, and, as built into the philosophical understanding of legal argumentation, cf., by the author, *Lectures*…, p. 93, note 120.

mately the question 'Is the Common Law Law?' arises. For—as the response holds[41]—

> "[c]ommon law rules are a strange breed. They can be modified at the moment of application to the case at hand, and their modification depends upon the background of social propositions. If […] a doctrinal proposition should be enforced or extended when and only when it is congruent with the relevant social propositions, and a doctrinal proposition should be discarded or reformulated when it lacks such congruence, then the doctrinal proposition seems to be no more than a rule of thumb."

### *2. The Transformation of Law-Application into a Collective, Multicultural and Multifactorial Search for a Solution*

The principle of *stare decisis* has never been accepted in Quebec, although Canadian legal development has always remained open to borrowing, especially from English and French law. This is the reason why it has seldom tried to either formalise or close down its normative sources. Typically, not even the first Quebec Civil Code (1866) abrogated the previous law and did not prohibit reference to former decisions as sources of the law. Or, it generously left in force from pre-code law anything not in simple repetition of wording from codes or incompatible with code provisions, with the effect that "the codification of the Quebec laws seems rather like a half-measure, typical of compromise."[42] For it is to be remembered that demarcation lines between "us" and "them" have always been alien to Canadian tradition. Just as no "formal »adoption«" was known there, eventual borrowings were not regarded as "radically »foreign« laws" either, since, pragmatically, "they represent living law which may be useful in the practical process of dispute resolution."[43]

As if learned from the admonitions of the Institutions of GAIUS that peoples are governed both by law that is particular to them and by law that is common to humanity,[44] the normative bases referred to in judicial decisions

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[41] Frederick Schauer 'Is the Common Law Law?' *California Law Review* 77 (1989) 2, p. 455–471, quotation on p. 467.

[42] *Code civil de Québec,* Art. 2712, and the quotation by M. A. Tancelin 'Introduction' in F. P. Walton *The Scope and Interpretation of the Civil Code of Lower Canada* New ed. M. A. Tancelin (Toronto: Butterworth 1980), p. 27.

[43] H. Patrick Glenn 'Persuasive Authority' *McGill Law Journal* 32 (1987) 2, p. 289.

[44] *„Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur"* in *Inst.* Gaius 1.1.

testify to a rather open and international audience. A recent analysis of jurisprudence shows the following proportion of citations for

the Supreme Court of Canada[45]

| **to decision** | | **to doctrine** | |
|---|---|---|---|
| domestic | 367 | domestic | 63 |
| British | 110 | British | 29 |
| American | 045 | American | 24 |
| Australian–Asian | 014 | French | 09 |
| French | 002 | Australian–Asian | 07 |
| other | 004 | other | 02 |
| **foreign** | **175 (32,3%)** | **foreign** | **71 (53%)** |
| **foreign altogether** | | **36,4%** | |

and Quebec[46]

| | |
|---|---|
| to local decision | 129 |
| to French author | 117 |
| to common law decision | 079 |
| to local author | 029 |
| to French decision | 025 |
| to common law author | 013 |
| **to foreign decisions altogether** | **44,64%** |
| **to foreign authors altogether** | **81,76%** |
| **to foreign sources altogether** | **234 (59,7%)** |

[45] *Supreme Court Reports* 1 (1985), p. 296. According to another survey, the frequency of citation of foreign decisions or laws at the Supreme Court of Canada amounts to 24,2–32,7% of all the references as compared to other Canadian sources, and as compared to foreign ones (typically reference to United States sources in public law, to French ones in cases of Quebec and, in other cases, mostly to German and Israeli ones), 18,9–21,8% of all the references. Cf. H. Patrick Glenn 'The Use of Comparative Law by Common Law Courts in Canada' in *The Use of Comparative Law by Courts* ed. Ulrich Drobnig & S. van Erp (Dordrecht, &c.: Kluwer Law International 1999), pp. 59–78, especially p. 68.

[46] P.-G. Jobin 'Les réactions de la doctrine à la création du droit civil québécois par les juges: les débuts d'une affaire de famille' *Les Cahiers de Droit* 21 (1980), pp. 257–275, especially p. 270.

All this means that references to foreign authors are more frequent in all of Canada, and significantly more frequent in Quebec, than to domestic, respectively local ones; reference to foreign decisions is made in one third, and two fifths of all references, respectively; altogether, reference to foreign materials is made in one-third, and three fifths of all references, respectively; and finally, in Quebec, the frequency of references to foreign decisions is higher by 38,2%, and to foreign authors by 54,26%, than in Canada at large.[47]

Well, at the level of catch-phrases, we may encounter globalised multiculturalism perfected. Interestingly enough, something more is also at stake for a comparative historical investigation of legal traditions. Repeated experience is the case, reminding us that European legal development came about through continuous (doctrinal and judicial) re-interpretation of traditions in *jus commune* rather than from oeuvres created in original construction.[48] Or, the other great (English, French, German or American) legal cultures—which usually serve as standards for us—are in the final analysis nothing but products of trans-national learning and mutual borrowing.[49]

Common Law as a historical accumulation of precedents is process-like by definition: "common law is a developing system in the sense that there is a continuing process of development and exposition of rules."[50] For this very reason,

> "the search for law is too important for any potential external source to be eliminated *a priori*. The law is never definitively given; it is always to be sought, in the endlessly original process of resolution of individual disputes through law."[51]

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[47] There is a remarkable contrast here with the United States asserting itself as open and multicultural, where the frequency of citations in one state from another is about 10%, whereas from an authority outside the USA is scarcely 1% [John Henry Merryman 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970' *Southern California Law Review* 50 (1977) 3, pp. 394–400], or downright unheard of (0%). In its own past, however, this ratio was 25,7% in 1850 and 1% in 1950 [William H. Manz 'The Citation Practices of the New York Court of Appeals, 1850–1993' *Buffalo Law Review* 43 (1995) 1, p. 153].

[48] Cf. primordially *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* I, hrsg. Helmut Coing (München: Beck 1973) [Veröffentlichung des Max-Planck-Instituts für Europäische Rechtsgeschichte].

[49] Glenn 'Persuasive Authority', p. 263.

[50] W. R. Jackett 'Foundations of Canadian Law in History and Theory' in *Contemporary Problems of Public Law in Canada* Essays in Honor of Dean F. C. Cronkite, ed. O[tto] E. Lang (Toronto: University of Toronto Press 1968), p. 29.

[51] *Ibid.*, p. 293.

The feeling of insecurity, the renunciation of any search for law, the wish for agreement and legitimisation from any source at any price add to the above, as if inherent scepticism were to be overcome by a rush for a substitute for safety. After all, the judge "feels much safer if he can rely on foreign jurisprudential continuity instead of own sources gained exclusively from the text".[52]

All in all, new catch-phrases indeed take the lead: d i v e r s i t y , p l u r a l i s m , and c o n c u r r e n c e — as much in law as in other fields.[53] We can be sure that they are fulfilled. According to statistics, for instance, the safe, foreseeable and calculable Civil Law excels in both the number of cases and the time needed for justice administered, as well as in other features of mass-scale litigation. Spectacular and frivolous lawsuits are more typical in the Anglo–American world—filed out of individual rivalry (sometimes represented by gender-, colour- or culture-specific groups), or mutual ambition to suppress, or for revenge or profit-seeking or business interests (e.g., in divorce, for real or alleged discrimination, sexual harassment, medical malpractice, or product liability, etc.). Albeit all this is, due to the complexity of procedure and the cost of lawyer's fees, only available to those in the middle-class with balanced financial backgrounds. Anyway, the number of judges per 100 000 inhabitants is[54]

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|---|---|
| in Germany | 26 |
| in France | 11 |
| in Canada | 08 |
| in England | 01,9 |

The data are not only relevant for employment statistics: they speak of the extent of actual workload and institutional significance as well.

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[52] J.-L. Baudouin 'Le Code civil québécois: crise de croissance ou crise de vieillesse' *Canadian Bar Review* 44 (1966), p. 406. [„se sent beaucoup plus sűr de lui, ayant comme appui la continuité jurisprudentielle étrangère plutőt que ses seules propres ressources d'exégèse du texte"]

[53] Cf., e.g., Vittorio Villa *La science du droit* (Bruxelles: Story-Scientia & Paris: Librairie Générale de Droit et de Jurisprudence 1990) 209 pp. [La pensée juridique moderne]. In Canada, due to inclination towards experiment, differing from the US at any price and concentrating in cities, all this can turn into a remarkable driving force. Cf., for the symbolic resonance of the concurrence of pluralist diversity in Canadian philosophical life, Rita Melillo *Ka-Kanata* Pluralismo filosofico, I–II (S. Michele di Serino: Pro Press Editrice 1990) 165 + 306 pp.

[54] H. Patrick Glenn 'La Cour Suprême du Canada et la tradition du droit civil' *The Canadian Bar Review* 79 (March–June 2001), pp. 151–170, especially p. 161.

Accordingly, the litigation habit developed in the early modern Common Law (with the social exceptionality of a judicial event) continues. Moreover, from the comparative numerical data of the caseload *per annum* of supreme courts—

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|---|---|---|
| Canada | Supreme Court | 100–150 cases heard |
| France | *Cour de cassation* | 28 000 decided cases |

—, it is revealed that two hundred to two hundred and fifty times fewer cases are decided in Canada yearly as against, say, the mass-scale caseload in France.[55]

### *3. Practical Trends of Dissolving the Law's Positivity*

The possibility of a judge becoming his own master by complementing legal considerations with social assessment is inherent in the doctrine of precedent. Take, for instance, the DWORKINian approach, which by differentiating between principles and rules and, thereby, establishing by principles the relevance of rules,[56] involves the mixing of purely legal aspects with external axiological and social considerations.[57]

This is a complete change in the law's nature, running against the one-time JUSTINIAN creed, according to which adjudication has to be based upon not the former instance but the law.[58] Now, a conviction according to which it is "closer to the truth to regard the law as a continuing process of attempting to solve the problems of a changing society, than as a set of rules"[59], becomes the deontological corner-stone of the judicial profession. Also a self-reassuring thought appears to persuade the sceptics that all this

[55] *Ibid.*, p. 154. This comparison does not take account of the mass of unsettled cases, the number of which has grown by 200 000 in France in one single decade. E. Tailhades *La modernisation de la justice* Rapport au Premier Ministre (Paris: La documentation française 1985), p. 36.

[56] Ronald M. Dworkin 'The Model of Rules' *University of Chicago Law Review* 35 (1967) 1, pp. 14–45 {reprint: 'Is Law a System of Rules?' in *The Philosophy of Law* ed. Ronald M. Dworkin (Oxford: University Press 1977), pp. 38–65}.

[57] Precisely, 'questions of law' themselves cannot be anything else than products of an abstraction taken out of a merely analytical interest. Cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

[58] Justinianus (*C.*7.45.13): „*non exemplis sed legibus iudicandum est*".

[59] S[tephen] M. Waddams *Introduction to the Study of Law* (Toronto: Carswell 1979), p. 5.

may conform even better to the claims of participatory democracy than legal positivism, based upon the alleged sovereignty of law. This concept is post-modern, worthy of our brave, new world indeed:

> "Law is less precise but more communal and there are more possibilities of persuasion and adherence to law, and eventually of eliminating it. Decisions are less conclusive, other sources may later prevail, and broader forms of agreement become possible, tolerant of differences now seen as minor and perhaps transient."[60]

From now on, old patterns of institutional development again enter the scene. Once the dam breaks, what used to be merely a phenomenon becomes essential and what was just symptomatic transforms into a programmatic vision about the future, now forming in the womb of society. Anyway, this aspiration is descriptively formulated, yet fulfils a justificatory function, leaving behind any limiting and disciplining framework as an outdated obstacle. The claim for innovation is also formulated as a theoretical claim:

> "Modern societies have been [...] oriented towards the rationalization of autonomous fields of social practice, they have raised the problem of the unity of social action to the level of a formal, universalizing and abstract law, and have understood law as the deduction of an ideal of justice characterized by individual freedom. The indeterminate nature of this idea of justice, namely the impossibility of deducing some concrete content from a principle, has generated a crisis of the power to make law and brought about inductive and pragmatic procedures for recognizing the rights claimed in social conflicts by various categories of actors."[61]

Well, while we may freely meditate on the sense of these and similar theses reminiscent of the leftist Utopian radicalism of Critical Legal Studies, nevertheless, it is a fact that they are no longer exceptional or unique. What they betoken are real alterations in actual practice and factual arrangement. They ascertain, for instance, on a theoretical level that

> "[t]wo paths of legal development may be envisioned. One involves shifting the centre of the legal system away from legislation towards a

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[60] Glenn 'Persuasive Authority', pp. 297 and 298.

[61] Gilles Gagné 'Les transformations du droit dans la problématique de la transition à la postmodernité' *Les Cahiers de Droit* 33 (1992) 3, pp. 701–733 and in *Aux frontières du juridique* Études interdisciplinaires sur les transformations du droit, dir. Jean-Guy Belley & Pierre Issalys (Québec: GEPTUD 1993), pp. 221–253, in abstract, p. 221.

> limited set of fluid principles and concepts. The other implies re-emphasizing legislation as the centre of the system, while rolling back the legislative tide and reactivating the symbolic meaning of legislation—especially through the development of new forms of civic involvement in the legislative process."[62]

Thus, once the dam breaks, a further recognition (mixed with some neophyte haste and hypocrisy) is added to the theses: of course, all this is true, quite to the extent that this has never been otherwise either in Civil Law[63] or in codification.[64] One may have been wrong in the past but now one is certainly right.

As the Canadian justice LA FOREST declared in a recent case, "[t]he legal system of every society faces essentially the same problems and solves these problems by quite different means, though often with similar results".[65] Well, it is precisely the diversity of both the paths of procedure and the instruments applied, the sources invoked and the kinds of reasoning resorted to, from among which the result of the choice actually generated today proves to be quite open-ended, which may signal the advent of a new era.

Though in a theoretical veil, it is now declared with brutal openness that "it is no longer the legislator with whom the interpreter conducts a dialogue but the authorities; namely, the opinions of other learned justices, judges and especially famous justices".[66] Actually, hereby, both the subjects and

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[62] Pierre Issalys 'La loi dans le droit: tradition, critique et transformation' *Les Cahiers de Droit* 33 (1992) 3, pp. 665–699 and in *Aux frontières juridiques*, pp. 185–219, in abstract, p. 186.

[63] "law is prior to the law […] law is not entirely included in the law" [„le Droit est avant la loi" "le Droit n'est pas tout entier dans la loi"] Ph[ilippe] Rémy 'Éloge de l'exégèse' *Revue de la Recherche Juridique / Droit prospectif* VII (1982) 2, p. 261. – "Law is variable and diffuse. It is a material to be explored and not to be created." [„Le droit est variable et diffus. Il est donc une matière à découvrir et non pas à créer."] C[hristian] Mouly 'La doctrine, source d'unification internationale du droit' *Revue internationale du Droit comparé* 38 (1986) 2, p. 364. – "law is prior to legal rule and overflows it everywhere" [„le droit est antérieur à la règle de droit et la déborde de partout"] J[ean]-M[arc] Varaut 'Le droit commun de l'Europe' *Gazette du Palais* (19–20 September 1986), Doct., p. 9. – "Law is not some kind of construction, but a reality to be explored" [„le droit n'est pas une construction mais une réalité à découvrir"] Christian Atias 'Une crise de légitimité seconde' *Droits* 4 (1986), p. 32. – "There is no one today to declare [confirming the words of MONTESQUIEU] that the judge is nothing else but »the mouth of the law« […] the judge sets up his own barriers for himself." [„Nul n'oserait plus soutenir aujourd'hui que le juge n'est que »la bouche de la loi« […] le juge arrête lui-même ses propres limites"] François Rigaux *La loi des juges* (Paris: Odile Jacob 1997), pp. 65 and 247.

[64] [1977] 2 *R.C.S.* 67, at p. 76.

[65] *Rahey v. The Queen* [1987] 1 S.C.R. 598, at 319.

[66] Rémy, p. 260. [„l'interprète ne dialogue plus avec le législateur, mais avec des autorités: opinions d'autres docteurs; opinion des juges, spécialement l'opinion des grands juges"]

the play, topic, purpose and stake of a legal process, as well as the arguments invoked and the function of the entire judiciary are changed. "All the World's a Courtroom"—they shout not quite without foundation, heralding a new millennium. At once a methodology builds upon the apparent description, so that

> "[t]he court does not proceed in a purely deductive manner, because the available sources or principles are not always clear and complete enough to permit deduction. This is wherefrom the dialogical and transnational character of civil law arises. The process is not inductive either, because no simple multiplication of instances or potential examples is able to lead to j u s t i f i c a t i o n by the foundations provided for the resolution of the affair before the court. Otherwise, among these sources beyond the law's borders, the court does not cite only judicial decisions. It also has recourse to authors expressing opinions and developing principles, just as to laws and codes. If this method should be qualified, it can be described as analogical, first of all. By means of this method, one searches for links and common elements between the problem to be resolved and the model proposed, whatever the institutional source of the latter. […] The legitimacy of the court's decision depends on the legitimacy of the decision's sources; enlarging these, the range of legitimate decisions is enlarged." [67]

Thereby, we seem arrive from Common Law tradition (having once originated in Europe) at a peculiar compound of some Anglo–American Europe. A new kind of logic is to correspond to this. In its terms,

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[67] [„la Cour ne procède pas d'une manière purement déductive, car il n'y a pas toujours de source ou de principe suffisamment clair et complet pour permettre la déduction simple. D'où le caractère dialogique et transnational du droit civil. Le processus n'est pas non plus inductif, car la simple multiplication d'instances, ou d'exemples potentiels, ne saurait donner lieu à une j u s t i f i c a t i o n , ne saurait fournir une raison pour la résolution de l'affaire particulière devant la Cour. D'ailleurs, parmi ces sources extra-frontalières, la Cour ne cite pas que des décisions judiciaires. Elle a recours aussi aux auteurs, qui émettent des opinions et développent des principes, de même qu'aux lois et aux codes. S'il faut qualifier la méthode, elle peut être décrite comme étant surtout une méthode analogique. Par cette méthode, on cherche des liens, des éléments communs, entre le problème à résoudre et le modèle proposé, quelle que soit sa source institutionnelle. […] La légitimité de sa décision dépend de la légitimité de ses sources; en les élargissant, on élargit le champ des décisions légitimes."] H. Patrick Glenn 'La Cour Suprême du Canada…' p. 169. Cf. also Shirley S. Abrahamson & Michael J. Fischer 'All the World's a Courtroom: Judging in the New Millennium' *Hofstra Law Review* 26 (1997) 2, pp. 273–291.

> "[t]he dialogical principle means that two or more various kinds of »logic« are combined into unity in a complex (mutually complementing, concurring and antagonistic) manner without duality being lost in this unity."[68]

One has to note here that duality may have an additional meaning in relation to the specific case of Canada, as is clearly shown in the Canadian characterisation of methodological novelty:

> "the jurisprudence of Quebec, especially in civil affairs, departs from the model of judicial syllogism, in order to practice the discursive and descriptive reasoning characteristic of common law."[69]

This is what was recently announced in Canada with a simultaneously reconstructive and normative claim, as a legal theory of post-modernism, called l e g a l s o c i o - p o s i t i v i s m .[70] The scholarly motive of elevating all this to theoretical heights is neutral in itself: apparently it results from the merely sociologically inspired approach to and specification of the concept of law.[71] However, by extending its subject, it also turns the entire conception inside out. Namely, law is not a kind of normativity any longer but a mere fact or, more precisely, an aggregate of facts regarded as legal.[72] Or, law embodies a kind of polycentrism by its "inter-normativity" that mediates—through its network of many actors—between law and the axiologism of invokeable extra-legal (social, economic, ethical, etc.) norm-systems.[73]

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[68] Edgar Morin *Penser l'Europe* (Paris: Gallimard 1987), p. 28. Quotation by H. Patrick Glenn 'Harmonization of Private Law Rules between Civil and Common Law Jurisdictions' in Académie internationale de droit comparé *Rapports généraux* XIII[e] Congrès International, Montréal 1990 (Cowansville, Qué.: Éditions Yvon Blais n.y.), pp. 79–95 on p. 89, note 29. [„Le principe dialogique signifie que deux ou plusieurs »logiques« différents sont liées en une unité, de façon complexe (complémentaire, concurrente et antagoniste) sans que la dualité se perde dans l'unité."]

[69] Bjarne Melkevik 'Penser le droit québécois entre culture et positivisme: Quelques considérations critiques' in *Transformation de la culture juridique québecoise*, pp. 9–21, especially on p. 15. [„la jurisprudence québécoise tend, surtout en matières civiles, à sortir du modèle du syllogisme judiciaire pour pratiquer le raisonnement discursif et descriptif caractéristique de la common law."]

[70] According to his expression: '*socio-positivisme juridique*'. *Ibid.*, passim.

[71] Hubert Rottleuthner 'Le concept sociologique de droit' *Revue interdisciplinaire d'Études juridiques* (1992), No. 29, pp. 67–84.

[72] Melkevik, *ibid.*

[73] See, e.g., *Entre droit et technique* Enjeux normatifs et sociaux, dir. René Côté & Guy Rocher (Montréal: Thémis 1994) x + 425 pp.

Otherwise speaking, it is a duality, a compound of "law as a s o c i a l l y c o n s t r u c t e d fact" and "law as a s p e c i f i c a l l y n o r m a t i v e f a c t".[74] As hoped for, this is already on the way to dissolving the law's separation, distinction and specificity. Its ideologists are about to take sides. Accordingly,

> "[w]e prefer a more integrated approach, one in which law also takes part in exercising power and especially state power, and which also allows for the constitution and reproduction of social relations and institutions, moreover, within certain limits, their transformation as well, so that law serves as a system of justification in the exercise of power, consequently also as a point of reference in the contestation of power (out of which the revindication of »rights« may arise)."[75]

### *4. New Prerogatives Acquired by Courts*

The specific ambition of the Supreme Court of Canada in the first half-century of its operation was to unify the Common Law and Civil Law, which ambition it has, however, recently renounced, probably for lack of better results than those achieved to date.[76] It has assumed new goals instead, and some of these indicate new shades of judicial function with particular prerogatives. In the following, we shall pay special attention to them, because they use (or misuse) the authority provided by the law when they actually draw from extra-legal sources, notwithstanding the fact that they demand indisputable authority for themselves, like the one due to decisions taken in law.

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[74] Andrée Lajoie 'Avant-propos' in Andrée Lajoie, J. Maurice Brisson, Sylvio Normand & Alain Bissonnette *Le status juridique des peuples autochtones au Québec et le pluralisme* (Cowansville: Yvon Blais 1996). [„le droit, fait social construit / le droit, fait normatif spécifique"]

[75] René Laperrière 'À la recherche de la science juridique' in *Le droit dans tous ses états* La question du droit au Québec, 1970–1987 (Montréal: Wilson & Lafleur 1987), pp. 515–526, quotation on p. 524. [„Nous préférons une approche plus intérgrée selon laquelle le droit participe à l'exercice du pouvoir, et particulièrement du pouvoir étatique, à la fois en permettant la constitution et la reproduction des rapports sociaux et des institutions et même dans certaines limites leur transformation, et en servant de systèmes de justification à l'exercice du pouvoir, et donc de points de référence à la contestation du pouvoir (d'où la revendication de »droits«)."]

[76] H. Patrick Glenn 'Le droit comparé et la Cour suprême du Canada' in [Université d'Ottawa, Section de droit civil] *Mélanges Louis-Philippe Pigeon* (Montréal: Wilson & Lafleur 1989), p. 197.

a) Unfolding the statutory provisions in principles The new *Code civil de Québec* (January 1, 1994), awaited and prepared for so long (rendering the masterly, albeit belated commentary of the old code[77] mere waste paper), actually anticipated the dawn of the new era. Sharply opposed to the classical tradition—as set forth by the president of the office devoted to the old code's revision[78]—, it was from the very beginning drafted as "temporal, relative, variable, consecrating [...] a certain manner of thought, a certain manner of life, at a given time in the history of a people"; moreover—as also announced before the code entered into force—, the period for which it was foreseen to be effective, might even prove surprisingly short.[79]

Its drafters aimed at consolidating jurisprudential developments since the earlier code as *de lege lata* addenda, on the one hand, and integrating it through codification with newly formulated *de lege ferenda* doctrinal ideas, on the other. At the same time, some balancing and value- and interest-representing function was also assumed. After all, the first internationally acclaimed act of post-modern codification was halted halfway,[80] by codifying without making the law rigid.

Nonetheless, this may perhaps offer a model for the private law codification launched by the European Union as well. It seems, anyway, as if the Canadian codifiers were aware of the fact that they had achieved hardly more than the reconstruction of the dilemmas and conditions of mid-18th-century Europe, while also undertaking tasks normally performed through judicial processes.

This is why the outstanding Canadian comparatist could proudly declare—while not denying the need for continuous national legal development—that, back in his time,

> "SAVIGNY may have been right [...] but [...] codification may not be the obstacle to this process that SAVIGNY saw it to be [...: for] contemporary codes may not represent the type of code that SAVIGNY and others had in mind."[81]

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[77] *Quebec Civil Law* An Introduction to Quebec Private Law, ed. John E. C. Brierley & Roderick A. Macdonald (Toronto: Edmond Montgomery Publications Ltd. 1993) lviii + 728 pp.

[78] Paul A. Crépeau 'Les lendemains de la réforme du Code civil' *Canadian Bar Review* 59 (1981), p. 625 et seq., quotation on pp. 626–627.

[79] Serge Gaudet 'La doctrine et le Code civil du Québec' in *Le nouveau Code civil* Interprétation et application (Université de Montréal Faculté de Droit 1993), pp. 223–240 [Thémis].

[80] Cf. note 36.

[81] H. Patrick Glenn 'The Grounding of Codification' *University of California Davis Law Review* 31 (Spring 1998) 3, pp. 765–782, especially p. 782.

b) Constitutionalisation of issues The way procedure developed in the United States[82] has already penetrated Hungary and the Central and Eastern European region as well. In Canada, it was the constitutional review to be carried out by the Supreme Court to implement the *Canadian Charter of Rights and Freedoms* (1982) that created this opportunity. The courts took the chance with "enthusiasm"; moreover, in the hope of extending the scope of civil liberties, they were soon to cover private law cases as well.[83] However, the mere prospect of statutory provisions being put aside so that ordinary courts can directly apply principles of charters in their own interpretation, has amounted to a change of legal practice as well. "Conflicts of interest now tend to be framed as conflicts of rights, and the Court is expected to adjudicate."[84]

This development provokes both criticism and fears of the politicisation of the judicature—as the book-title *The Charter Revolution and the Court Party* may illustrate[85]—; after all, practice has already proven that "the Charter serves merely as a blank cheque in the hands of the judges".[86] The criticism is reminiscent of the indignation against the Supreme Court of the

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[82] The subjection of the decisions of state judges (as state-acts) to the *Bill of Rights* took a start half a century ago [*Shelley v. Kraemer*, 334 U.S. 1 (1948)], growingly covering the field of state private law with regard to the elected nature of judicial office [*New York Times v. Sullivan*, 376 U.S. 254 (1964)].

[83] Peter W. Hogg 'The Law-making Role of the Supreme Court of Canada: Rapporteur's Synthesis' *The Canadian Bar Review* (March–June 2001), pp. 171–180, especially p. 172. The moderate degree of even an explosive "enthusiasm" in a well-balanced state—in contrast with the almost infantile self-asserting fury of the Constitutional Court activism in Hungary in the first nine years since its inception—appears from the fact that a total of 64 statutory provisions (not complete laws!) were struck down in as many as 18 years, in addition to a much larger number of governmental actions by police officers or government officials. Cf. P. J. Monahan 'The Supreme Court of Canada in the 21st century' in *ibid.*, p. 374, note 2.

[84] *Ibid.*, p. 179.

[85] E.g., F. L. Morton & R. Knopff *The Charter Revolution and the Court Party* (Peterborough: Broadview Press 2000). – "The rule of the Charter is accompanied by the hyper-juridicisation of social relations" [„La règne des Chartes s'accompagne d'une hyper-juridicisation des rapports sociaux."] Jean-François Gaudrealt-DesBiens 'Les Chartes des Droits et Libertés comme loups dans la bergerie du positivisme? Quelques hypothèses sur l'impact de la culture des droits sur la culture juridique québécoise' in *Transformation de la culture juridique québécoise*, pp. 83–119, quotation on p. 108. Cf. also Luc Bégin 'Le Québec de la Charte Canadienne des Droits et Libertés et la critique de la politisation du juridique' in *ibid.*, pp. 153–165.

[86] Michael Mandel *La Charte des droits et libertés et la judiciarisation du politique au Canada* (Montréal: Les Éditions du Boréal 1996), p. 107.

United States actually re-writing the Constitution with no specific authorisation.[87]

Press cuttings are also thought-provoking. One of them, entitled *Supreme Self-restraint*, reads as follows:

> "Canadians have been outraged as the courts have used the Charter to tweak or abolish dozens of laws, including the abortion law, the Lord's Day Act, restrictions on pornography and voluntary school prayer, and laws that kept incompetents from fighting fires".[88]

These and similar criticisms have finally been followed by remarks from the United States, according to which this is but the order of values of some self-appointed individuals imposed upon the community, without having ever been confirmed by any democratic voting procedure. For instance, according to the article *Out-of-control Judges Threat to Rule of Law*,

> "[i]nstead of upholding the law as defined by precedents and legislative enactments, judges now routinely change the rules of law to accord with their own personal political preferences."[89]

Imposing values upon the community by the mere force of judicial authority, supported only by a narrow intellectual elite but without any democratic assessment, may easily end in counter-effects. For politicising the judicature may prompt democratic voters with legitimately elected legislative and executive institutions to react by treating the judiciary and its partisan views in a genuinely politicised way, as a political institution. The obvious danger of this was already formulated by some prophetic justices.

> "Only judicial independence will suffer if we continue to push the constitutional envelope as we have over the past 20 years. An overridden public will in time, demand, and will earn, direct input into the se-

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[87] Cf., chiefly, from Robert H. Bork, *The Tempting of America* The Political Seduction of the Law (New York: The Free Press & London: Collier Macmillan 1990) xiv + 432 pp. and *Slouching towards Gomorrah* Modern Liberalism and American Decline (New York: Regan Books / Harper-Collins 1997) xiv + 382 pp. {reconsidered by the present author in 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man, elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom, 2000) pp. 71–76.}

[88] 'Supreme Self-restraint' *National Post* (April 7, 2000), p. A19.

[89] R. Leishman 'Out-of-control Judges Threat to Rule of Law' *London Free Press* (May 12, 2000).

> lection of their judges as they do with their legislative representatives. There will be renewed calls for a supplementary process wherein their judges' performance, even the continuance of their employment (as it will be characterized) can be periodically reviewed."[90]

c) The Supreme Court as the nation's supreme moral authority It has been observed during the last decade that the Supreme Court of Canada is not only willing to rely on scholarly opinions—moreover, from living authorities[91]—but, besides widely using legal doctrine, it also growingly draws from mostly mainstream philosophical considerations as normative foundations.[92] Thereby, it inevitably takes a stand on political and moral philosophical issues as a partisan forum, for, in fact,

> "[t]he Supreme Court has, since 1982, taken a one-sidedly praetorian position in favour of liberal philosophy and ideology, which is a break with formerly prevalent pluralism. What we can see is thus an attachment to one single philosophy [of, e.g., JOHN STUART MILL, DWORKIN or RAWLS or SCHAUER, as the author of the quotation adds—Cs. V.], with any other aspect ruled out at the same time."[93]

Obviously, no one has entitled the Supreme Court to elevate itself to ethical heights using nothing but its competence of decision.[94] The circumstance

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[90] Justice A. McClung in *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 (Alta. C.A.), paras. 23–63, para. 56. For all three examples from press-cuttings, see Patricia Hughes 'Judicial Independence: Contemporary Pressures and Appropriate Responses' *The Canadian Bar Review* (March–June 2001), pp. 181–208, especially p. 201, notes 71–72. – It is to be remarked that The International Bar Association Code of Minimum Standards of Judicial Independence itself does by far not exclude the responsibility of each judge to be borne before the community as running against judicial independence: "It should be recognized that judicial independence does not render the judges free from public accountability […]." *The International Bar Association Code of Minimum Standards of Judicial Independence*, Section 33.

[91] As running against the tradition long-established in Britain. Cf. D. Vanek 'Citing Textbooks as Authority in England' *Chitty's Law Journal* 19 (1971), pp. 302 et seq.

[92] Christian Brunelle 'L'interprétation des droits constitutionnels par recours aux philosophes' *La Revue du Barreau* 50 (mars–avril 1990) 2, pp. 353–390, in particular at p. 370.

[93] Melkevik 'La philosophie du droit', p. 180. [„La Cour suprème a, depuis 1982, pris une position unilatérale et prétorienne en faveur de la philosophie et de l'idéologie libérales qui contraste avec l'ancien pluralisme. Il s'agit ainsi d'une adhésion à une philosophie unique au détriment de tout autre point de vue"]

[94] Cf., e.g., Georges A. Légault 'La fonction éthique des juges de la Cour suprême du Canada' *Ethica* 1989/1, pp. 95–109 and Louis LeBel 'L'éthique et le droit dans l'administration de la justice (ou le juge fait-il la morale?)' *Cahiers de recherche éthique* 1991/16, pp. 159–169.

that in the most debated topical questions dividing society (like euthanasia, abortion or *in vitro* fertilisation), it declares itself to be the highest forum of indubitable authority,[95] implies—despite any short-term effects and actual influences—that the long run threat for the Supreme Court itself will be to make its own position indefensible and vulnerable.

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The scale of globalisation witnessed in Canada, the subject of the present case study, is not at all unfamiliar in the European Union either, especially not after the decision was taken a decade ago to prepare a codification of private law, which would be common at least in basic principles. In both cases, the main point is to re-consider the law's normative material in a way somewhat released from nationally positivated self-restriction while searching for a kind of trans-national cultural community. By gradually eliminating the law's substantive nature, legal self-identity is mostly preserved in a rather procedural sense. Naturally, all this involves a change in the concept of, approach to, and even traditional techniques in, law, eventually also leading to a change of character with consequences and perspectives utterly unforeseeable in detail for the time being.

Although by far not as a *sine qua non*, yet globalisation may nevertheless call for an issue in "sustainable development", so it will be accompanied by the preservation of some kind of "sustainable diversity", in the form of the increasing reciprocal action of all great legal cultures and traditions of the human kind with the mutual utilisation of shared sources for inspiration.[96]

[95] Melkevik, *ibid.*, p. 186.

[96] These trends are traceable already in Glenn *Legal Traditions*…, ch. 10: »Reconciling Legal Traditions: Sustainable Diversity in Law«, pp. 318 et seq. as well as in his 'Vers un droit comparé intégré?' *Revue internationale de Droit comparé* 51 (1999) 4, pp. 841–852 and 'Comparative Law and Legal Practice: On Removing the Borders' *Tulane Law Review* 75 (2001) 4, pp. 977–1002.

# HUMANITY ELEVATING THEMSELVES?
## Dilemmas of Rationalism in our Age*



> "The *Homo Europaeus* [...] has replaced the creative principle with Reason, his own reason, which has also occupied the place of his soul, and he thus became, depriving himself of any kind of transcendence, more and more immoral, soulless and ungodly."
>
> {Nándor Várkonyi *Az ötödik ember* [The Fifth Man] I–III, ed. Katalin Mezey, III (Budapest: Széphalom Könyvműhely 1997), p. 41}

> "It is not rights that constitute freedom; this is what we have got from inside from the beginning, i.e., freedom that acquires the rights due to it."
>
> {*Ibid.*, p. 266}

## I. The Reason and its Adventures

### *1. Progress and Advance Questioned*

"Whether the progress in sciences and arts has contributed to the advancement of morals?"[1]—this was the question formulated more than a quarter

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* First presented at a conference in the Petőfi Literary Museum (Budapest) in 1999 and subsequently published in its proceedings volume *Sodródó emberiség* [Mankind adrift: Papers dedicated to Nándor Várkonyi's *The Fifth Man*] ed. Katalin Mezey (Budapest: Széphalom [2000]), pp. 61–93.

[1] „Si le rétablissement des sciences et des arts a contribué à épurer les moeurs", by Un Citoyen de Genève [Jean-Jacques Rousseau] *Discours qui a remporté le prix à l'Academie de Dijon* En l'année 1750 (Genève: Barillot n.y.) 66 pp.

of a millennium ago as the theme for competition by the Academy of Dijon, and perhaps there is still no question that would be more pressing than this one, inquiring into our age's concept of humanity and (perhaps even more importantly) the place and quality of human personality in our vision of the future.

"God is dead!"—this is how *Zarathustra* of FRIEDRICH NIETZSCHE, descending from the mountain, alone again, spoke to his heart;[2] and now we know that in his own way he was right, as it was his age that he expressed in a symbolic form, from the perspective of an inverse logic. "It is not God that is dead but man and rightly so because he has extinguished the Divine in himself"—as VÁRKONYI remarked later, in a conceited age, one even more repulsive to human reflection.[3]

How has all this been possible? How have things gone that far? Many a brilliant mind has struggled with the flood of problems arising from the above question for generations, giving various answers covering nearly all quarters of life. It is hardly my task to repeat or even summarise these here and now. All the less so because I, as a student of legal philosophy, have for a long time now encountered issues that have proven to be insoluble dilemmas even now,[4] focussing on exactly the same pivotal issues that VÁRKONYI—in his oeuvre in general and in his search for the perspective of *The Fifth Man* in particular—chose as leading concerns of his inner struggles as a thinker. Accordingly, one of the fundamental topics I shall address in the present paper is the disappearance of deeper human knowledge—or wisdom—from our culture, owing to the fact that people have, in their ways of acquiring knowledge, rendered exclusive the so-called methodical paths of cognition expressed in the CARTESIan *cogito* of the individual ego. The other fundamental topic I shall address is the process of a person's inner emptying after he or she had, as part of modern civilisation, rendered his or her own essence, values and choices optional (by making them dependent on incidental personal or majority will).

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[2] Friedrich Nietzsche *Thus spake Zarathustra* [Also sprach Zarathustra, 1883] trans. Thomas Common [1891] in <http://eserver.org/philosophy/nietzsche-zarathustra.txt>, Prologue, para. 2.

[3] Nándor Várkonyi *Az ötödik ember* [The Fifth Man] I–III, ed. Katalin Mezey, III (Budapest: Széphalom Könyvműhely 1997), p. 316.

[4] Cf., by the author, above all, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] and, as basic research, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

We shall see that despite its apparent present-day alienation and verbally concealed esoteric professionalism, law is one of the most sensitive mirrors of human culture, precisely because it is compelled to respond to crucial social and cultural dilemmas in the dichotomic exclusivity of either "yes" or "no". Lawyerly mentality with its "artificiall reason"[5] is, therefore, a function of the world concept society has formed about nature and humanity, of the factors and motives in play and of the destination of them all, while it both expresses and instrumentally shapes this world concept.

*2. The Human Search for Safety Objectified*

The science-philosophical reconstruction of the ways of both human cognition and our interpretation of texts at any time clearly shows that in one's artificial reality-constructing role, the human attitude to tradition is always pre-conditioned by the personality and its cultural (etc.) setting. That is, a human construction of reality is also created when a scholar claims just to reflect reality by formulating its laws and/or merely inferring them from given premises. The language used is itself constructive and the world-view, the set of concepts, moreover, even the so-called scientific methodology elaborated within the frameworks of the search for answers, are all to some depth of a normative force.[6]

Despite our constantly renewed efforts to make science and language objective, longing for safety yields in the final analysis nothing more than the relativity of conceptual foundations, the unstable basis of logified inferences and the sheer unproductivity of the arrogance of intellectualism. However, our conclusion is not necessarily bound to be pessimistic, heralding the solipsism of some kind of self-assertion. For even if reason may not find a solid foundation in itself, in its encounters with the feedback of human practice and through its success, proven in basic matters of life, it still can become a guide on which we can rely.[7]

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[5] First used as "Equity and Lawes, an artificiall Reason and Will" in Thomas Hobbes *Leviathan*… (London: Andrew Crooke 1651), The Introduction in <http://oll.Libertyfund.org/Texts/Hobbes>.

[6] Cf., e.g., by Joachim Israel, 'Is a Non-normative Social Science Possible?' *Acta Sociologica* 15 (1972) 1, pp. 69–87 and 'Stipulations and Construction in the Social Sciences' in *The Context of Social Psychology* A Critical Assessment, ed. J. Israel & H. Tajfel (London & New York: Academic Press 1972), pp. 123–211.

[7] Cf., as formulated by the author—following the systemic (autopoietic) reconstruction of the nature of the social thought of man—*Theory of the Judicial Process*, ch. 5 and *Lectures*…, paras. 5.3 and 7, as well as Annex VII [both in note 4].

In this case, where is the place of reason among the known diverse human abilities and actions? Does it represent the entirety of our potentialities, or, being itself nothing but a medium, is it able to approach only that which it can grasp through its own filter anyway? Is it true that any filtering[8] can be equal only to homogenisation, and that homogenisation leads inevitably to the impoverishment and disintegration of the one-time entirety, that is, to a kind of distortion?[9]

Is it possible that, although our world is complex, by having described its uninterrupted unity in a finite sequence of detached laws we have brought about something that is dramatically artificial, and ultimately nothing other than a mere operational repetition reduced to some rudimentary rules?[10] Is it con-

[8] 'Filtering' denotes also a 'jump', standing beyond the sphere of logical interpretability, and thereby also a 'transformation'. In a legal context, cf., e.g., Aleksander Peczenik 'Non-equivalent Transformations and the Law' in *Reasoning on Legal Reasoning* ed. Aleksander Peczenik & Jyrki Uusitalo (Vammala: Vammala Kirjapaino Oy 1979), pp. 47–64 [The Society of Finnish Lawyers Publications D/6].

[9] "Nature [...] is not reasonable at all; it operates with completely different factors than reason does. Thus, it does not, first of all, work with identical and continuously repeating units, that is, quantities, but with the endless multitude of dissimilar, independent and non-recurrent qualities. [...] When we »recognise« numbers, that is, units, identical features, repetitions, in other words, rules, laws in nature, in fact we do nothing other than to project the abstractions of our intellects back onto it, we form it in our likeness, we anthropomorphise, rationalise and falsify it." Várkonyi *Az ötödik ember* [note 3], p. 44. Let me also quote the expressive statement by VÁRKONYI's contemporary: "the formations of our sensational world, the mere ideas, are not finally and not very much realistic. One formation melts into the other and the formations themselves depend considerably on their repetition, somehow on human conventions, while their coverage of reality is not too stable. Man had to make unimaginable efforts to create the forms of the solid material world. Because, properly speaking, these do not exist in fact, but it is we who filter them from the reality. Objects are in reality not like that; it is humanity that forms them. It was probably this that Greek civilisation brought about before history, the ultimate forms of assessment, the geometry and the human body, the musical and poetic rhythm, the edifices, the mathematics. These are conventions based on order, serving as orientations for humanity. […] What our eyes see is not what exists but what they pick out from reality, what is important for us, and we give it a shape. Seeing is not simply perception, it is not a remarked fact, but a new structure and formation based on selection." Béla Hamvas 'Logika és ellentmondás (Stéphan Lupasco)' [Logic and contradiction] in his *Szarepta / 64-es cikkek* (Budapest: Médio [1998]) 442 pp. [Hamvas Béla művei 14], pp. 342–343 and 343.

[10] "[H]is laborious fight for the recognition of eternal laws is essentially nothing other than imagining his own laws back into the order of nature"—Várkonyi [note 3] wrote (p. 44), adding: it is only the description of actual causality that can be taken as science, while extrapolation of past repetitions into the future is only a matter of belief.

ceivable that our own (otherwise successful) means, used to construct our own concept of the world, may themselves overcome us in the end? Is it acceptable that our lives will finally be meant to serve nothing other than the fulfilment of such means? That is, is it sensible for us to tend to think about the world by projecting our instrumental representations as a universal transcendent power, more and more exclusively within the bounds defined by our means?

It is by no means unreal to presume that the message of the past can suggest a more complete image as compared with the fashionable—although over-confident and over-simplistic—answers of the present. Therefore, revoking it in an unbiased way may perhaps promise a more complete and comprehensive perspective for our future, too.

*3. Knowledge Separated from Wisdom*

According to reconstructions (which are not too fashionable nowadays),[11] our mental world is wholly composed inextricably, and even in elementary parts inseparably, of the constant interaction of the following two kinds of impetuses:

- the unconceptualised (or just barely conceptualised) inspirations of our spiritual existence, building in us day to day through the accumulation in a constant maelstrom of all kinds of experiences, desires and fears of our life lived through both emotionally and ethically, of contemplations linking us to the memory of the Divinity living with us, of our senses of values and of the urges and limitations arising from our subconscious and all the observations we derive from everyday practice. These are what drive or shadow us in our actions at any time, what validate us or put us into uncertainty when we decide whether or not we shall follow certain conceivable directions. In brief, these add up to what we call the p r a c t i c a l e x p e r i e n c e of the individual or his or her community, or (in case it needs to be conceptualised or formally expressed) what we refer to as the 'logic' of 'problem-solving', 'discovery' or 'search for an answer', and quite commonly arrange into the field of 'practical philosophy', while in cultures based on the non-formal transmission of knowledge, we term as 'everyday wisdom'. It is this sort of practical experience that, having abandoned its original sources traceable back to the Divine Creation and revelation, and been deprived of its transcendent essence (as received from the outset or

[11] For me, encountering the developments by Seyyed Hossein Nasr *Knowledge and the Sacred* (Edinburgh: Edinburgh University Press 1981) ix + 341 pp. [The Gifford Lectures 1981] proved to have a force of revelation in this respect.

living within us due to the original grace of our Genesis as *imago Dei*), still best reminds us of what remained of the one-time ideal of w i s d o m [*sapientia; sageness*] in our secular and materialistic age, trusting uncritically in the exclusivity of reason; and

• the accumulated p o s i t i v e k n o w l e d g e that classifies our world into sets of abstract and general concepts, conceived as being able to describe it exhaustively, that is, knowledge that reduces mutual relations within the basic unity of the world to a series of abstract general laws, arranged within a sequence of taxonomic orders, thought to be logically inclusive and conclusive, represented mentally as a conceptual system, and presumed to prevail mercilessly, with the "force" of a "natural law". All this is embodied by science, with means of explication and arrangement afforded by logic (through *analysis* / *divisio* / *definitio* // *analysis* / *divisio* / *definitio*—and so on again and again). Despite numerous practical doubts that may arise, we usually subject ourselves to such a scheme without any further consideration or reservation, admitting its power as affording us the sole and exclusive explicative and classifying principle of our world, believed to be cognised eventually, while we are mastering it, albeit knowledge organised in s c i e n c e , as well as l o g i c , defining and describing the order of operations that can be performed within it, which serves (as the medium of controlling human ingenuity, inventiveness, imagination, creativity and the practical ability to provide responses) nothing but the purposes of confrontation and assessment, as well as performance of modifications deemed necessary in practice. For science can measure, if at all, by means of the exteriorised standards of some aggregate of knowledge (as the sum of pieces of information and considerations, questions and conclusions, conceivable in a community united by methodical thinking), projected (i.e., dysanthropomorphised, yet built into a unified and coherent system, that is, consciously mentally homogenised, in order that it can fill the role designed to it) from our anthropomorphous (and, therefore, diversely heterogeneous) existence as humans, resisting direct procession for scientific description notwithstanding. As contrasted to the former—intuitive—logic, we term this latter the 'logic' of 'justification' [*verificatio*].[12]

[12] With CARNAP, these are also consecutive phases of learning, in so far as the formation of any naive theorising is always followed by its epistemological treatment. Rudolf Carnap *The Logical Syntax of Language* [Logische Syntax der Sprache] trans. Amethe Smeaton (London: Kegan Paul, Trench & Tübner & New York: Harcourt, Brace and Co. 1937) xvi + 352 pp. [International Library of Psychology, Philosophy, and Scientific Method], pp. 1–2.

*4. Pure Intellectuality thereby Born*

Historically, both practical experience and positive knowledge germinated, through polarised paths, from a common learning in which wisdom and positive knowledge had not yet been separated. However, once they split,

- the search for provably identifiable positive knowledge (defined by the conceptual unambiguity of formulated laws) became derived from this common human knowledge as its exclusive representation. It is s c i e n c e that has emerged from it, having—by projecting and externalising its own ideals as added points of reference in order to arrange the theses it may formulate (coherence), introduce new theses (deductive inference) as well as formulate theses not deducible with similar certainty (inductive inference) within a scheme—established logic as a methodology with the ideal of *mos geometricus*, channelling and, thereby, integrating all the information it can filter through and into its systemic medium, from any kind of human experience and traditional wisdom;[13]

[13] It is by no mere chance, therefore, that "philosophy" has by now been confined to the science of logical analysis, and ontology is superseded by epistemology. See Seyyed Hossein Nasr 'Contemporary Western Man between the Rim and the Axis' in his *Islam and the Plight of Modern Man* (London & New York: Longman 1975) xii + 161 pp., especially at p. 5.

That is to say, our conceptual expression is bipolar with a d i c h o t o m i c construction, exclusively sensitive to and expressive of its own principle of construction, which may include anything and its own negation into one conceptual unity, able to bring thereby l o g i c a l l y anything else, arising at random (even if the latter is quite ephemeral, exceptional or building from essentially differing principles) to a level equal to the former, transforming both into complements of each other. Therefore, dichotomic pairs within one conceptual unit are false constructions from the outset. Hamvas 'Logika és ellentmondás' [note 9] mentions on p. 346 that in addition to the bare dualism of the 'finite' and the 'infinite', there is, for instance, also the "transfinite" ("there are always finite boundaries that are regularly crossed with bounds expanded again and again"), or, in addition to the duality of the 'rational' and the 'irrational', there is also the "trans-rational" ("the thought can be stretched well beyond the limits of reason known so far without becoming insensible or irrational"). Otherwise speaking, conceptual building using the same logical value if split by self-negation into dichotomy may both express doctrinarian identification/separation and encourage solutions of merit as well. For instance, including a value and its own negation into one common *genus* concept suggests a false identity (similarity or proximity) just as dichotomising 'conservatism' and 'liberalism' does (as if they were mere realisations in differing directions of the same action, when it turns out only later that, in practice, one of them is a positive programme, in itself workable and constructive to society, while the other is focused on liquidation of limitations, that is, on deconstruction of and faultfinding in something already working, in functional dependence on it). In-between, for instance, ideological/denominational 'neutrality' purports to be constitutional indifference, aiming merely at separation, in opposition to 'correctness' that encourages us to ponder the substantive framework for a genuine response. See

• and the rest was left behind, abandoned and relegated—as random incidences of the phenomenal world and the play of senses as psychical events or simply as the fruits of fantasy, i.e., as historical occurrence(s) attributable to contingent human existence—to the domain of e v e r y - d a y l i f e, neither relevant nor amenable to scientific treatment. All this remains alongside throughout, with only an occasional chance of becoming relevant to scholarly interest, in cases of handling individual deviancies or managing unusual crises (and, even in such cases, not as a subject for scholarly consideration, but merely as the empiricism of a casual mass of simple accidents, to be processed using scientific methodology within a mere pragmatic perspective).

Saint BONAVENTURE, DUNS SCOTUS and Saint THOMAS AQUINAS mark the milestones in a spiritual process of construction, in the course of which the idea of the Divinity in the focus of the one-time undividedly common human wisdom was torn out of its original medium, only to be categorised as the key-concept of a theological world-view, ranged—in the name of methodical learning from positive knowledge through logically valid conceptual operations—amongst, as the first of, the scientific disciplines.[14] It preserved for scholarly processing all it could from the legacy of Saint PAUL and Saint AUGUSTINE, among others, while the rest could only be cultivated or cared for in a rudimentary form by thinkers like Meister ECKHART or JAKOB BÖHME, labelled, for lack of anything better, as plain mystics.

With this, in the name of scholarship taken as the sole repository of human knowledge, our spiritual endeavours (with all their infinitely composite facets) became unipolarly one-rooted, filtered through one homogenising focus. This artificially erected scene perceives humans as a thought-automaton (like LEIBNIZ's machines—effecting transmission with wooden slide-pistons—from early modern times, reducing the original act

Tamás Kocsis '»Vétkesek közt cinkos aki néma«: Kis János »Az állam semlegessége« a »korrekt állam« eszméjének tükrében' [»He who keeps silence among sinners is a party to crime himself«: On János Kis »The neutrality of state« in the mirror of the ideal of a »correct state«] *Kovász* [Budapesti Közgazdaságtudományi Egyetem Környezetgazdaságtani és Technológiai Tanszék: Altern-csoport {Budapest University of Economics, Department for Environmental Economy and Technology: Group 'Altern'}] II (Spring 1998) 1, pp. 3–23, especially at p. 22.

[14] As Robert Young 'Man's Place in Nature' in *Changing Perspectives in the History of Science* Essays in Honour of Joseph Needham, ed. Mikulaš Teich & Robert Young (London: Heinemann 1973), pp. 344–438 remarked, instead of science substituted to God, He became equated with the laws of nature.

of Creation to the diligence of clock-makers, with mechanical safety solely built in), who thinks—as far as he is rational—in terms of the ideal of axiomatism (taken from geometry as a conceptual/mathematical construction of reality) according to the logic of verification. Any other ideal and feasible logic sank into oblivion for a long time (even if perhaps not forever) or at least was lost from the circle of scientific relevance as a paradigmatically recognised source of positive knowledge.[15]

In consequence, the rationally verified thought of the methodically rational thinker is to become a force capable of both shaping society and originating its order (first mainly through violent acts in despotism or revolutions, yet later on also through some more refined channels of gradual social evolution). However, by mechanising the underlying processes (to which the expressive term 'social engineering' refers quite openly), rationalisation effects impersonalisation. Indeed, rationalisation eliminates both personal and professional responsibility for decisions, replacing individual involvement with the relentlessness of logical "consequences".[16] Accordingly, the idea of personal responsibility as something to be assumed by the individual in this age of modernity (who regards himself or herself as the hub of the universe in every respect except for burdens) has, for a long time now,

[15] The existence of this very shift and exclusivity is usually concealed by science, which regards any innovation as "progress" by itself, as if each element in the sequence of processes and operations were to point towards one endpoint, and could have a meaning solely depending on, as interpretable from, the perspective of this very endpoint. Glorifying to the present as it may be, such an attitude will inevitably relegate all other (earlier) conditions to the darkness of the 'uninterpretable', disqualifying them from the outset. Cf., e.g., László Vekerdi *Tudás és tudomány* [Knowledge and science] (Budapest TypoTEX 1994) 582 pp., especially 'Tudás és tudomány' [Knowledge and science, 1973], pp. 158 et seq. as well as 'Tudományos világkép – tudományos műveltség' [Scientific worldview – scientific erudition, 1975/1976], pp. 233. et seq. For an even more pointed formulation, cf. Peter L. Berger *A Rumor of Angels* Modern Society and the Rediscovery of the Supernatural (Garden City, New York: Doubleday 1969) xi + 129 pp. on p. 51 on the historically unjustified and undemanding relativisation of the highest achievements of the past vis-à-vis the bare routine of the present.

[16] "The era of modern times has been built upon the deliberate negation of sin. This results in the artificially nourished moral and existential indifference that had brought about science and, with it, also the apotheosis of impersonality." Béla Hamvas 'Korszenvedélyek utólagos igazolása' [Posterior justification of passions of ages] in his posthumous *Patmosz* I: Esszék [Essays] (Szombathely: Életünk könyvek 1994), p. 162 [Hamvas Béla művei 3]. Robert Nisbet *The Quest for Community* A Study in the Ethics of Order & Freedom (San Francisco: ICS Press 1990) xxxv + 272 pp., especially on pp. 26 et seq., traces the syndrome of social isolation in our age back to the correlation of rationalism and moral alienation.

been losing its importance perceptibly (and has fallen into desuetude in practice) in the fields of law and morals alike. Or, personal responsibility has in the era of "progress" been replaced by the unstoppably triumphal march of "rationality", traced back, as degenerated, into the bare logical (and therefore definitely impersonal) application of ready-made propositions (as the typical end-product concocted in the melting-furnace of a self-regulating "scientific community"), indifferent towards (because lacking, in terms of its own rules of the game, any controlling competence on) the humanity's own fate—with all the theoretical and practical consequences involved.[17]

Meanwhile, it is not only scholarship that has become professionalised—protecting itself, its institutions and actors alike from any external and pragmatic criticism, including predictable feedback[18]—but, in the upward (mature) phase of progress at the dawn of modern time, the type of the i n - t e l l e c t u a l has also entered the scene.[19] Such an intellectual is the kind of human who, exactly because he or she thinks freely and does so on a professional basis, i.e., with reference to scientific rationality,[20] expects exemp-

[17] The possibility of any mechanical conclusion is unanimously rejected by today's cognitive sciences. From a post-WITTGENSTEINian perspective, all that can be stated—by Jaakko Hintikka *Logic, Language-games and Information* Kantian Themes in the Philosophy of Logic (Oxford: Clarendon Press 1973) x + 291 pp. at p. 47, for instance—is that sentences are simple recipes of how to erect alternative reality constructions.

[18] The degree of progress of social scientific thought on the paths it has beaten is indicated by its recurrent failure to prognosticate anything—ranging from predicting the fate of the Soviet Union via the re-formulation of the idea of nation to the recognition of religion and family as surviving frameworks of human life.

[19] Cf., as a preliminary survey, Lewis A. Coser *Men of Ideas* A Sociologist's View (New York: The Free Press & London: Collier-Macmillan 1965) xviii + 374 pp. and Thomas Molnár *The Decline of the Intellectual* [1961] (New Rochelle, N. Y.: Arlington House 1973) x + 369 pp.; as a thought-provoking series of portrays, Paul Johnson *Intellectuals* (New York, etc.: Harper & Row 1988) x + 385 pp. Cf. also, as placed somewhere on the borderline of Leftist Utopianism and high treason, David Caute *The Fellow-travellers* Intellectual Friends of Communism [1973] rev. ed. (New Haven & London: Yale University Press 1988) 458 pp. and Robert Silverberg/Paul Hollander *Political Pilgrims* Travels of Western Intellectuals to the Soviet Union, China and Cuba: 1928–1978 (New York: Oxford University Press 1981) xvi + 524 pp.

[20] See, for the lawyerly interventionism with a proudly pragmatic activism—"boldness, assertiveness, a willingness to demand what is due, to defy traditions, to challenge authority, to raise eyebrows"—Alan Dershowitz *Chutzpah* A Bold Call for a New Attitude by and toward American Jews (Boston, Toronto, London: Little, Brown & Company 1987) ix + 378 pp., quotation at p. 18.

tion from the responsibility to be borne for the consequences of attempts to implement his or her own innovative intentions in practice (which, in our own recent times, have often resulted in the most inhuman suffering accompanied by destruction and social-material damage).[21]

## II. The Will-Element Formalised in Law

### *5 Mere* Voluntas *in the Foundation of Legal Positivism*

In the cultural and scientific development of Europe, it was the few centuries between Saint THOMAS AQUINAS and RENÉ DESCARTES that effectuated a practically complete replacement of our dual human heritage and ability: firstly, the reductive translation of the holy tradition of transcenden-

[21] There is a considerable literature dedicated to intellectuals 'floating', interfering both aggressively and irresponsibly with our everyday lives. See, e.g., by Robert H. Bork, *The Tempting of America* The Political Seduction of the Law (New York: The Free Press & London: Collier Macmillan 1990) xiv + 432 pp. and *Slouching towards Gomorrah* Modern Liberalism and American Decline (New York: Regan Books / HarperCollins 1997) xiv + 382 pp. Some aspects of the same attitude are analysed in *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] ed. Csaba Varga (Budapest: [AkaPrint] 1998) 122 pp. [A Windsor Klub könyvei II] as well as in his *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] and 'Legal Scholarship at the Threshold of a New Millennium' *Acta Juridica Hungarica* 42 (2001) 3–4, pp. 181–201{& <http://www.ingentaconnect.com/content/klu/ajuh/2001/00000042/F0020003/00400027> & <http://springer.om.hu/content/tna87eew2v0jen8y/fulltext.pdf> & in *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot) = *Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn, pp. 515–531 & 'Legal Scholarship at the Threshold of a New Millennium' in *Šiuolaikinë filosofija* Globalizacijos amžius [Contemporary Philosophy: Age of Globalization] Monografija, red. Jűratë Morkűnienë (Vilnius: Lietuvos Teisës Universitetas 2004), pp. 287–307}.

The perspective faced today is not in the least different from the one sensed a century ago. What was once described in a pathological vision of modernity by José Ortega y Gasset in his *La Rebelión de las masas* (Madrid 1930) {*The Revolt of the Masses* (London: G. Allen & Unwin 1932) 204 pp. & (New York: Norton 1993) 190 pp.} as the end-result of the multiplying effect of the merely quantitative selection, brought along by the over-dominance of mass democratisation, presents itself today as the Utopia of "open society" which, precisely through its levelling-down mass-effect—cf., e.g., Leo Strauss *Natural Right and History* [1953] (Chicago & London: The University of Chicago Press 1971) 372 pp. at pp. 131–132 [Phoenix: Philosophy]—may yield a reproduction at a lower level of deeply human qualities, virtues and values.

tality—pointing beyond us, humans, and thereby calling to modesty—into the abstract logico-mathematical language of geometry, by reducing it to mere conceptuality, alongside the discrete isolation of all the presumed elementary entities, then, secondly, the entire loss of significance of its substantive parts both in scholarship and everyday life situations.

I recall here that my first great professional master and paternalistic friend, the renowned professor MICHEL VILLEY of Paris, who, having relaunched the cultivation of legal philosophy in France after the Second World War—searching for responses to our coming postmodernity—used to rely mainly on reading the Bible, the Church Fathers and other classical authors (which can be attributed to both his combatant Catholicism and original interest in Roman law), and who also traced back "deterioration" to precisely this historical interval, which had degraded law, supporting the Divine order, to just a symbolically complementary adornment of power with no moral in the background, fabricating nothing but a toy out of law in the hands of those who are stronger and act with fewer scruples. For law, which throughout the previous classical ages was *ars aequi et boni*—the way towards realisation of the unquestionably common moral ideal of what is "good" and "equitable" through '*ars*', denoting craftsmanship and arts alike, and, therefore, necessarily based on the professional knowledge, expertise, and skills of those committed to the cause—had all of a sudden become a mere *voluntas*. This implied that human frailty and the very human volitive act of power came to the foreground to master all that once used to be part of the religious-moral world order of humanity, constituting its very basis. Or, thereby, law became a faceless medium, a means available to anyone serving the stronger, those who are more competitive and quarrelsome, who know how to survive all the earthly moral chaos, notwithstanding, that is, a means that can be both swung as a club and handed over as a palm branch, as the underlying circumstances may require, in order to gain maximum profit out of any situation and human condition.

Thus, dedicated exclusively to its own positivation, law not only broke away from morals, collective and/or individual, but also from any genuine consideration of merits (pondering upon substance and impacts). By this very act the *ius*, that is, the idea of law itself, was reduced to the *lex*, that is, to the rule positivated as a law by those exercising the ultimate power. Thereby, law also became a mere text generated through a formal procedure by a competent agent, in a process called *legis latio*. In conclusion, the *ordo*, embodied by the motion of the created world, eventually yielded its place to arbitrary human decisions. From now on, any text can indeed be-

come law, only provided that it is declared to be the law through a due procedure activated by the governing will. Otherwise speaking, however thoroughly organised and balanced a culture is, anyone empowered to tell what the law is (in books) will have discretion to determine what the law shall be (in action). Or, the last interpreter turns to be the eventual law-giver. Once the formal path required for the act of either law-making or law-applying has been covered, the interpreter may transform any text or meaning (eventually chosen by an act of *mihi placui*, or, as the French monarch used to finally authorise his will by sealing it: *"c'est mon plaisir"*) into law.[22]

As a result, law became something that can no longer be legally restricted, but rather a merely discretional product of any deal or autocracy, which was also freely shapeable—developed, changed or withdrawn—in time, by resorting to the procedural formalities of its origination. In turn, it remains ephemeral even if it is recorded on a table of stone resisting the passage of time, and it remains the changeable instrument of changing times even if its wording happens to last for a long period of time. Once it is taken as a plainly human artefact, it degenerates into a mere instrumentality that can be manipulated by anyone. No longer is it the supporter of a community mission (transcendental vocation, moral conviction and common cause), inherited and handed down from generation to generation, but the instrument of human arbitrariness: a bare will, institutionalised and made enforceable by the stronger.

What all this boils down to is a conclusion that may from now on remould our entire image of law. For law is no longer something sacred as standing above us but rather the rules of a game prevailing in society, made indisputable for all those within its reach. It is no longer law that embodies justice and equity. Instead, the rules of the game asserted will enforce one single variation of truth as the exclusively justifiable solution in law, notably

[22] The scheme of legal positivism can in fact be reduced to the sharp dichotomy of the propositions defined/undefined by the law (in the latter case with no guidance searchable for in the law). An exemplary theoretical reconstruction is offered by Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Proglematik (Leipzig: Franz Deuticke Verlag 1934) xiv + 236 pp., operating strictly within the law's domain according to the logic reconstrued of modern formal law, as well as by Niklas Luhmann 'Closure and Openness: On Reality in the World of Law' in *Autopoietic Law* A New Approach to Law and Society, ed. Gunther Teubner (Berlin & New York: de Gruyter 1988), pp. 335–348 [European University Institute, A/8], concluding to the *Ausdifferenzierung* of the legal sphere from social totality in its openness to new information and closedness of the way the latter is processed through a binary code (separating systemically what is 'legal' from what is 'non-legal'), termed as *autopoiesis*.

the one the legislator happened to select from a mass of equally workable solutions as the only available justice within the law. In this perspective, law has a single quality (neither requiring nor tolerating anything more), and this is that law is what it is (and nothing else). Accordingly, it will be applied solely by the law's force, with no further consideration or critical view as to its consequences in practice.

It is worth noting that from the perspective of the logic of the modern formal law's construction and operation, the emergence of law—taken as "a great mystery"[23]—remains unanswered in this culture. For that which will have come about cannot be explained or previously defined by the law. Whatever new law may come to be can be built into the body of law through a merely formal procedure. Once law (any law) is established, its application will, by the force of the lawyer's prevalent world concept and professional deontology, be schematised as a quasi-mechanical process (with the deductivism of logical inference resulting in foreseeably necessary consequences) all over the European continent. All in all, such a logified approach symbolises legal development and operation as if patterned by the so-called scientific world concept.

This cannot be otherwise in Civil Law, for, within the *more geometrico* model of demonstration, once a premise is proven, its logical consequence will (without further ado) also be taken as proven. Moreover, it is not even the role played by logic that is genuinely new in such a methodological development but the total subjection of all (differently homogenised and autonomously separated) spheres and forms of human action, including law itself, to the ideal of science with its one-focused (homogenised) criteria of selection. As mentioned already, this inevitably results in consequences that will necessarily re-mould the underlying character of law itself. For, from now on,

- anything can be made the content of law;
- anything "legal" will also appear as exclusively "just" (ethical, and so on) in the realm of law;
- anything that has been made legal will have to be actualised by lawyers' deductive logic (with apodictic conclusions) in individual cases; consequently

[23] Hans Kelsen *Hauptprobleme der Staatsrechtslehre* entwickelt aus der Lehre vom Rechtssätze (Tübingen: J. C. B. Mohr 1911) xxvii + 709 pp. on p. 411.

- anything legal will have to be enforced, with no further consideration, as the exclusively available legal truth, in each and every situation of life.[24]

*6. Formalism with Operations Fragmented*

Hence, what all this implies is that within the realm defined by the internal rules of the legal game, there is no longer any room for moral, teleological or practical deliberations on how the law ought to be enforced. One has to presume from the outset that the original law-maker was in a position to assess what had to be assessed when the "great mystery" of the origination of the law was undertaken.

Of course, the ideal of mechanical jurisprudence is justified by its aim to reach the certainty and safety of the future via formal legality, guaranteeing foreseeability and calculability. Nevertheless, it leads unavoidably to the ethical emptying of practical legal life, with law-applying officials becoming replaceable and irresponsible automatons in person, increasingly disinterested in the consequences of their own actions, and, thereby, also beings degraded by the sheer routine business of justice administration.

Moreover, if in a complex network of normative expectations harmoniously supporting each other, law separates itself from all the other normative mediators in order to assert nothing but its instrumental autonomy, representing one will randomly selected from among the many incessantly forming in power games, it will certainly achieve far more than just lawyerly professionalism, promising some consistency and methodological purity in asserting its own rules of game. For, in addition, it will also necessarily have to undertake the burden of implementing and maintaining the fundamental and desirable order in society, which it can barely carry along. The more democratic a regime is, the more frequently evasions and kinds of profes-

[24] As Max Weber formulated in a classical way—*Rechtssoziologie* hrsg. Johannes Winckelmann (Neuwied am Rhein: Luchterhand 1960) 346 pp. [Soziologische Texte 2], at p. 103 translated by Csaba Varga *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp. on p. 294: "contemporary legal work at the highest level of methodological-logical rationality sets out from the following postulates: (1) Any concrete legal decision can only be the »application« of some abstract provision of the law to a concrete factual issue. (2) From the abstract provisions of the law in force, a decision has to be derived for each concrete factual issue with the means of legal logic. (3) The positive law in force has to be a »gapless« system of legal provisions, overtly it has to incorporate such a system or, at least for its application, it has to be considered as doing so. (4) Anything that cannot be »constructed« legally and rationally cannot be legally relevant. And, generally, (5) man's social activity has to be conceived of as either the »application« and »enforcement«, or, alternatively, as a »violation«, of the provisions of law."

sional cynicism will, sooner or later, also appear in law. And this construction will also imply the realisation that both in its generation and functioning, law is nothing but a political process after all: a token of political bargain taking place in society, depending on—as arising from—the political games at work. This will be manifest in the dysfunction shown by the fact that no political actor—no matter how powerful—will any longer assume individual responsibility for either the actual shaping of the law or the final consequences of the law's action—the fact notwithstanding that law remains both the supreme and the last (official) factor in controlling society.

Considering the fact that it is the whole institutional structure of society that leads to the impersonality and irresponsibility of its constitutive parts, the political game itself becomes incorporated into a medium that develops at random, through the interaction of layers building upon and interfering with one another anarchically, in a way that any accidental actor (competent and incompetent alike, guided by individual motives and interests, serving or destroying the common good, as the case may be) is free to shape continuously (re-cutting and re-modelling, or even tearing) this texture, which, however, is by no means regarded by anyone as his or her own, while no one will assume responsibility, personal or institutional, for its destiny.

For instance, constitutional courts, without showing the least responsibility and without ever re-considering their decisions, have a practically free hand to devise—inspired by their own allegedly sublime principles alone—a practice extending or narrowing rights and obligations in a way arbitrary to the core issue (sometimes neither properly founded in this underlying constitution, nor cogently deducible from its wording, nor even justified by the court's formally defined competence to assess constitutionalism)—that is, as led by a mainstream simplistically called "activism" but standing in fact for the WEBERian enchantment of the world [*Entzauberung der Welt*].[25] Or, increasingly complex networks of ombudsmen's offices and professionalised human rights activists' bureaus target, instead of dedicating their efforts to exploration of actual violations of legally well defined rights in order to remedy them, mostly act on behalf of partial interests, extorting a social policy that, in want of the encouragement by any social feedback, may sim-

[25] Cf., by the author, 'Transfers of Law: A Conceptual Analysis' *in Hungary's Legal Assistence Experiences in the Age of Globalization* ([Nagoya:] Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 21–41 {& 'Reception of Legal Patterns in a Globalising Age' in *Globalization, Law and Economy / Globalización, Derecho y Economía* Proceedings of the 22nd IVR World Congress, IV, ed. Nicolás López Calera (Stuttgart: Franz Steiner Verlag 2007), pp. 85–96 [ARSP Beiheft 109]}.

ply demand unconditional public aid.[26] All in all, forceful actors without law-making or law-applying competence can successfully incorporate formal elements and/or actual completed devices into the law in books and/or in action that are, in their totality and in the final account, intended to divert—though they may, one by one, be worth considering, beneficial and even desirable from a humane or humanitarian *de lege ferenda* point of view—the law from its own path, by pushing its actualisation into inconsistency, contradictions and dysfunctionality. This produces a chaotic mixture that will indeed bear the marks of everyone but not the concept of anyone, also fragmenting, partialising and finally atomising the commonality of law, formerly standing above all of us as undisputedly shared.

## III. The State of America Exemplified

*7. "Slouching into Gomorrah"*

The consequences are striking. As exemplifying in outline and through a case study the main message of the everyday life of a superpower nowadays, cherished as the archetype to be implanted for and by us, let me refer to the presentation by ROBERT H. BORK, the one-time Attorney General of the United States of America and professor of constitutional law at Yale University, informing those on behalf of whom he may still hope to be understood, that the Mecca of the one-sidedly vindicated individual rights has already slouched towards a kind of Gomorrah.[27] For there is a price to be paid for having only rights proclaimed in a Constitution that does not provide for either obligations or communitarian limits on using rights. By now, according to many inside observers in the States, this has resulted in the atomisation of society[28] and a deplorable homogenisation of the public talk.[29]

Let us see what their ideals are like! Well, if a leftist rebel of 1968 strolls provocatively up and down the corridor of the courthouse, proudly showing off the inscription "F... the Draft" on his jacket, the Supreme Court majority cannot find anything objectionable in his action because "[o]ne man's

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[26] Cf. mainly Béla Pokol's press publicism in *Magyar Nemzet* [Hungarian Nation, a daily] in the period between 1998 and 2002.

[27] Bork *Slouching*... [note 21], ch. 6.

[28] William A. Donohue *Twilight of Liberty* The Legacy of the A[merican]C[ivil]L[iberties]U[nion] (New Brunswick, NJ: Transaction Publishers 1994) xxv + 332 pp. at p. 65.

[29] Mary Ann Glendon *Rights Talk* The Impoverishment of Political Discourse (New York: The Free Press 1991) xvi + 218 pp.

vulgarity is another's lyric."[30] And if one of his mates burns the national colours in public, while chanting "America, red, white, and blue, we spit on you"—well, he cannot be condemned for such a self-realisation, although disgrace of the national colours is expressly prohibited by forty-eight member states and the Federal State itself. All that goes apparently for nothing, for what would remain from freedom of speech if "we would be forced to control our own political preferences, and impose them on the citizenry"?[31] On the other hand, legal defence has to be called for immediately if a certain Miss Deborah Weisman happens to get in a situation of having to hear, through a brief supplication, standing or in respectful silence at least, a state opening ceremony of the school-year, because—oh, what a horror—this seems to be a case of undue pressure, for being expected to tolerate a manifestation of religious faith not necessarily professed by her in person may offend her personal sensitivity.[32]

Yet, all this is far from being the historical destiny of the American people or the inevitable consequence of any given state of things. Just to the contrary. As Justice SCALIA of the Supreme Court pointed out, this change in sensitivity is due to the new activism of their federal

> "most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases, only the counter-majoritarian preferences of the society's law-trained elite) into our basic law",[33]

moreover, sometimes (e.g., in case of the declared right to abortion) not only lacking any explicit constitutional authorisation whatever or, indeed, any legal backing providing justification but without even pretending to try to give constitutional rationales.[34] As is well known, EARL WARREN began the leftist liberal politicisation of the Court, when the encroachment of politics onto the supreme jurisdiction began as a result of antitrust matters covered up by, as well as government decisions defended against, taxpayers. By now, all this interference seems to explode as a kind of "war in the culture".[35] As a Harvard law professor now states,

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[30] *Cohen v. California*, 403 U.S. 15 (1971), at 25.
[31] *Texas v. Johnson*, 491 U.S. 397 (1989), at 417.
[32] *Lee v. Weisman*, 505 U.S. 577 (1992).
[33] Justice Scalia, dissenting in *United States v. Virginia*, 116 S.Ct. 2263 (1996).
[34] Bork *The Tempting of America* [note 21], passim.
[35] Bork *Slouching*… [note 21], p. 110.

> "the effect of rulings of unconstitutionality over the past four decades has been to enact the policy preferences of the cultural elite on the far left of the American political spectrum."[36]

Or,

> "judicial activism presents the […] currently crucial questions whether and how we can return to the federalist system of representative self-government that the Constitution contemplates, a return which is necessary if we are to reverse the socially destructive policies that judicial activism has imposed."[37]

And indeed, there is something predestined in all this actually having taken place. For, "the attitude of courts that increasingly accept nihilism as a constitutional value" and, as a part of this, "the road to the moral chaos that is the end of radical individualism and the tyranny that is the goal of radical egalitarianism" can hardly be institutionalised otherwise than through "the illegitimacy of the Court's performance in usurping powers".[38] This is exactly what factors in the background condition. For, as stated, "[m]odern liberalism is fundamentally at odds with democratic government because it demands results that ordinary people would not freely choose."[39] To be sure, this development runs against the American constitutional order as well, as it only conveys that

> "[w]e are no longer free to make our own fundamental moral and cultural decisions because the Court oversees all such matters, when and as it chooses. The crisis of legitimacy occurs because the political nation has no way of responding."[40]

The Civil Rights Act of 1964 prohibited discrimination.[41] This is what later resulted in "affirmative action" to allow preferences in hiring and promotion for blacks and women,[42] for—as it was often justified—"the preferences

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[36] Lino A. Graglia 'It's Not Constitutionalism, It's Judicial Activism' *Harvard Journal of Law & Public Policy* 19 (1995–1996) 2, pp. 293–299, especially at p. 298.

[37] *Ibid.*, p. 299.

[38] Bork *Slouching…* [note 21], pp. 332, 331 & 319.

[39] *Ibid.* p. 318.

[40] *Ibid.* p. 109.

[41] "to discriminate against any individual […] because of such individual's race, color, religion, sex or national origin" is unlawful for an employer.

[42] *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) as well as *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

were remedies for past discrimination". Since then, this initial extension of rights became excessively expanded far beyond its statutory wording. Government agents do decide at their discretion with no statutory mandate in the background who within their competence shall be regarded as members of a disadvantaged group to be given preference. The REAGAN-administration, for instance, ranked the Hasidism of New York among those to be advantaged.[43] The kind and extent of positive discrimination had in a few cases turned out to be incredibly one-sided. For example, the constitutional stand of Colorado providing that "homosexual [...] status should not entitle any person to claim quota preferences, protected status, or discrimination", in its quality of "a rather modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws"[44] was declared to be unconstitutional by a gesture, in terms of which "[s]triking it down is an act not of judicial judgment but of political will".

Or, as Bork summarises,

> "[t]his individualism [...] attacks the authority of family, church, and private association. The family is said to be oppressive, the fount of our miseries. It is denied that the church may legitimately insist upon what it regards as moral behavior in its members. Private associations are routinely denied the autonomy to define their membership for themselves."[45]

And the ensuing result is "a pornographic culture" with "propaganda for every perversion and obscenity imaginable".[46]

Well, all this seems to be corroborated by statistics. In 1920, the birth rate for unmarried women was 3%, in 1960 it was 5% and in 1970 11%, yet this proportion rose to 18% in 1980 and to 30% by 1991. In 1991, white illegitimacy was 22% and the black rate was 68%. The incidence of violent crime (per hundred-thousand inhabitants) was 1900 in 1960 and increased more than threefold, to 6000, by 1980. The rise among the young is particularly striking: during the last three decades the proportion of babies born to unmarried teenagers has tripled; while the incidence of murder grew by 165% among those 14 to 17 years old and by 65% among 18- to 24-year-olds.[47]

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[43] Bork *Slouching*... [note 21], p. 107.
[44] Justice Scalia, dissenting in *Romer v. Evans*, 116 S.Ct. 1620 (1996), at 1629.
[45] Bork *Slouching*... [note 21], p. 6.
[46] *Ibid.*, p. 139.
[47] *Ibid.*, pp. 155 & 157.

American criminologists have in due time realised that this was the deliberate result of social engineering, scientifically nurtured by mainstream liberalism, as it statistically ran in parallel with the unconditional expansion of social relief. For making financial aid from public funds claimable by anyone not as a special favour but as a right, resulted in the disappearance of any social stigma on illegitimate birth. Nowadays it is no longer unusual under the cover of school sex education to advocate openly oral sex, masturbation and homosexual activity among minors as an outlet for tensions for want of anything better, with parents suing so far without success against such an obvious "educational" abuse.[48] Crime control is not an exception to such a general loss of direction either. According to national statistics, only one out of one hundred violent perpetrators, and not more than half of blacks actually sentenced for violent crimes, were actually sent to prison.[49]

Well, all this manifests a particular culture. For feminist, Afro-centric and/or self-liberating activists may have succeeded only in making hated, among other things, the values and traditions originating in Europe or developed on properly American soil. In public education curricula commissioned by the National Endowment for the Humanities, neither the WRIGHT-brothers, nor EDISON or EINSTEIN are worthy of mention; the Constitution hardly deserves more than a single reference; and, for the sake of political correctness perhaps, the first gathering of the U.S. Congress is not commemorated, only the establishment of the National Organization for Women; and in-

[48] *Ibid.*, pp. 160 & 159.

[49] *Ibid.*, pp. 166 & 165. Within a "global village" diagnosis, America's present-day problems are contrasted with the virulence of Japan by Denis Szabó *Intégration normative et évolution de la criminalité* [manuscript] (Paris: Sorbonne 1995) {subsequently published in *Valeurs et modernité autour d'Alain Peyrefitte* dir. Raymond Boudon & Pierre Chaunu (Paris: Odile Jacob 1996), pp. 202–230}, as based on the research of D. H. Bayley *Forces of Order* Police Behavior in Japan and the United States (Berkeley: University of California Press 1976) xvi+ 261 pp. The one-sided hypertrophy of law (with the growing insertion of procedural fora and lawyerly intervention into everyday life) has destroyed the remaining prestige of law and order and the chances of effective control. Law is now both soft and aggressive at the same time. Namely, extending the law's scope by indiscriminately re-interpreting its principles has opened the way to breaking up its classical stance, while the aggressive assertion of the rule of law idol emptied and isolated it. For law is being increasingly abandoned by (as it rejects drawing additional strength from) other factors of social integration such as community morals and ideals. Besides the differences in mentality and socialisation, i.e., the self-deception of (post)modernity's prevailing liberalism of the States, in the background, there is hardly any explanation for the collapse of US crime control, operated at the price of several times more material and human (etc.) input, while in Japan the sense of personal shame continues to be seen as one of the strongest barriers to massive deviance.

stead of European (to be understood: CHRISTian) religious traditions, solely the beliefs of American Indians and Africans are taught in public schools.[50]

Paradoxically speaking, universities strengthen rather than cure practical illiteracy, long latent in America. Students paying at least some attention at most meet on the first four days of a week; they cram for exams mostly from tapes they recorded at lectures. Properly speaking, they are rather listeners (instead of students proper), as reading would raise genuine frustration in them.[51] Well, so sophisticated is the medium in which p o l i t i c a l c o r r e c t n e s s has been born. For

> "[p]olitical correctness is, above all, a climate of opinion, a complex of social and institutional pressures and threats, beliefs and taboos which have come to dominate the campuses and academic public discourse overt the past quarter century […]. There are at least five areas to which political correctness applies and where it succeeded in imposing a fair amount of conformity. They are: 1) race-minority relations; 2) sexual and gender relations; 3) homosexuality; 4) American society as a whole; 5) Western culture and values. In regard to each, political correctness prescribes publicly acceptable opinions and attitudes which are often conveyed on the campuses by required courses, freshman orientation, sensitivity training, and memoranda by administrators, speech codes, harassment codes, official and student publications and other means. Deviation from the norms of political correctness may result in public abuse, ostracism, formal or informal sanctions, administrative reproach, delayed promotion, difficulty of finding a job, being sentenced to sensitivity training, etc."[52]

A shift of dominant ideology can be presumed in the background. According to a domestic argument,

> "[t]he »sixties« culture had tried to reinterpret history in terms of race, class, and gender. […] The model, however, was flawed because it did not make adequate allowance for those multiple loyalties that transcended those of mere race and ethnicity."[53]

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[50] *National Standards for United States* History: Exploring the American Experience [Grades 5–12] (Los Angeles: University of California National Center for History in the Schools 1994) vi + 271 pp. In criticism, cf. Lynne V. Cheney 'The End of History' *Wall Street Journal* (October 20, 1994), p. A22, quote by Bork *Slouching…* [note 21], pp. 253–255.

[51] *The Dissolution of General Education* 1914–1993 [Report] (Princeton, N.J.: National Association of Scholars 1996) v + 65 pp.

[52] Paul Hollander 'Political Correctness is Alive and Well on Campus Near You' *Washington Times* (December 28, 1993), p. A19.

[53] Lewis H. Gann & Peter Duignan *The New Left and the Cultural Revolution of the 1960s* A Reevaluation (Stanford, CA: Hoover Institution 1995) 49 pp. at p. 43.

Or, instead of a commitment to nothing but reality through investigations with open possibilities, political correctness—motivated by the alleged need to cure past repressions—is "better suited to attack than to analysis".[54]

Accordingly, the present-day diagnosis also holds that the "tyranny of political correctness" has deprived universities of their traditional role, serving as workshops of orientation and a source of inspiration for scholarly thinking, by transforming them (their goal-oriented state funding notwithstanding) into strongholds of violent political activism "to make converts to an ideology, always a liberal to left ideology".[55]

BORK considers this provocative raging of liberal neo-primitivism to have come to a natural end in the meantime. For findings proving that differences in gender roles are partly hereditary may be a major blow to radical feminism, as there will hardly be any further sense in formulating gender roles as a mere social construction. Multiculturalism may also be confused when faced with statistical data showing that "not all cultures are equal in their capacity to equip their members for success in the modern world".[56] What is more, comprehensive surveys have also recently revealed cognitive ability varying as a function of hereditary mutations among different races.[57]

However, following the movement's actionist logic, the response to such new challenges was not some kind of awakening but a shift of intellectual self-assertion to new domains in everyday (over)politicised practice. The shift completed, destruction based upon enlightened reason has by now become a mere burden to be thrown away, and the mere dreams about rationality as the root of the hated "logocentrism" of European white males are "rejected »even as ideals«".[58] In the background, relief troops also enter the scene: ten times as many astrologers and astronomers offer their services in America now. In addition to the Yale-graduate wife of the former President, now Foreign Secretary, a quarter of professors—repositories of scholarship—also believe in astrology.[59]

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[54] Bork *Slouching*… [note 21], p. 263.

[55] *Ibid.*, pp. 260 & 272.

[56] *Ibid.*, p. 267.

[57] Richard J. Herrnstein & Charles Muray *The Bell Curve* Intelligence and Class Structure in American Life (New York: The Free Press 1994) xxvi + 845 pp.

[58] John R. Searle 'Rationality and Realism: What is at Stake?' *Daedalus* 122 (Fall 1993) 4, pp. 55–83 at p. 55.

[59] Bork *Slouching*… [note 21], p. 263.

Since liberal tolerance has been in vogue, homosexuals and lesbians are equally allowed to preach the Gospel to the few believers still to be met in church. Thanks to so-called liberation theology, even Catholics "became soldiers in the antiwar, anticapitalist, and anti-American empire movements". According to their MARXiSing conversion of "sin […] identified with »unjust structures«", they shelter, as "»co-workers with God«", even destructive, anarchist revolutionaries under their wings in order to defeat "labeled »demonic powers«".[60]

As the sceptical critic concludes, there is hardly any other way out from the depths of "the profound bigotry and anti-intellectualism and intolerance and illiberality of liberalism"[61] than reminding the few colleagues sharing that opinion that it was once a handful of monks living in six stone beehive cells and a small oratory in the shrine of Skellig Michael, a pinnacle of rock, who, after the fall of classic antiquity, undertook "to preserve the virtues that the West has so assiduously cultivated".[62]

## IV. Consequences

*8. Utopianism*-cum-*Voluntarism*

Doctrinaire thinking is to assume the primary responsibility for creation of such a situation, in our age mostly characteristic of neo-liberal mentality.[63] It is driven by principles based on the geometrical-mathematical vision of the CARTESIan ideal of learning. It defines basic positions as axiomatic premises and refutes any criticism as the rejection of a commonly shared civilisational minimum. It constructs all its theorems and postulates by the

[60] *Ibid.*, p. 286, with quotes from Gann & Duignan *The New Left…* [note 53], p. 30 and then from K. Lloyd Billingsley *From Mainline to Sideline* The Social Witness of the National Council of Churches (Washington, DC: Ethics & Public Policy Center 1990) ix + 209 pp. on p. 180.

[61] Richard John Neuhaus 'Second Thoughts' in *Second Thoughts* Former Radicals Look back at the Sixties, ed. Peter Collier & David Horowitz (Lanham, MD: Madison Books 1989) xv + 271 pp. at p. 9.

[62] Thomas Cahill *How the Irish Saved Civilization* The Untold Story of Ireland's Heroic Role from the Fall of Rome to the Rise of Medieval Europe (New York: Nan A. Talese / Doublebooks 1995) x + 246 pp. on p. 4.

[63] David Jonas & Doris Klein *Man-child* A Study of the Infantilization of Man (New York etc.: McGraw-Hill Book Company 1970) xvi + 362 pp. attributes the degeneration of post-modern humans (also with inherited qualities) to the artificial ways of life, as the outcome of a sheerly intellectual construct.

force of logic. It trusts exclusively in such pre-posited starting points and glorifies the logic of theory construction stemming from these—and it indeed requires nothing more. Any proof to the contrary would *a limine* exclude itself from the field of official scholarship, as it would be held to be denying its very foundations. If reality failed to adjust to such ideals, it would be all the worse for the facts of practice.[64]

This is nothing but sheer Utopianism that, when put to the test of reality, remains insensitive to any failure in practice, as its underlying approach is basically eschatological; believing itself to have been commissioned with a prophetic mission, it expects facts to conform to it. In consequence, the new mainstream announces itself to be the exclusive holder of truth; hence it stubbornly sticks to its own version of the truth, in spite of any majority, consideration, harsh reality, conspicuous damage or obvious impossibility it may encounter or elicit. This is why it reacts as being immune to anything pointing or having originated beyond it. Moreover, it cannot even be shaken until it prevails, as it will actually come off victorious out of cataclysms it may have caused, even more strengthened in its own truth. Due to its inborn intolerance and in a paradoxical manner, however, in the final analysis

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[64] On liberalism sticked to abstraction, which, facing certain failure, is always superseded by the concrete, see Georg Wilhelm Friedrich Hegel *Vorlesungen über die Philosophie der Weltgeschichte* Ausgabe Georg Lasson, IV (Leipzig 1923), p. 925: „Die Richtung, die an der Abstraktion festhält, ist der L i b e r a l i s m u s , über den das K o n k r e t e immer siegt und gegen das er überall Bankrott macht."

The aversion to anything traditional and established (with the drive to transcend, by way of conscious future-planning, anything reached) is the typical characteristic of today's intellectual. Molnár *The Decline of the Intelletual* [note 19], ch. ii. On rationalism equating conceivability with the chance of actual implementability into practice, see cf. Jeane J. Kirkpatrick 'Introduction' in her *Dictatorships and Double Standards* Rationalism and Reason in Politics (New York: Simon and Schuster 1982) 270 pp. on pp. 1–18.

Such a background, of course, presents science as a filter that pre-selects its end-result. Indeed, institutional science—by working out its own axiomatic presuppositions and criteria of methodicalness—is one of the factors of social reality construction. Moreover, not even its own perception of reality is adjusted to its subject of investigation but becomes previously defined by its own view on reality. According to a critical formulation, "science has come to see what it believes according to its *a prori* assumptions concerning what there is to be seen." Nasr *Knowledge and the Sacred* [note 11], pp. 206–207. Even sociologically this proves to be true, as "the success of action in society depends on more particular facts than anyone can possibly know. And our whole civilization in consequence rests, and must rest, on our b e l i e v i n g much that we cannot k n o w to be true in the CARTESIan sense." F[riedrich] A. Hayek *Law, Legislation and Liberty* A New Statement of the Liberal Principles of Justice and Political Economy [1976–1979] complete one-volume ed. (London, etc.: Routledge & Kegan Paul 1982) xxi + 244 pp., p. 12.

it is bound to exclude itself from the field of science proper, as its underlying proper aim is—perhaps inspired by the late LUDWIG FEUERBACH—less to explain than to change reality. This is as if it were just a substitute, a drawing-room revolutionism pursued by intellectuals alienated from reality. Although such an approach may produce deconstructions with fascinating analytical depth, it is completely at a loss, merely offering confused and impractical responses, when it should, instead of principled proclamations (of a liberal minimum or based on expectations formulated by the World Bank, etc.), come up with any liveable proposition, constructive for the entire society.

Well, principles are what they are and not anything else, just because they hover indefinably between the everything and the nothing in the ether of logical predicates. This is why moral philosophy speaks of "reflective equilibrium",[65] because principles seem to tell something, although actually they do not—until we do not reformulate them through a series of practical instances so that, in a series of logically assessable statements, we can draw the limits of what they can possibly convey to users here and now. Or, a principle offers no guidance until it is interpreted, as its timely guidance will be a function of its being contrasted with a set of practical instances reflectively.

As is well known, what we know as legal positivism has been, throughout the centuries of Civil Law codification, simplified into rule-positivism. The Code of JUSTINIAN and the early codes of Enlightened Absolutism (especially by PETER THE GREAT, FREDERICK THE GREAT and others) already had reduced the idea of law [*ius*] to the statutory enactment [*lex*] of a will [*voluntas*], forced upon society by the prevailing state power and, thereby, also degraded that which had once embodied value, ideal pattern and measure, to a purely formal texture. By the same act, interpreting and implementing such law-texts in practice were left to the lawyers' profession, that is, to procedures and arguments, skills and values recognised within the profession as transmitted from generation to generation. Only that which was posited by the legislator was accepted as the law (hence the expression 'positive' law), and codification was in fact resorted to exactly in order to establish an

[65] As inspired by Nelson Goodman *Fact, Fiction, and Forecast* (Cambridge, Mass.: Harvard University Press 1955) 126 pp. on pp. 65–68, see John Rawls *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of the Harvard University Press 1971) xv + 607 pp. at pp. 20–21, 48–51 and 120. For the above correlation, cf. also Varga *Theory of the Judicial Process* [note 4], pp. 110 and 124.

exhaustive system of the law's provisions. Only such a construction was trusted as being able to serve legal security. In their geometrical-mathematical vision, the social and individual destiny of all humans within their reach was to rely on nothing but the coherency and consistency of the law's logical "application" and, thereby, also the personal stand in, and responsibility for, decision-making became simplified merely to drawing the necessary consequences from rules while enforcing them in practice.[66]

Following the logical ideal of rule-positivism, actors in law may have become indifferent to the social consequences of their actions. By dismissing any ethical scruple, they may have insisted on patterns handed down from above as ready-made, that is, on rules fixed in statutory texts. To be sure, principles have been known from early times in classical Roman antiquity. Their assumed role has ever been to convey traditions as the law's implicitly self-evident presuppositions (to orient decision-makers in ambiguous situations), without the background idea of also entitling anyone to evade or destroy rules.

The unbroken continuity of this tradition has remained one of the buttresses of Civil Law development up to the present day. Common Law did not break away from this pattern either: principles may have played an auxiliary role in inductive reasoning leading to the formulation of those standards by which cases could be decided. Well, this is the practice that became turned inside out by the generation of 1968 in the United States under the influence of constitutionalism deconstructed by human rights activism—first, challenging the prevailing law and order and, later, also transcending it critically.

In view of the political activism in contemporary America, posited law is nothing more than a prime exemplification of the way in which the legal order can be broken down—that is, it is as it is, albeit it could have also been different. Or, the legal order as compounded by constitutionally recognised principles and their logically or otherwise inferred consequences is assumed to have a somewhat primitive, i.e., superior, validity. Therefore, in routine situations the judge simply applies the positive rule f o r w a n t o f a n y t h i n g b e t t e r (that is, practically, as a subsidiary source of the law) or, metaphorically speaking, in acknowledgement of the fact that then and there the judge has not found it challengeable either constitution-

[66] Cf., by the author, *Codification*… [note 24] and 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives' in *Legal Development and Comparative Law* ed. Zoltán Péteri & Vanda Lamm (Budapest: Akadémiai Kiadó 1981), pp. 45–76.

ally or with reference to legal principles or human rights, and, therefore, lacks reason or grounds to disregard the formal law in order to enforce the judge's own version of a rule to be derived from principles or justified by theoretical reasoning.

Well, principles have in the meantime become a weapon for practising lawyers in America to extend absolute control over the law in action, taken as a pattern now spreading in global dimensions. Owing to them, law in practice is no longer mastered by the legislator who has established its rules[67] but by those who may synthesise a principle out of the Constitution's wording (be it merely solemn, pathetic, or perhaps just goal-setting, through invoking an unspecified ideal), that is, by the one who (either as a lawyer resorting to such reasoning or as a judge over- or misusing the judicial powers granted) asserts an individual solution by reference to such "fertilising" principles (or, even more "constructively" in judicial "activism", to so-called secondary principles drawn by logical inference), trying to impose it upon society as 'the law's response', by rejecting expressly and openly the application of the same law's otherwise relevant rule. This newly invented way, elaborated as a mere theoretical possibility in the beginning,[68] has since grown into a trend practiced world-wide—as allegedly justified by legal scholarship,[69] which is also entering step by step into the Central European scene.[70]

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[67] The espousal by Benjamin Hoadly, Bishop of Bangor, against his King [*Sermon Preached before the King* (1717)] is a classical example for this to declare: "»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." Quoted by John Chipman Gray *The Nature and Sources of the Law* [1909] 2nd ed. (New York: Macmillan 1927) xviii + 348 pp. on p. 102 {& also in <http://www.hku.hk/philodep/courses/law/Gray%20text.htm>}.

[68] Ronald M. Dworkin 'The Model of Rules' *University of Chicago Law Review* 35 (1967) 1, pp. 14–46, with the title 'Is Law a System of Rules?' in later reprints.

[69] The scholarly analysis of legal reasoning has taken such a road in Germany, especially owing to Ralf Dreier's *Recht – Moral – Ideologie* Studien zur Rechtstheorie (Frankfurt am Main: Suhrkamp 1981) 365 pp. [Suhrkamp Taschenbuch Wissenschaft 344] and *Recht – Staat – Vernunft* Studien zur Rechtstheorie 2 (Frankfurt am Main: Suhrkamp 1991) 247 pp. [Suhrkamp Taschenbuch Wissenschaft 954].

[70] When the crucial challenges of the transition from Communism were faced in Hungary, the Constitutional Court derived most of its criteria from the Dodonaean wording of the old-new Constitution, declaring the new republic to be "a democratic state of law", with reference to which quite a few laws have been declared unconstitutional in a way leading to rather deplorable socio-political consequences—cf., e.g., by the author, *Transition?*

With this, we have returned to the realisation of how problematic our world has become. It is as if humanity were blinded by technological advances to an extent preventing us from sensing the perils which lurk in the world we have engineered all around us. Our mentality is dominated by Utopianisms with allegedly scientific extension, and self-confidence, relying on the unbiased force of logic, has stricken an attitude of doctrinaire self-assertion. Humans believe themselves to have acquired a divinely creative ability by looking back at tradition and experience as relics of some outworn age, mere mementoes of their one-time weaknesses.[71]

*9. With Logic in Posterior Control of Human Formulations Only*

The history of both mathematics and logic is obviously universal. It may not know frontiers but only cultures that encourage or discourage philosophising on given matters in given directions. Consequently, the genuinely relevant aspect of the development of human thinking is not simply the extent to which Greek, Roman, Judaic, Islamic, or Renaissance minds cultivated formal categorisation in abstract generality but also the framework and the purpose they used it for; namely, how far and to what extent they relied on its guidance and how much they regarded the pattern derived from it as offering the last authoritative word in their solutions of human (moral) dilemmas emerging in any age.

Well, intellectual developments on the European continent seem to have pointed in a single direction over the past one and a half thousand years. Notably, GOTTFRIED LEIBNIZ' favourite allegory exemplifies the very type of thinking *more geometrico*: people unable to come to an understanding in their debates, when enlightened, take a pencil and writing slate in hand and, by resorting to a "methodical" procedure and exclaiming *"Calculemus!"*,

*To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008) 292 pp. [PoLíSz Series 7], part on »The Burden of the Past«, pp. 105–196]—the fact notwithstanding that the rule of law had no proper doctrine in Hungary—cf., e.g., by the author, 'Varieties of Law and the Rule of Law' *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, pp. 61–72—and that not even international literature goes too much further than pointing out that, depending on authors and contexts, there can be as many understandings of the term (and ideals behind it) as there are applications. See also Richard H. Fallon, Jr. '»The Rule of Law« as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (1997) 1, pp. 1–56.

[71] On rationalism as the rationalist's vision of the abstract possibility of mere chances, instead of weighing the concrete and the probable when the real human destiny is envisaged, see Kirkpatrick *Dictatorships…* [note 64], *ibid.*

practically "count" what the result concludes.[72] It is worthwhile noting that the unconditional reliance on sheer logic (treating conceptual abstractions that are representations of aspects of the outside world as if they were symbols in mathematics) is far from being accepted in the two non-CHRISTian traditions originating from ABRAHAM,[73] namely, in Judaism and Islam. In these theocratic world orders, it is theology that provides a framework, and law is only meant to inform us fallible humans on the directions and limits of social application within its framework. Well, in Judaism and Islam, law does not take logic as either unconditionally competent or as an ultimate word. Of course, neither of them rejects logical considerations from within their relevant fields of application but they regard its use as too much depending on artificial presuppositions and contextures (and therefore too simplifying as a means) to fully rely upon it in human (moral) affairs and dealings at all.[74]

Logical identity is one of the logical categories; it has no human message. What any logically stated paradox, inconsistency or contradiction is about is, above all, its logical conclusion.[75] All it conveys about humanity's ethical dilemmas is that humane qualities are much too complex for an approach reducing everything to mere formalism.

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[72] Gottfried Wilhelm Leibniz *Die philosophische Schriften* hrsg. Carl Immanuel Gerhardt, IV (Berlin: Weidmann 1875–1890), p. 200. Also cf., by the author, 'Leibniz und die Frage der rechtlichen Systembildung' in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, hrsg. Karl A. Mollnau (Stuttgart: Franz Steiner Verlag Wiesbaden 1987), pp. 114–127 [*Archiv für Rechts- und Sozialphilosophie* Beiheft 31].

[73] I have borrowed this designation from one of the expressions recurrently used by NASR.

[74] Cf., e.g., Chaïm Perelman 'Legal Ontology and Legal Reasoning' *Israel Law Review* 16 (1981) 3, pp. 356–367 and especially at pp. 358–359, as well as Lawrence Rosen 'Equity and Discretion in a Modern Islamic Legal System' *Law & Society Review* 15 (1980–1981) 2, pp. 217–245 and especially at pp. 232 et seq. {reprinted 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 and Legal Theory: Cultures 1], part IV: »Comparative Legal Methods«, pp. 363–374 & 419–447}.

[75] Cf. the *Talmud*ic stand on the debate between the mutually excluding lawyerly positions of SHAMMAI and HILLEL, eventually sanctioned by a voice descending from Heaven: "Both are the words of the living God." *The Babylonian Talmud* Seder Mo'ed, III: Erubin, ed. Rabbi Dr. I. Epstein (London: The Soncino Press 1938), 13*b*, pp. 85–86. Because "[o]ne makes one's choice out of two opposing interpretations that are considered equally rational, if one is required to do so; but by no means referring to either of them being false or irrational." Chaïm Perelman 'Désaccord et rationalité des décisions' in *Archivio di Filosofia* ed. Enrico Castelli (Roma: Istituto di Studi Filosofici 1966), pp. 87–93. For the underlying methodological dilemma, see, by the author, *Lectures…* [note 4], particularly at p. 93, note 120.

## V. Perspectives

*10. And a Final Resolution Dreamed about*

It is difficult to draw any conclusions from such a diagnosis of Western civilisation, mostly because rarely questioned pivotal presuppositions of its very foundations are thereby inevitably concerned. By developing systematic thought within the institutionalised[76] demand for scientific methodology to which Western thinkers have been willing to subordinate themselves as well, they have succeeded in conquering the surrounding world. Indeed, they have subjugated it and it is now even up to their discretion to destroy it. The question at stake is, therefore, not whether this instrument is good or bad, suitable or unsuitable, but exclusively a preliminary issue that is mostly never formulated. Notably, does this human talent resulting in such an extraordinary performance also have to overpower its creator? Do the unquestionable achievements on the field of technology also inevitably involve the creator becoming the servant of this human-created technology? Is it not exactly owing to the multi-directional complex endowments of our own created human being that we could master our environment—involving ourselves—on this Earth? Or, is our creativity generating instruments that are necessarily destined to become our fate also, dependent upon instruments? Should it be so indeed that anything apparently good, if used in the proper context for proper purposes, is only available to us as hypertrophied and overpowering us? Has modernity outdated the wisdom of our ancestors drawing the inevitable correlation between virtue and proportion? Is it unavoidable to confine the richness of human qualities within one sole selective principle, that of mere utilitarianism?

It is difficult indeed to draw any conclusion, because while considering the magnificent achievements of Western civilisation, it is also difficult (and perhaps also unjust) to meditate about becoming trapped in some dead-end. Yet, contemporary trends may also ascertain that any reforming intention remains sheer substitute rhetoric if not based upon the clarification of the circumstances that have brought about the conditions underlying them.[77] All in all, we have to find the way back to the re-founding of our human values, recovering all our abilities, endowed on us as humans.

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[76] Institutionalisation itself is one of the corner stones of any development. Cf., for science, e.g., Vekerdi *Tudás és tudomány* [note 15], passim.

[77] Many of the ideas for reform (such as, e.g., setting limits to growth or committing ourselves to sustainable development) in search of a final meaning can accomplish scarcely more than minimising or optimising some randomly selected consequences, if the underlying basic conditions are not faced.

As we have already seen, too, it is not to the powerful (even if one-sided) development of our abilities and instruments but their domination over us, immensurate and spreading far beyond their proper fields, that the present diagnosis objects.[78] As we have also seen, it is not the incorporation of the legal guarantees of foreseeability, certainty and security into the law's own operations but the elimination of responsibility to be borne for our personal decisions that I address here and now.[79] Several proposals have been formulated in the regimes of both the Civil Law and Common Law to somewhat fundamentalise legal decision-making, to materialise and substantiate formal justification by making legal processes also socially responsive;[80] however, they have never transcended the magical circle of utilitarian justifiability and never questioned the very structure of legal thought as patterned by the ideal of scientific methodology elaborated for human cognition.

It is exactly the perspective of scientific methodology, extended so far as finally to be able to captivate human fate, that NÁNDOR VÁRKONYI addressed, when he defined the enigma of our historical existence as having become problematic. This is all the more so because the awareness of the com-

[78] "[A]buse of the intellect in the negative sense of rationalism is only possible if the intellect is taxed beyond its capacity, if its nature, its limits and premises are ignored. […] [I]n the sphere of pure logic and mathematics reason is free and independent, following its own laws, but the error occures precisely when this *a priori* method of thinking is applied to the realities of life and society, where the intellect is after all merely the judge who has to consider empirical facts and conditions." Wilhelm Röpke *The Social Crisis of our Time* [Gesellschaftskrisis der Gegenwart, 1942] introd. William F. Campbell (New Brunswick: Transaction Publishers 1992) xxxvi + 261 pp. [The Library of Conservative Thought], on pp. 48 & 49.

[79] "Laws are so numerous, so conflicting, and so bendable despite their apparent austerity, that it is always available to judge on the basis of equity. – And do they indeed proceed like this? – Never, because judging on an equitable basis would make one assume responsibility that nobody wants."—writes Emile Faguet in his *Le culte de l'incompétence et l'horreur des responsabilités* (Paris: Bernard Grasset 1921 [Checy: Coda 2004]) 172 pp. It is by no mere chance, therefore, that lack of responsibility is regarded by Várkonyi *Az ötödik ember* [note 3], p. 255 as the inevitable concomitant of democracy: "when in minority, one has no word; growing into majority, one is entitled to act however one likes; all in all, one may fail but one is not punished".

[80] Richard A. Wasserstrom *The Judicial Decision* Toward a Theory of Legal Justification (Stanford: Stanford University Press & London: Oxford University Press 1961) 197 pp.; Per Olof Bolding 'Reliance on Authorities or Open Debate? Two Models of Legal Argumentation' *Scandinavian Studies in Law* XIII (Stockholm: Almqvist & Wiksell 1969), pp. 59–71; Philippe Nonet & Philip Selznick *Law and Society in Transition* Toward Responsive Law (New York, etc.: Harper & Row 1978) vi + 122 pp.

plexity of human abilities, the requirement of the versatile putting forth of human endowments, the richness of the sources of human wisdom and knowledge, as well as the inherent ambivalence of any exclusively selected ("royal") path all have already been equally exposed and cultivated to their depths by the great cultures of mankind.

And the need for some reconciling and synthesising Great Resolution—instead of any one-sidedness—was, if at least symbolically, already formulated in Europe centuries before the age of DESCARTES, in a synoptic vision by ALBERT OF BRESCIA when he saw a vision of Saint AUGUSTINE appearing to him to bear testimony of community and final unity with Saint THOMAS AQUINAS, harmonising into one body their respective oeuvres.[81]

[81] "For THOMAS AQUINAS is my son indeed, who faithfully followed the apostolic teaching and my own, and so illuminated the Church". [The Dominican brother Anthony of Brescia**]** in 'First Canonisation Inquiry', para. LXVI in *The Life of Saint Thomas Aquinas* Biographical Documents, ed. Kenelm Foster, O.P. (London: Longmans & Baltimore: Helicon [1959]) xii + 172 pp. on p. 104. Within the framework of the opposition of, and coming synthesis between, the striving for both productive uncertainty in thinking & language usage and axiomatically arranged conceptual formation in logic, see, by the author, *Lectures*… [note 4], para. 2.3.3, especially at p. 93, note 119.

# Rule of Law? Mania of Law?*

## On the Boundary between Rationality and Anarchy in America†



*(Transformation of American Law and Legal Mentality)* Law is based on the idea of *ordo*, and modern formal law endeavours to enforce some kind of order built on ideal regulation that offers unambiguous application to anyone ready to draw rational conclusions from it.

Historically, differing institutions and rationality-concepts (with a variety of constructions and normative expectations) were built in various cultures. In ways and roles characteristic of them individually, they all aimed at serving safety in application by developing a logic that may ensure inevitable conclusions with no alternatives. As is known, on the E u r o p e a n continent, regulation was conceived geometrically as a conceptual system, logically organised and striving for completeness. So, continental law is dominated by abstract deductions. A n g l o - S a x o n s have always been different, preserving sensitivity towards the concretely unique features of individual cases to be assessed eventually by judicial fora, and this has allowed them to consider analogically judicial solutions applied in earlier similar cases. And A m e r i c a n law developed from the English system, showing increasingly differing features step by step. Today, it is overwhelmingly codified as based on legislation. Moreover, in the United States, the English method of distinguishing (having recourse to or excluding analogy between past cases and the present issue) has become both liberated and complemented by argumentation through principles, and thus significantly

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* In its first version, in *Valóság* XLV (2002) 9, pp. 1–10 & [reprint] in *Az év esszéi* 2003 [Essays of the year 2003] ed. Krisztina Molnár (Budapest: Magyar Napló 2003), pp. 99–114 [review: Pál Molnár 'Zuhanó csillár: Gondolatok üde mozaiktáblája' {Falling chandelier: A refreshing mosaic of ideas} *Heti Válasz* III (18 July, 2003) 29, p. 46].

† Paul F. Campos *Jurismania* The Madness of American Law (New York & Oxford: Oxford University Press 1998) xi + 198 pp.

less formal than the mere observance of rules, over the past few decades. Therefore, the self-image of American law is contradictory from the outset. In contrast to the English, they believe that law, inasmuch as it is cognisable, can provide unambiguous guidance for all in principle. In consequence, present-day American regulations incessantly interfere with life relations, including the private sphere, which had been protected as free from legal intervention until now. At the same time, in the name of the rule of law and in order to support the enforcement of law at both individual and collective levels, they constantly increase the range of procedural choices for action. Consequently, it may well occur that the law's final word would only be heard long after the last available procedural measure was taken (and in some cases practically never). This is because the struggle to be tirelessly continued and resumed again, which is encouraged in the name of law, as a practical matter may exclude legal force from ever being reached.

Our age is characterised by l e g a l t r a n s f e r s all over the world. Our Central and Eastern European region is especially involved in this (in addition to Latin-America, Asia and even Africa), because after half a century of imposed experimentation with the Communists' party-state and centrally planned economy, we had to re-adapt ourselves to legal frameworks drawn by parliamentary democracy, a multi-party system, and an economy based on free competition and the market. At the same time, as we become integrated into Western Europe within the European Union, we have tens of thousands of pages of rules and regulations translated daily to be adopted (along with the Union's constantly forming law) in our law. We should, therefore, be expected to be familiar with laws serving as patterns for us from Brussels to Washington in their everyday implementation and overall effect, while we, as specialists, are used to seeing trees instead of the forest itself, with no capacity to assess their total outcome. European law is being formed day to day, and now with us also taking part in forming it. But on the other hand, the compound federal and state complex (made up of a multitude of institutions and myriads of regulations and practices, with an army of practically unavoidable specialists trained expensively and employed at high costs for their procedural tricks and ingenious argumentation) we call American law in books and in action scarcely reveals itself in transparent dimensions for outsiders as a lively whole, whether to those searching in law libraries or visiting the States. This is not peculiar at all. After all, monographs necessarily treat technical details, and the visitor's eye could only be opened by a reflection both critical and endowed with self-irony if it is due—a gift that Americans as world power players since World

War II, owing to their self-closing mass socialisation, cannot boast of in the least.

The everyday formation and experience of an arrangement, making it quite liveable or perhaps problematic for those living within it, can hardly be grasped from an outsider's position. Let us consider as one minor instance that the institutionalised and apparently world-conquering practice called political correctness—despite being more powerful and efficient in shaping American public discourse (within media, scholarship and education) than the thoroughly re-interpreted Constitution itself—has not (yet) been elaborated in professional literature. Hence, (in terms of transparency afforded by disciplines describing sources of social normativity) it cannot be taken otherwise than as a mystery how it could have become as overwhelmingly dominant as it is. Paradoxically, reading American tabloids offers a better chance to sense the prevalent ethos of everyday common and professional life than perhaps anything else. Yet it would obviously be bizarre to draw conclusions regarding considerations dominating legal life from phrases and occasional exaggerations in the press, prompted by incidental turns of mind, while the professional reader is flooded by some fifty-thousand pages of essays and analyses from hundreds of journals published by American law faculties and lawyers' organisations every month.

Some of the changes that took place in American legal practice over the past few decades may have also been perceived in Hungary. The first to be mentioned is (1) j u r i d i f i c a t i o n , that is, the increase in both the diversity of ways through various formal procedures and the number and variety of occurrences actually resorting to them in a constantly broadening circle. The second is (2) p r o c e s s u a l i s a t i o n , that is, with substantive regulation being gradually pushed into the background, the growing tendency to assert law as an in-itself neutral set of rules of a formal game, presuming equality of the parties (through an emphasis slowly shifted to the protection of the individual—even if a criminal—against the state). And, as a theoretical achievement and then also making its way into practice, the third is (3) a r g u m e n t a t i o n b y p r i n c i p l e s . In accordance with the Americans' widespread spirit of extending individual freedom to their personalised choice from an almost unlimited set of values and patterns of self-realisation within just few decades, this creative argumentation has resulted in the thorough re-interpretation of the Constitution with such a long-term impact that, from now on, whether to follow rules is made a function of whether or not the rule concerned encounters lawyerly counter-argumentation that refers to any principle or value claimed to be constitu-

tional. By now, all this has torn American law practically into two, duplicating the paths that can be followed as a function of the result hoped for by the client, which actually crumbles the rules' authority by relegating them to the role of a mere substitute.[1] It is to be noted that this tendency inspired sympathy in Western Europe and, later on, in Central and Eastern Europe as well, particularly in countries which were facing transition to the rule of law. For, as a technique innocent in itself, it only suggested revitalisation of one of the components of Roman law (long forgotten in our region),[2] while it also offered rehabilitation to the very wording of constitutions, neglected till then as a proper—*sui generis*—source of the law.

*(With Repercussions on the Underlying Ethos)* Experience in Hungary may have made it clear by the end of the past decade at the latest that almost unforeseeable consequences (deteriorating the law's prestige) may be induced if social space vanishes from behind the law, and religion (with ideas fundamental enough to cement society together and traditional enough to generate communal reproduction) becomes inoperative, that is, if values degenerate to a function of personal choice and, in the final analysis, social normativity is al-

[1] See, e.g., by the author, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi's »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom 2000), pp. 61–93 and 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44.

[2] As can be remembered, even the so-called socialist legality was based on a strictly interpreted kind of rule-positivism reflecting the official acknowledgement of the superiority of statutes that at the same time rejected Western European post-war developments of a creative jurisprudence either through general clauses or based upon argumentation by general principles, constitutional or other. And now the urge to reject one's own responsibility (by considering its task reduced to the exclusively mechanical application of posited rules) is the most burdensome heritage of all this, having survived from socialism as prevailing in the ethos of the legal profession, since its staff is basically unchanged. This is one of the explanations for the absolutely negative attitude of our constitutional judiciary (arising from the unspoken presumption of a most rigid and formalistic legal continuity), compared to the willingness and determination in both Germany and the Czech Republic to face politically motivated and therefore not prosecuted crimes of the old regime without granting them a legalistic pardon. Cf., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995), »Coming to Terms with the Past«, pp. 119–115 [Philosophiae Iuris], *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models (Budapest 1994) xxvii + 178 pp [Windsor Klub] as well as *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008), »The Burden of the Past«, pp. 107–196 [PoLíSz Series 7].

so atomised to the depth that law would remain the only common denominator among individuals, acting as a self-generating demiurge.

For, according to legal sociology (powerfully developed in Hungary during socialism and having been in unreasonable decline since), no matter how much additional burden we are compelled to put on law (out of the constraint to modernise), we have to bear the limits of its optimum load capacity in mind, because it can also collapse under its own weight.[3] Speaking paradoxically, law operates with an optimum efficiency when it is resorted to only exceptionally and mostly symbolically as the ultimate authority, that is, when its regulation points to the path the actual social movement takes anyway.[4] After all, even if its eventual overburdening may increase its apparent significance, playing added roles that cannot be filled properly will unavoidably provoke changes in character in the long run.

It is a change of ethos through the challenge by our post-modern age[5] that is seen as behind such developments by the American author whose considerations I shall outline in the following.

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The intention of self-revelation through providing a faithful mirror is to be highly appreciated, especially when it originates from academic circles. PAUL F. CAMPOS, Professor of Law at the University of Colorado and Director of the Byron R. White Center for the Study of American Constitutional Law, dipped his pen into vitriol. He did so to stir up the still water of a world in which legal professionals' business is becoming increasingly costly (with no added input) and increasingly complicated in technicalities, while unavoidably being wedged out of mere self-profit in the ongoing so-

[3] Cf., above all, Kálmán Kulcsár *Modernisation and Law* (Budapest: Akadémiai Kiadó 1992).

[4] As Campos appropriately expresses it, "law is always a somewhat crude and potentially destructive social steering mechanism, that works best when it remains a tacit presence in the social background." (p. 183)

[5] Signalled by, among others, as to the quantity of the legal stuff, Philip K. Hovard *The Death of Common Sense* How Law is Suffocating America (New York: Random House 1994) 202 pp. and, as to the complexity—without return—of processes, Harold J. Rothwax *Guilty* The Collapse of Criminal Justice (New York: Random House 1996) xiv + 238 pp. Cf. also, by Pierre Schlag, 'Law as a Continuation of God by Other Means' *California Law Review* 85 (1997) 2, pp. 427–440 & *The Enchantment of Reason* (Durham: Duke University Press 1998) vii + 160 pp.

cial events. What he describes is a pathology not only of the caste of lawyers as a post-modern super-elite, but also of present-day American public speech, continuously promoted by means of the media.

*(Legalisation through Processualisation)* As he reveals, it is trivial that present-day America is not just the land of opposites but also of extremes, often switching into each other uncontrollably (p. vii[6]). America happens to be undergoing a period of the law's hypertrophy: courts are flooded with 30 million cases a year (p. 178); the duration of some lawsuits extends to one decade and hundred-page decisions for them are becoming usual, while articles of several hundred pages in length are devoted to analyse them in the professional press with half a thousand of notes each (p. 81). Could the Fathers of the Constitution have anticipated that both the perfection of their work and their efforts at making it accepted by the member states would be devalued as a mere trifle compared to the alleged sacrifice of time and energy detailed in the bills by O. J. SIMPSON's lawyers until they got, through craftiness, the appointed jury entirely replaced (p. 21)? And do today's taxpayers realise that the lawyers of TIMOTHY MCVEIGH, convicted for the 1995 bombing in Oklahoma City that killed 168 people, charged ten million dollars for a trial lasting only three months at the cost of the American public, without even straining themselves to come up with serious exculpatory evidence (p. 183)?

What lies behind all this? Corrupt practices? Or *zeitgeist*, some snobbish contemporary trend of thought? It seems that wealth and imperial dimensions may also have an effect on socialisation, in that it is difficult to stay modest. And if it is rational organisational capacities (in addition to power) to which America owes its success, then it is exactly this field where temperance may encounter difficulties. Anyway, public discourse in America is mostly cut short: "problems have solutions" (p. 125), with a "mania for giving reasons" in the background (p. viii.). All this adds up to a culture of "juridical saturation" with almost all social interactions "subject to possible surveillance and regulation via the agencies of state" (p. 34), for "the best way to attack a problem is to inflict a comprehensive regulatory scheme on the social context in which the problem occurs" (p. 82[7]). "Legalize it!"

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[6] Let us mention as an illustrative example the "growing awareness that the whole culture of dieting and rigid exercise is the root cause of the fat explosion", as concluded by Richard Klein in his *Eat Fat* (New York: Pantheon 1996) xx + 247 pp.

[7] Meanwhile maintaining the "belief that it is possible to both produce comprehensive regulatory regimes and to predict accurately the effects of essentially *ad hoc* legal decision making" (p. 179).

(p. 6) And the panacea of "going to law" (p. 5) is obviously promoted as a substitute, as if lawyers (just as advisers are gradually replacing priests these days) had a kind of inherent wisdom or learned knowledge distinguishing them from the rest of society (ch. 7 on »Addicted to Law« as well as p. 186).

Thus, actors from libraries to sports associations (no longer trusting themselves, and as if having forgotten the gift of common sense) begin enthusiastically drafting regulations of several hundreds of pages each to insert into everyday processes something external to rely on, as a substitute for both reason and authority, afforded by both quasi-law and therapy as embodied by mediators, counsellors and psycho-analysts.[8]

It is not "obsessive proceduralism" (p. 179) and not even the "passion for regulating" (an attribute used earlier to characterise the Prussian Enlightenment of FREDERIC II[9]) in themselves that make American practice problematic. What is really puzzling is the way it resorts to the law's instrumentality by making the community believe that legal professionals are more competent in value-choices as well as in defining preferences involving balancing and mutual thinking than anyone else; so much so that they may not only overshadow policies but also have to control political alternatives as ultimate judges with their principled justifications and authoritative (judicial) approval.[10] To put it briefly, nothing matters anymore but law. Nothing else can create community but law. And there is no other authority than that of law (as, by absolutising our individual self-realisation, we have rendered all

[8] Campos' remark is worthy of attention: just as "a serious gambler does not gamble to win money—he wins money in order to gamble", likewise "we look to the visible law not so much for answers to the unanswerable, but to submit ourselves to the will of those who assure us they have such answers." (p. 79) This is why he quotes JOSEPH DE MAISTRE's opinion summed up by ISAIAH BERLIN: "Men—moral beings—must submit freely to authority: but they must submit. […] No man, no society can govern itself; such an expression is meaningless: all government comes from some unquestioned coercive authority. Lawlessness can only be stopped by something from which there is no appeal. It may be custom, or conscience, or a papal tiara, or a dagger, but it is always a s o m e t h i n g ."

[9] Thomas Babington Macaulay 'Frederick the Great' [1842] in his *Essays* [popular ed.] (London: Longmans 1895), pp. 808 and 805, as well as Thomas Mann 'Frederick the Great and the Grand Coalition: An Abstract for the Day and the Hour' [1914] in his *Three Essays* (London: Secker 1932), pp. 156–157. For the context, cf., by the present author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), pp. 76–77, with notes 22 & 28 on pp. 86–87.

[10] It is Professor RONALD M. DWORKIN who has actually come to the conclusion that traditional politics with the representation of group interests can only be legitimate as far as its message can be developed or reconstrued—as approved of by a federal justice—through "a single, coherent set of principles". Campos, p. 39.

our choices a reflex of our momentary mood). And what is at stake here is not just airy desires, or intentions or a merely ideological guise. What we have to reckon with now is a change in the character of the whole legal set-up with the social use of law, affecting procedures and methods, attitudes and the entire ethos as well, that can also be traced in the judicial handling of everyday cases.

*(With Hyperrationalism Added)* For, in America,

> "law is manifesting itself as a kind of cultural madness, whereby hyperrational modes of decision making are employed in a vain attempt to resolve rationally what are rationally irresolvable moral and political conflicts." (p. 182, similarly p. viii),

while

> "the American civic life has become burdened with the widespread delusion that something called »the rule of law« can succeed where politics and culture fail." (p. 181)

This tendency is not just dangerous in itself but also threatens to cause law in American practice to become extremely one-sided, that is, with potentials increasingly narrowing but increasingly imposed upon society. This is so because

> "[t]he current cultural dominance of legal modes of thought—the belief that political and ethical decisions are legitimate only to the extent they can be crammed into the conceptual categories of legal reasoning—helps reinforce a legal culture in which other modes of decision making are treated as degraded versions of law, rather than as potentially valuable alternatives to law's imperialistic grasp." (p. 187)

*(Example: Finding Lost Property)* As a methodological illustration, the author refers to the issue of ownership of lost property and rewarding its finder. Guiding precedents[11] only emphasise contradictory aspects, such as returning to the original owner, meeting the expectations of both the finder

[11] Such as the decisions in the cases of *Hannah v. Peel* (1945), 1 King's Bench 509; *Bridges v. Hawkesworth* (1851), 21 LJ Queen's Bench 75; and *South Staffordshire Water Co. v. Sharman* (1896), 2 Queen's Bench 44.

and the owner of the place of finding, rewarding luck and honesty or, after all, finding any solution that is easy and rapid (p. 84). Whatever the case may be, debatable concepts will necessarily emerge such as 'prior owner'—by no means as a function of competing interpretations but as one of the substantial dilemmas inherent in law. For every

> "legal concept of possession is of course an artifact of legal reasoning itself, which is to say it is a socially constructed concept rather than a plain fact of nature; [...] the c o n c e p t will be sufficiently ambiguous to accommodate the essential tensions between the various social values the legal concept reflects." (p. 85)

This cannot be otherwise, for "All rules by their nature a s r u l e s must be both over- and under-inclusive" (p. 88). And the same is the reason why there evolve successive opposing movements in legal development, firstly to standardise exceptions from the rule, and then, in counter-reaction to the confusion emerging from this, to regulate the practice confused by those exceptions (p. 89).

*(Practicalness Veiled by Verbal Magic)* The question arises, therefore, whether or not interpretability, controversial in itself, is an incidence of law that has to be settled by lawyerly instruments. Or is it a necessity, a function and outcome of the subject conflicting in itself (albeit concealing its very nature)? In one of my earlier attempts at reconstruction,[12] I reached the conclusion that no matter how sensitively the law is formed, by its very nature it cannot be but a net of conceptual projections that reflects an ideal order according to the intention, imaginative power and conceptualisation of its designer, while, as the law is followed, real life strives, by balancing conflicting values and interests, to find fulfilment within the framework of such a conceptualisation. Or, this means that such a contradiction is neither a defect of law nor a deviation in life but the very substance of any legal (or formally mediated) game. Moreover, law could not even reach more security either, this being the fate and exclusive possibility of every conceptual projection contrasted to real life. CAMPOS identifies the knot of American legal culture in the fact that the legal ideology has been silent on the very issue for a cen-

[12] See, by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) pp. vii + 249.

tury, with formalists denying the failure of rational choice between conflicting interests and values, on the one hand, and realists accepting it exclusively as a practical matter to be faced at the most within individual situations, on the other (p. 90). This explains why there is constant mystification, and even "incantation", "verbal magic" and "delusion" in judicial discourse (p. 10), with a "bald assertion of intuitive belief masquerading as rationally compelling argument" (p. 91). That is, all these "blatantly circular forms of pseudo-formal reasoning" (p. 112) and

> "legal artifacts are the fruit of futile, hypertrophied exercises in forms of argument that can themselves »reason«, but that in fact must conclude with the assertion of axiomatic [that is, logically not following from any premises in logic—Cs.V.] or circular [that is, drawing from and concluding with themselves—Cs.V.] propositions." (p. 101)[13]

He also finds—and rightly so[14]—logical positivism responsible for such mystification, as it creates artificial certainty with its special emphases, while excluding real human processes from the circle of scholarly investigation.[15] Albeit what MIGUEL DE UNAMUNO once called "the tragic sense of life" is sensibly based on the recognition that our values may be irreconcilable with each other and there is no rational justification available to control the choice from among them. Meaning the same, ISAIAH BERLIN could also only conclude that

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[13] I have found similar developments in some American phenomenological reconstructions, by chance in a MARXising critical legal studies one. Cf. William E. Conklin *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Disclosure of Suffering (Aldershot, etc.: Ashgate 1998) xii + 285 pp., as reviewed by the present author in 'What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of »The Judicial Establishment of Facts«' in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676.

[14] Having had the opportunity to research in great libraries from Canberra to Edinburgh to Berkeley, what I found the most staggering is that those tens of thousands of books devoted to 'cognition' and 'knowledge' considered their subject as a hypothesising intellectual game, i.e., as a conceptual set of cases formed of other concepts out of purely analytic interest. For actually they constructed a thoroughly theoretical 'cognition' and 'knowledge' that scarcely have anything in common with cognition practised in either everyday or professional (scholarly and lawyerly) life and knowledge acquired by humans.

[15] According to logical positivism, a statement is t r u e if it can be empirically verified by virtue of a definition (in logic or mathematics), while statements on personal preferences are just e m o t i v e expressions with truth either merely subjective or uninterpretable on the whole (p. 152).

> "a »notion of plurality of values not structured hierarchically« does not entail relativism, but it does entail »the permanent possibility of inescapable conflict between values.«" (p. 160)

For we hardly "know" anything (pp. 144–145[16]). The most we can do is merely to live again, process and improve the tradition cultivated by our predecessors and fellows, construed as knowledge. For human thinking is mostly tautological, even if covered by public speech. This is

> "a symptom of how the contemporary worship of analytical and supposedly scientific modes of thought can shade off into a type of dogmatic pseudo-religious belief, and eventually into the realm of a sort of intellectualized irrationalism." (p. 150)

*(Ending in Jurispathy)* Translating all this to juridical language, ROBERT COVER blames judicial decision-making for being thoroughly "jurispathic", as faced with the

> "luxuriant growth of a hundred legal traditions, [judges] assert that this one is law and destroy or try to destroy all the rest." (p. 160)

This is why Professor ROBIN WEST, known for her feminist reconstructions, can openly declare that

> "reason alone is not going to compel agreement. [...] If we are really aiming for genuine consensus, then the experiential gaps must be bridged." Because "moral convictions are changed experientially or emphatically, not through argument [...] reason alone simply will

[16] As Campos himself points out, this is by far not more than—with the words of Ludwig Wittgenstein *(On Certainty)*—"the psychological experience of certainty that is a product of the interpreter's unconscious reliance on the truth of various nonverifiable interpretive axioms." We have to remember how ISAAC NEWTON eventually summarised his experience of life: "I do not know how I may appear to the world; but to myself I seem to have been only like a boy, playing on the seashore, and diverting myself in now and then finding another pebble or prettier shell than ordinary, while the great ocean of truth lay all undiscovered before me." Recently, JORGE LUIS BORGES concluded as follows: "There is no classification of the universe that is not arbitrary and conjectural. The reason is very simple: we do not know what the universe is." And finally, Albert Einstein *(Geometry and Experience)* characterised his subject in rather restrictive terms: "So far as the laws of mathematics refer to reality, they are not certain. And so far as they are certain, they do not refer to reality." (p. 150)

> not move us—but experience, empathy, and reflection might." (pp. 160–161[17])

All in all, owing to the general practice of argumentation by principles,

> "The Constitution has become [...] what the prophecies of NOSTRADAMUS represent [...]: an ideally vague set of oracular-sounding propositions, whose very vagueness comfort the devotee with a sense that the correct interpretation of an essentially magical text will provide insight into mysteries that would otherwise remain unknowable and obscure." (p. 169)

While

> "Indeed the Constitution as a whole (as opposed to judicial decisions that refer to the Constitution) appears to have nothing whatever to say about a right to abortion, or to privacy, or individual autonomy, or sacredness, or any of the other highly abstract concepts that make up the heart of DWORKIN's argument. [...] For all legal rhetoric's grandiloquent talk of »reason« and »principle« we know that our law is always a contingent product of fallible human choices—choices that within interpretive equilibrium zones must remain essentially contestable." (pp. 115 & 116)

It is exactly this that present-day American hyper-realism, striving for certainty at any price, is unwilling to recognise. For American justices are mistrustful of any decision making based on personal responsibility; therefore, they rather prefer judicial argumentation drawn directly from the Constitution as well as from the field of practical policy. But this testifies to their mistrust of democracy itself—that is, (as an anthropological presumption) of man considering his matters and therefore ready to choose, and (in technical realisation) of his adjusting his personal decisions to majoritarian individual opinions. In such a way, personal stance is replaced by the "expertise" of lawyers, alleged to allow a deeper insight. After all, obviously,

> "Voting [...] is an explicitly arational mechanism for deciding controversial issues [...], [because] it doesn't require any justification of par-

[17] Consequently, she proposes pro-life against pro-choice activism by authentically displaying the guilt felt by those who underwent abortion, growing to unbearable degree at times, or the way foetuses killed by abortion are "hacked to pieces in a procedure difficult to distinguish visually from simple infanticide" (p. 162).

> ticular results beyond reference to the formal definition of the activity itself." (p. 70[18])

It is ironic to see development or progress as created by trust placed in the rational foundation of decision-making, when it resorts to the panacea of comprehensive regulation and exposes itself to judicial incidentalities. For such a by-chance outcome may, through side-effects, both interfere with the social total motion and divert it on forced paths, as "any systemic action will cause a myriad of unforeseen, and indeed unforeseeable, reactions." (p. 91) Has anyone considered the fact that since the due process rights of the accused have been highlighted, scarcely anyone proceeds to trial and the majority of criminal convictions (for example, 96% of the total in Colorado in 1995) were the result of other procedures? That since the war on drugs was launched, the number of those in prison has suddenly quadrupled (without having been budgeted) over the past twenty-five years? That scarcely a generation since racial segregation in schools was declared unconstitutional, spontaneous segregation of public schools is incomparably higher than ever? That there is a sevenfold increase in the number of legal malpractice suits only as an incidental result of technical measures aimed at reducing them? (pp. 92–93[19]) One may find substantial wisdom in the statement according to which an operable regulatory mechanism needs to be minutely sophisticated, yet

> "the more it elaborates itself, the more manipulable the system will become, and the more unpredictable the social effects of such manipulation will be." (p. 95)

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[18] And he even adds that "At bottom many judges and most legal theorists dislike democracy because it is an implicit acknowledgment of the severe limitations of their expertise."

[19] It was the Supreme Court of New Jersey that started to enforce the statute of limitations rather restrictively, in order to restrict the propensity for litigation at least by those who had switched lawyers during the limitations period. However, to limit their own responsibility, newly hired lawyers launched litigation at once. Adding some more examples, the question might be raised whether the community knows that nearly two-thirds of the immense American medical care costs are incurred within the last six months of people's lives, because there is no legal practice available to separate reasonable prolongations of life from unreasonable ones. And does anyone know that in result of the partial legalisation of euthanasia, several hundreds die every year, e.g., in the Netherlands without clearly consenting? (pp. 163–164)

*(Transubstantiating the Self-interest of the Legal Profession)* All this seems to be motivated by the self-interest of the legal profession in maintaining increasingly confused methods of regulating and decision-making. American lawyers have proven unprecedentedly successful in this, gaining increasing fields of action, prestige and wealth in return. This also requires them to build a mechanism for self-protection. And to cultivate the myth of the only true knowledge they have acquired when in their "practice of law […] self-knowledge remain[s] for the most part systematically repressed." (p. 102[20]) Well, the fascination of a "relentlessly rational culture" (p. 136) and of the "public reason" (JOHN RAWLS, p. 64) accessible to all obviously brings about its own self-belief. As Yale Law School Dean ANTHONY KRONMAN once declared, his faculty's corporate creed is "a community united by faith in the power of reason" (p. 64[21]). That is,

> "even though we now believe unicorns are solely creatures of our imaginations, we are still habituated to a cultural practice in which we talk about unicorns as if they existed autonomously from our beliefs about them." (p. 141)

So it is fine for us to learn that Americans, amazingly unfamiliar with differing cultures, are convinced their law is "the best in the world" and that we are either to be offered American-type rule of law, or Bosnia and Lebanon will be the end-result. The only thing that CAMPOS finds wanting is the recognition of a deeper truth, evident even to simpler minds, namely, that water is obviously a good thing and a precondition of life itself, yet "[t]oo much water, however, and we drown." (p. 178)

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*(Post-modernity, Substituting for Primitiveness)* The more the everyday life of a legal culture is based on written records, on formal mediation by texts and

[20] Professional socialisation itself shows a duality of this type, as "A successful legal education […] both sharpens and desensitizes the adept's sense of analytic complexity." (p. 120)

[21] During my stay at Yale as an American Council of Learned Societies scholar between 1987 and 1988, I called the attention of Professor KRONMAN, monographer on MAX WEBER in the series of "Jurists: Profiles in Legal Theory", to a conceptual misunderstanding probably due to mistranslation, presenting my paper on the issue once published in English in Rome. Although he seemed not to speak German (and not to see any need to do so either), he looked at me and declared articulately that it was t h i s how he interpreted WEBER, and added with charming simplicity that his pioneering work was indeed applauded by many American law review articles.

on the internal constraint of discussion, debate and reconsideration of issues within a professional community (that is, in addition to formal law-positivation, it is based on democratism and on the additional normative influence exerted by the common opinion of the legal profession), the stronger are the mechanisms built in it aiming at constantly further increasing the complexity and refinement of its internal structure and operations. In brief, each and every systemic state and course may have its own advantages and disadvantages as well.

Well, to employ a generalisation, the reason why we deal, for instance, with so-called primitive law is that it presents a system in action in an embryonic form that is yet compound and ready for sensitive responses and changes. Meanwhile, elementary contexts and operations can indeed be revealed in it that might stay hidden to the observer in its later, more developed and complex states. For large systems, powerfully developed to reach a higher degree of complexity and sophistication, do not necessarily allow cohesive system-elements as actual pillars to be easily seen and recognised (let us just consider the English law's developmental continuity through a thousand years), albeit their overall spirit is reflected, like an ocean in a drop, in the elaboration of details. Taking these two extreme poles—between which Hungarian law may be placed probably somewhere in the middle—, the mass of legal literature (with official collections, compilations, doctrines and commentaries, semi-official and authorial analyses of cases, monographs and review articles) is very telling. How do we assess the volume of legal writing by the Americans, the British, the French, the Germans, the Russians, the Egyptians? This obviously declining sequence[22]—by far disproportional either to the ancientness of the roots of a given culture or the power and internal differentiation of the society behind it—can tell us even more about the degree of complexity achieved.

In large systems, ramifications are also larger, so the chances are greater for both functional excesses and dysfunctional, forced paths to occur. This enhances the need for various institutions, designed to balance and control

[22] Having written this paper in the capital of Egypt, I was amazed to find—in the huge collections of the libraries of Cairo University (mostly in Arabic and French) and the American University in Cairo (primarily in English)—that despite its vast Afro–Asian range, the literary cultivation of Islamic law is relatively modest in volume and that Western (English, French, Italian and German) scholarly elaborations of the same law (far from depreciable in their actual extent albeit rather limited in an Euro-Atlantic comparison) play a crucial role in its literary treatment.

and also to provide feedback in both planning and operative functioning, to be intersected from top to the medium level.

The book of PAUL F. CAMPOS on *The Madness of American Law* is especially suitable to exemplify such manifold paths of movement offering several possibilities. Neither chances nor fields of action are truly closed.[23] The widening of prospects necessarily lends new wings to human efforts to profit from them. CAMPOS presents chaotic directions and temptations to explore opportunities in a true personal picture, which most probably could also be viewed differently through someone else's eyes. Every panoramic view of the mentality of living cultures is edifying. Not even law can be made a fetish,[24] as it cannot be abstracted from the society which collectively shapes it. CAMPOS may have also meant just this when he held a mirror to his compatriots, aware of the fact that "law and legal reason are also the simulacra of real community." (p. 194)[25]

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[23] As Alexis de Tocqueville remarked in his *Democracy in America* ed. Phillips Bradley, I (New York: Vintage Books 1990), p. 280 [Vintage Classics] almost two centuries ago,

> "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings".

[24] As Alexander I[saevich] Solzhenitsyn expressed in his *A World Split Apart* Commencement Address Delivered at Harvard University, June 8, 1978, trans. Irina Ilovayskaya Alberti (New York: Harper & Row 1978) 61 pp.: "a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man."

[25] As to reflections by those characteristically rare reviews the book has got, this „diatribe against the increasingly legalistic tenor of American life" [Lisa Stansky in *The American Bar Association Journal* 84 (1998), p. 84] has mostly been criticised for its "lack of prescriptive guidance" [Major J. Thomas Parker in *Military Law Review* 158 (1998), pp. 179–191 and also A. Bradney in *Anglo–American Law Review* 27 (1998), pp. 526–528] and for its being, „fundamentally, a literary text", misconceived and flawed all through, for "Yes, Rome [too] felt, but not at the hand of procedurally fixated lawyers." [Mathew K. Roskoski *Michigan Law Review* 98 (1999–2000), pp. 1529–1548, quote on p. 1541] Cf. also John Dinan in <http://h-net.msu.edu/cgibin/logbrowse.pl?trx=vx&list=APSACIVED&month=a&msg=PwaJsKkRGWWL4gcGuWY4zQ&user=&pw>.

# TRANSFERS OF LAW
## A Conceptual Analysis*



The issue of legal effects resulting in a transfer of law(s) belonged to the circle of investigation of comparative law until the past few decades. Within the legal history discipline, it was addressed only as far as this was inevitable, as the subject of the national or comparative description of a path of legal development covered exactly in this way and no other. On the other hand, legal sociology (together with legal anthropology, which was considered at that time mostly as an extension of legal sociology to rural or otherwise primitive marginal conditions) used to treat the above issue exclusively as a means of diagnosing some admitted dysfunction in case of failure, seen as quite exceptional or abnormal (compared to success, which was regarded as normal), or—rarely—in order to propose a therapeutic substitute or some bypass measure that could be resorted to eventually in order to remedy it.

The situation has radically changed since. The phenomenon itself, with the political interest vested in it and the scholarly challenge of understanding and learning from it, has equally become in general use today. This is expressed by the changing conceptualisation used to describe the phenomenon (which conceptualisations themselves do truly reflect the changes in emphasis that have taken place over the past decades while legal transfer became a global process), on the one hand, and also by the scholarly debates that followed (while simultaneously provoking) this continuous refinement of emphasis, on the other. The fact that the centre of gravity is being more and more shifted onto legal culture as the medium of sustainment has, as a specific counterbalance, cast a new light on the mere technicality of law as a compact compound ensuring a series of tools, skills and abilities (faceless in themselves) allowing a given legal culture to develop and manifest itself at all.

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All this makes it possible now to draw a few consequences in the light of some examples, to be taken as case studies.

## 1. Terms

*('Rezeption' / 'octroi & imposition' / 'Rechtsexport')* These terms implicate what we know as Roman law's European continental and Anglo-Saxon revival, having taken a start as an almost cultic adaptation after centuries of almost total oblivion; or the worldwide spread that proves the partly cross-cultural success of (above all) the French, Austrian and German, as well as, later on, Swiss codes; or the by no means insignificant influence by codes on the development of the law of the American states and federal law, by codes and kinds of code-substitute textbook-writing on British Commonwealth law; or, even later on, by the code-substituting enterprise of the Restatements of the Law on the internal law-harmonisation of the United States of America[1] (in an arrangement usually regarded as alien to the conceptualised systemic ideal of codification,[2] for it mainly starts out from empirical induction[3]). Well, all this appeared as a natural and organic process in jurisprudential analysis to the extent that descriptive concepts, drawing on the European continental experience and widely used there, notably, 'reception [*Rezeption* in German[4]]' and the French *'octroi*[5] [*imposition* in

[1] For the entire circle of questions, see, by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp., passim.

[2] The explication of Gunther A. Weiss 'The Enchantment of Codification in the Common-Law World' *Yale Journal of International Law* 25 (2000), pp. 435–532 proves, however, that the codification of the common private laws within the European Union is all but alien—and therefore not to be taken as an external challenge indeed—to the historical spirit of Anglo-Saxon law.

[3] Cf., by the author, 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800.

[4] From Latin: '*recipere* / *receptiōn*'; however, this is not used to refer to such processes in the English language. For all such English etymologies, see *The Compact Edition of The Oxford English Dictionary* [1971] Complete Text Reproduced Micrographically, I–II (Oxford: Oxford University Press) xii + 4116 pp.

[5] Practically unknown as an English word. '*Octroyer*' known in French started to spread from the 15th century in English in the exclusive sense of 'grant; concession; authorisation', involving some constraint or dictate. True, the form '*octroy*' as a verb has infrequently been used since 1865 in the above legal sense, however, this having been drawn from the German '*oktroyiren*'.

English[6]]', could present themselves almost as self-evident. Although having formed in different ways from differing roots, now they constitute symmetrically opposite notions: the former describes action on the recipient's behalf, tacitly suggesting initiation originating from him,[7] and the latter indicates the deliverer's initiative and mere toleration by the recipient under pressure.[8]

However, what we see is not only that—with the exception of administratively implemented cases of the extension of laws, extorted through the French (and, to an insignificant extent, Austrian and German) military occupation, and of the British imperial law-harmonisation—each of the above instances indicates quite a spontaneous need and initiative, as well as a sequence of actions exclusively on the receiver's behalf (accompanied by an almost complete passivity of the deliverer); it can also be established that once the conquest or the colonial subjugation ended, the one-time *octroi* calmed down as mostly transformed into voluntary reception.[9] In other

[6] On the pattern of the French ['*enposer*' in the 11th century and '*imposer*' from 1302 on] as adopted from the Latin ['*impōnēre*'], it is already known by the end of the 16th century, for example in this context: "The Imposition of this Law upon himself is his own free and voluntary Act." Richard Hooker *Of the Lawes of Ecclesiasticall Politie* I (1594), ii, § 6, quoted in *The Oxford English Dictionary*…[note 4], p. 1389 (101–102).

[7] E.g. Roland R. Bahr 'Rezeption als Kulturbegegnung (Zur Notwendigkeit eines erweiterten Rezeptionsbegriffes für die Beurteilung moderner Rechtsrezeptionen)' *Ritsumeikan Law Review* (1987), No. 2, pp. 35–62; Ernst E. Hirsch *Rezeption als sozialer Prozeß* Erläutert am Beispiel der Türkei (Berlin: Duncker & Humblot 1981) 139 pp. [Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung 50]; Imre Zajtay 'Die Rezeption fremder Rechte und die Rechtsvergleichung' *Archiv für die civilistische Praxis* 156 (1957), pp. 361 et seq.; Andreas B. Schwartz 'Rezeption und Assimilation ausländischer Rechte' in his *Rechtsgeschichte und Gegenwart* Gesammelte Schriften zur Privatrechtsgeschichte und Rechtsvergleichung, hrsg. Hans Thieme & Franz Wieacker (Karlsruhe: Müller 1960), pp. 581 et seq. [Freiburger staats- und rechtswissenschaftliche Abhandlungen 13]; Alan Watson 'Aspects of Reception of Law' *The American Journal of Comparative Law* 44 (Spring 1996) 2, pp. 335–351; C. C. Turpin 'The Reception of Roman Law' *The Irish Jurist* III (1968), pp. 162–174; Peter Bender *Die Rezeption des römischen Rechts* im Urteil der deutschen Rechtswissenschaft (Frankfurt am Main & Bern: Lang 1979) 168 pp. [Rechtshistorische Reihe 8]; Ernst Pritsch 'Das Schweizerische Zivilgesetzbuch in der Türkei – seine Rezeption und die Frage seiner Bewährung' *Zeitschrift für vergleichende Rechtswissenschaft* 59 (1957), pp. 123 et seq.

[8] The German term '*Rechtsexport*' is similar to it in many respests. Cf., e.g., Wolfgang Babeck 'Stolpersteine des internationalen Rechtsexports' *Was neues aus dem Westen* (2002), No. 4: Interessenpolitik durch Rechtsexport <www.forum-recht-online.de/2002/402/402babeck.htm>.

[9] As ALAN WATSON has rightly observed, it is exactly this duality—even if once accepted under pressure, yet hardly replaceable by anything better today—that should encourage us to realise that such great historical transfers of law may have embodied some kind of optimality on

words, the dictate *ratione imperii* had by this time become replaced by a continuation *imperio rationis* for eternity, by now without conditionality.

The above symmetrical conceptual designation—'reception' and '*octroi*'—can, therefore, also serve to draw a genealogical chain, or legal mapping, within a taxonomic systematisation of legal systems through the generic concept organised by so called 'legal families'. The above terms can, therefore, symbolise the great successes from Japanese legal modernisation to Turkish law-secularisation, which, no matter how double-faced they later appeared (in light of legal anthropology's more refined research methods),[10] had once implied a breakthrough on the whole, doubtlessly resulting in an almost complete change-over of laws as to their basic functions, and, thus, also in success as to their objectives.

In the background, the comparative legal movement, which originated, characteristically, on the European continent in the early 20th century, perceived above all a difference between the cultures of the Civil Law and Common Law, which were most strikingly broken away from each other at the time. In other words, it regarded the historical cultures of the one-time great Mediterranean (taken from Egyptian, Mesopotamian and Jewish, via the Roman, to Islamic and German ones), exclusively as either continued or discontinued historical preliminaries to these, for the purpose of drawing up—by natural derivation from all these—the taxonomic map, exhaustive of the known legal systems in the past and present world.

('*transfert de droit*' / '*legal borrowing*') 'Transfer of law [*transfert de droit*[11]]' is a French conceptual product of the mid-20th century,[12] describing the law's movement from the perspective of a neutral imaginary centre, as a result of which something taken as a law (with its approach, doctrine, solutions, rules, and institutions, or the partial or total set of all these) will serve as a law not only at a certain place (of origin) *A* but, from a given time on, also at a place (of reception) *B*, unknown to the latter until then but then having been transferred there in some way.

A similarly neutral meaning is implied by the expression 'legal borrowing', widespread in Anglo–American usage. It is not so common there as

the whole (even if we cannot always exactly reconstruct what we have done in the given moment and why).

[10] Cf., e.g., June Starr *Dispute and Settlement in Rural Turkey* (Leiden: Brill 1978).

[11] From Latin: '*trans+ferre*'; in English '*transfer*', used in the above sense as today from 1392.

[12] Jean Gaudemet 'Les transferts de droit' in *L'Année sociologique* 27 (1976), pp. 29–59 [Sociologie du droit et de la justice].

'*Rezeption*' is prevalent in German; true, it does not tell more, either. For the term 'borrowing' expresses the same movement in the same direction, albeit describing the action not from the side of receiving but from that of borrowing.

*('legal transplant')* It is this setting in which *Legal Transplants*, the historical overview published by ALAN WATSON (professor of continental private law history in Edinburgh at the time) made an impact. This magisterial work marked a brand new path even in WATSON's personal oeuvre, until then mainly focussed on Roman private law. It revealed the experience of the author's elementary recognition (without taking genuine notice of the precursor "law of imitation", long widely known in the entire field of cultural sociology[13]); notably, the realisation according to which imitation—i.e., instead of one's own invention, using something belonging to someone else but freely available to anyone by mere chance at some given time—is one of the greatest varying invariants as incentive and practice, and indeed, as a underlying motive force in the history of legal development.[14]

So, 'legal transplant' has become a fashionable catch phrase and, by virtue of its visual expressive properties, has not only facilitated its use by scholarly interests to open up towards problems at its heart but—seizing upon the eventualities of its metaphorical penumbra—has been used as a pretext to engender specific controversies, too. That is, 'transplant' as an English word of an obviously botanical origin, stemming from '*trans*+*plant*|*âre*', is proved to have been used as a verb in the sense 'to transplant [a seedling]' since 1440 and, as a noun—'[a seedling that has been transplanted]'—, since 1756. It has been used as a metaphorical verbal expression, 'to transplant [a person]', since 1555 and, with a meaning 'to transplant [a people, etc.]' related to a larger group of people, since 1608. Later on, it has been known in a surgical context—transplantation of skin or of an organ—since 1786.[15] And this metaphor, doubtless taken from far away, had by 1974 become the object of a further metaphorical association built upon the last, and now, owing to WATSON, we speak of 'legal

[13] Gabriel Tarde *Les lois de l'imitation* Étude sociologique (Paris: Alcan 1890).

[14] Alan Watson *Legal Transplants* An Approach to Comparative Law (Edinburgh: Scottish Academic Press 1974).

[15] Cf. *The Oxford English Dictionary*… [note 4], passim, as well as David Nelken 'Towards a Sociology of Legal Adaptation' in *Adapting Legal Cultures* ed. David Nelken & Johannes Feest (Oxford: Hart Publishing 2001), pp. 7–54 [The Oñati International Institute for the Sociology of Law], in particular at pp. 17–18, note 10.

transplant' upon the surgical pattern of organ-transplantation, likewise involving both a donor and a recipient.[16]

Whether this expression is felicitous or not is perhaps an open question now, left for time to decide. It can be misunderstood if one wants to, no doubt. And it seems that just as our human barbarities are able to overpower everything else with a so far unknown, targeted cruelty (perhaps as an outburst of the instinctual life suppressed more and more consistently in our so-called civilising development)—despite our days' increasingly powerful homogenising socialisations, which are artificially constructed and, as such, also incorporate inherently anti-natural urges—, well, sometimes it is precisely the lack of coverage of our rationality that emerges from behind our scholarly self-assurance: the nakedness of the King in the well-known parable. Anyway, it appears also from the context referred to above that the word-magic in the way we cultivate scholarship is strong enough to generate debates, contradictions, and negations—i.e., sets of misunderstanding mixing up or equating external linguistic forms with actual subjects even in productive thought—out of obviously metaphorical expressions that are surrounded by feasible associations that, if extrapolated, may lead in directions alien to the actual subject; that is, we may leisurely debate on what—in so far as it could be taken at all seriously conceptually—should be regarded as at least visually confused in its linguistic expression; in a manner as if jurisprudence had—obeying the still prevailing spirit of the worst of German *Begriffshimmel*'s doctrinarian traditions—no other subject than empty words, lacking any real reference.

In a surgical context, it is obvious that, having been transplanted, a piece of skin, a half-kidney, or a pig's heart will either continue to function in the same way as the original organ, or will be rejected (which means the failure of the intervention), or—according to a mere hypothesis constructible exclusively through logic, which has not yet occurred and is inconceivable to ever occur in practice—it starts functioning in a different way (which, again, will in conclusion be equal to the second version, i.e., a medical failure, again fatal for the patient).

Still staying within a biological context, the transplanted organ may prove to be more vulnerable, less capable of either reaction or self-regeneration, or simply embody a weaker version of its earlier self, while remaining otherwise

[16] The word 'transplantation' in a legal sense is not used in English. However, in the compound of words 'legal transplant', the noun refers to the transplant itself, the *transplantatum*: "That which is transplanted; *spec.* in forestry, a seedling transplanted once or several times." *The Oxford English Dictionary*…[note 4], p. 3384 (275/2).

identical with its original self. And again, in terms of biology, an analogy taken from forestry or general botany probably has similar possibilities to offer too. Another common feature is that once a seedling, plant, tree, piece of animal or human skin or organ is transplanted, every connection will be cut between the donor [from whom/what something is transplanted] and the recipient into whom/which the *transplantatum* is transplanted[17] from the aspect of that which has been transplanted. The transplant will from then on be exclusively connected to its new environment, with no contact whatsoever with, nor chance to rely on, its original environment any longer.

Related to man's social mode of existence, however, whether it be an individual or an entire group of people that are "transplanted", it is obvious that, transcending the biological level, we ourselves can undergo a transformation in the new receiving environment. And this is quite a natural outcome. After all, we do not live in order to reproduce some pure identity in ourselves as self-(re)generating automatons, but we live in a way (and we live so that we can live) in which we continually respond to the challenges of the prevailing (in our case: the new) environment, taken in a narrower or wider sense. Therefore, our ability to respond will grow both in diversity and internal differentiation as compared to our earlier status and expectations as well. In sum, the use of this metaphor in a social context presents the transplant—in contrast to the biological (botanical and human surgical) analogy, focussed on a functional reproduction of (self)identity—in direct interaction with and dependence upon its own new bearer and environment, as evolving from their further mutual development. Accordingly, as contrasted to the biological use of the metaphor, transplantation in a social sense can involve contacts with the former bearer and environment preserved, but exclusively as the outcome of an act not yet included in the merely factual act of transplantation that was made. That is, contact with the former bearing environment is feasible only provided that we aim, for instance, at caring for an uninterruptedly continuous interaction with the former environment, instead of an *uno actu* effect extracted by a single occasion, notably by the very act of the once-made transplantation.[18]

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[17] The terms of 'Transplanter [One who transplants]' and 'Transplantee [One who is transplanted]' have occurred—though rather rarely—since 1611, respectively since 1687.

[18] Although it is true that "part of the aim may also be somehow to recreate some aspects of the wider context from which the transplant is taken", yet, in opposition to Nelken's quoted opinion (note 15, p. 19), the difference between the scientific and the social is still not criterion-like, because conditions of further impacts by the original setting can, to some extent and in principle, be created and also set as a target in case of botanical and surgical transplantation as well.

As we shall see, contemporary scholarship has seized upon such a variety of associations, just to afford itself a problem (unnecessarily? artificially? perhaps still in such a way as to provoke some kind of a conceptual clarification) from the above metaphor.

Nevertheless, 'legal borrowing' and 'legal transplant', used merely as a signal without particular conceptual elaboration, have proven suitable for WATSON to express his accentuated realisation that he made as a legal historian, namely, that the real process of legal development and improvement takes place through patterns wandering here and there, as in the pragmatism of MOLIÈRE in that *"je prends mon bien où je trouve",* in the manner of adoptions and adaptations of continuously further developed solutions, taken from anywhere in the meantime or from its origins.[19]

*('building a market economy, democracy & the rule of law' & 'guaranteeing human rights' & 'European common law codification' & 'Law and Development' / 'Modernization and Law' & 'droit du développement')* Today, when the realisation revealed three decades ago is already common sense and exerting influence through exporting (even with a mercantile mentality, focussing above all on ones' own profit, as mediated by the "double agents"[20] one is trading with) legal patterns has become both trend-like and established and professionally routinised as a practice (in the main profile of activities of centres concentrating capital and/or knowledge), new terms have started replacing the old ones. 'Globalisation', 'building a market economy, democracy, and the rule of law', 'guaranteeing human rights', 'European common law codification'—when using such terms, we know exactly what and in what context we mean them, that is, that shaping laws upon basically external models is now at stake, although approaches and actors, chosen means and instruments, methods and procedures may vary considerably.

We arrive at the same conclusion when we describe the organised interest in transfers of law, expressed now by academia and universities and even

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[19] According to the present author's summation, reflecting his experience then, "Could it be that inertia is the most effective medium for human society to develop? Could it be that imitation is the humans' most lasting contribution to their own survival on more and more advanced conditions?" Csaba Varga 'Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező' [Transplanting of laws, or borrowing as a universal factor of legal development] *Állam- és Jogtudomány* XXIII (1980) 2, p. 191.

[20] Cf., e.g., Yves Dezalay & Bryant Garth 'The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars' in *Adapting Legal Cultures* [note 15], ch. 11, pp. 241–255, in particular on p. 246.

newly specialised branches of law. Well, 'Law and Development' denotes a clearly defined (and by now dated) ideology, implied by an American topic of research.[21] 'Modernization and Law' (or, more precisely, 'Modernization through the Law') refers to a specialised inquiry within legal sociology, related to developing countries as well as the entire Central and Eastern European region, as cultivated there and in the entire Western world. '*Droit du développement*' denotes specialised learning taken as a branch of legal regulation and relevant practical experience,[22] free of ideology (beyond the national self-centredness still reluctant to leave behind the surviving memory of the French *gloire* and its spread).

*('legal aid' & 'legal assistance')* Going on in the analysis of proliferating terms, '[foreign] legal aid' or, more frequently and euphemistically, 'legal assistance [or in German: *Rechtsberatung*]'[23] are also products of the same intellectual environment, focussing on the actor who takes the initiative by exerting an influence—terms neutral in themselves, instrumentally expressed. Regarding the form of action denoted, these latter expressions are even less definite than the former ones have been. However, in contrast to all the terms surveyed in the previous paragraphs, this one no longer conceives of law in its simple textuality; consequently, it does not trace the effect of external patterns upon the law (through refining its institutional regulative network) back to merely textual adoption. Symbolically, we can even perhaps postulate that the outcome is no longer the product of "Comparative Law" (rooted back in rule-positivism) but of "Comparative Legal Cultures" (emphasising the moment of tradition and culture that do underly the mere forms).[24]

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[21] E.g., *Law and Development* ed. Anthony Carty (Aldershot: Dartmouth 1992) [The International Library of Essays in Law & Legal Theory, Legal Cultures 2].

[22] Hence there are already 'development lawyers' as specialised agents in USA-based government agencies and non-governmental big-organisations. Cf. Herbert Christian Merillat 'Law and Developing Countries' *The American Journal of International Law* 60 (1966), pp. 71 et seq., particularly on pp. 72 and 78.

[23] Cf., e.g., Mark M. Boguslawskij & Rolf Knieper *Konzepte für Rechtsberatung in Transformationsstaaten* (Eschborn 1995) 55 pp. and Wolfgang Gaul 'Sinn und Unsinn internationaer Rechtsberatung' in *Recht in der Transformation* Rechts- und Verfassungswandel in Mittel- und Osteuropa: Beiträge zur Debatte, hrsg. Christian Boulanger (Berlin: Berliner Debatte Wiss-Ve. 2002), pp. 102 et seq. [Potsdamer Textbücher 7].

[24] Cf., by the author, 'Comparative Legal Cultures: Attempts at Conceptualization' *Acta Juridica Hungarica* 38 (1997) 1–2, pp. 53–63 and 'Comparative Legal Cultures? Renewal by

For legal assistance (using a variety of kinds of aid) may mobilise a multitude of procedures and methods, ranging from cultural shaping of the interpreting (hermeneutical) background, via the organisation of the frameworks within and through which tradition is followed, knowledge is disseminated and educational targets and networks are set up, to making a circle of targeted professionals and/or addressees involved.

The common feature of all this is that textual adoption of law (in the form of rules) is from now on only one in a huge and extendable store of instruments. And providing that this is only one conceivable partial element among many others, its position will also be different in this case. After all, now the text is not the exclusive or by any means the final carrier of the law any longer. It is legal culture, interpreted as a whole, that alone is capable of giving the transplanted text—so far as such exists at all—both a significance and a meaning.

Therefore, at the present level of our scholarly reconstruction, maybe this is the most adequate and comprehensive concept, while at the same time the least specified, for it indicates only the intention of development with external aid or assistance. All it conveys is that there is an external pattern and/or organisation assisting the transformation of law.

## 2. Technicality

In his original work, WATSON affords no definition to the concept. He simply speaks of the phenomenon of "moving of a rule" or of the "continual massive borrowing […] of rules".[25] He gives more details much later—in fact, only today, in responding to criticism. Now, however, he already surmises from the outset as obvious that "a rule once transplanted is different in its new home". Albeit he conceives of a rule in the spirit of legal positivism, this is by no means taken from the narrower-minded rule-positivism of H. L. A. HART and the modern English analytic school, as he now de-

Transforming into a Genuine Discipline' *Acta Juridica Hungarica* 48 (2007) 2, pp. 95–113 & <hrrp://www.akademiai.com/content/gk485p7w8q5652x3/?p=92d3ae5b793d45919c7d1b935a9389e1&pi=1> & <https://commerce.metapress.com/content/gk485p7w8q5652x3/resourcesecured/?target=fulltext.pdf&sid=54jelq45> & <http://www,akademiai.com/content/gk485p7w8q5652x3/fulltext.pdf>.

[25] Alan Watson *Legal Transplants* 2nd ed. (Athens, Ga.: University of Georgia Press 1993), pp. 21 and 107.

clares as similarly obvious that "it is rules—not just statutory rules—institutions, legal concepts, and structures that are borrowed". As an example, he quotes the memory of

> "a strongly held belief that throughout the Empire feudal law was one and the same, even if not identical from one state to the next. The lesson must be that through transplants law becomes similar, even if not identical, in many jurisdictions".[26]

On more careful reading—which does not necessarily characterise the reviewers of our day—it can be noticed that actually he did give the key definition in his original work, even if not in such a way as to fix contemporary critics' attention. For, as he declared as a temporary summary,

> "law like technology is very much the fruit of human experience. Just as very few people have thought of the wheel yet once invented its advantages can be seen and the wheel used by many, some important legal rules are invented by a few people or nations, and once invented their value can readily be appreciated, and the rules themselves adopted for the needs of many nations."[27]

Based on this, he himself has revised his earlier thesis of societal inertia,[28] by claiming that rules that may seem dysfunctional do not validate themselves as independent powers in a thoroughly mechanical social insensitivity, as they are applied by legal professionals socialised in a culture that is able to transform, through interpretative skills, even formalisms that are inadequate in themselves into schemes made to function acceptably in practice.[29]

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[26] Alan Watson 'Legal Transplants and European Private Law' *E[lectronic]J[ournal of]C[omparative]L[aw]* 4 (December 2000) 4 [Ius Commune Lectures on European Private Law 2] <www.ejcl.org/ejcl/44/44-2.html>, pp. 2 & 2 and 4.

[27] Watson (1974), pp. 95–100.

[28] For its simultaneous criticism, see Richard L. Abel 'Law as Lag: Inertia as a Social Theory of Law' *Michigan Law Review* 80 (1982), pp. 785–809 and, for a criticism of the mirror theory involved in it, William Ewald 'Comparative Jurisprudence (II): The Logic of Legal Transplants' *The American Journal of Comparative Law* 43 (1995), pp. 489–510.

[29] Alan Watson 'Legal Change: Sources of Law and Legal Culture' *University of Pennsylvania Law Review* 131 (1982), pp. 1121–1157. This position is already halfway towards taking the opposite one—treating law as »a system of meaning« by which human experience is both shaped and represented—, as pointed out by its later improver, Edward M. Wise 'The Transplant of Legal Patterns' *The American Journal of Comparative Law* 38 (1990) 1, pp. 1–22.

It is apparent, irrespective of his subsequent clarifications, that WATSON had in fact originally insisted on a formal understanding of law. I myself pointed out its restrictive tendency in my review at the time, indicating that

> "when he speaks of law, of legal borrowing or legal change, he always means the written body of the rules of posited law. He does not conceive of the legal complex in its compound nature. For he separates from its ontic functioning the technical (conceptual, systemic, institutional, etc.) framework and medium of the law's exerting an influence, which then gets expressed by shifts of emphasis and even distortions in his results."[30]

Well, if and insofar as a scheme of intellectual derivation—like

POPPER → KUHN → FEYERABEND

—can be justified in the philosophy of science at all, some suggest the relevance of the sequence of development—of

ZWEIGERT–KÖTZ → WATSON → LEGRAND

—in the realm of the methodological approach to comparison of laws as its equivalent.[31] After PAUL FEYERABEND methodologically destroyed[32] the frameworks within which THOMAS KUHN (following KARL POPPER's classical thoughts)[33] could depict scientific development at all in a self-disciplining process of traditions followed[34]—transcending the latter by offering a completely different framework of interpretation based on stochastic inci-

[30] By the author, 'Tehetetlenség és kölcsönzés mint a jogfejlődés döntő tényezői' [Inertia and borrowing as main factors in legal development {a review on Alan Watson 'Comparative Law and Legal Change' *The Cambridge Law Journal* 37 (1978) 2, pp. 315–336]} *Jogi Tudósító* X (1979) 11–12, pp. 4–9, in particular p. 6 {reprinted in Csaba Varga *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Legal theories and legal cultures: review articles in philosophy of law and comparative law] (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xix + 503 pp. [Jogfilozófiák], in particular p. 205}.

[31] Burkhard Schafer 'Form Follows Function Fails—As a Sociological Foundation of Comparative Law' *Social Epistemology* 13 (1999) 2, pp. 113–128.

[32] Paul Feyerabend *Against Method* Outline of an Anarchistic Theory of Knowledge (London: NLB 1975) 339 pp.

[33] Karl Popper *The Logic of Scientific Discovery* (New York: Basic Books 1959) 480 pp.

[34] Thomas S. Kuhn *The Structure of Scientific Revolution* [1962] 2nd enlarged ed. (Chicago: The University of Chicago Press 1970) [Foundation of the Unity of Sciences II:2].

dentalities building upon each other successively and solidifying as a standing practice—; well, after such preliminaries, interest in LEGRAND's accomplishment in transcendence obviously became enhanced.

As is known, PIERRE LEGRAND has been waging a battle to fight a two-front struggle for more than one and a half decades, with messages of basically the same substance. As WATSON's critic on a theoretical basis, and committed to the struggle by his practical convictions, he felt he had a vocation to transmit an alert that codification of the common private law of the European Union with a *rapprochement* between the Civil Law and the Common Law, visualised as becoming amalgamated in the foreseeable future, is not a realistic expectation. For LEGRAND has for a long time been of the opinion that law taken as a rule, as a merely textual objectivity, is simply uninterpretable without a deeper comprehension of the background culture, giving significance and meaning to it all. Or, rule and ruling culture are complementary aspects of one and the same entity, with components in interaction. Accordingly, what in fact underlies the eventual similarity or difference between rules, and/or the duality of Civil Law and Common Law, is simply a difference between diverging developments and firmly established traditions. Basically, two entirely differing *mentalités juridiques* are at stake, which cannot be brought to a common denominator. Therefore their difference in origins and underlying cultures cannot be unified overnight either by an act of will or by simple resolution. One has to conclude that all these differences are to be taken as genuine *donné*s (or given conditions) that may have also shaped the background popular mind in history, so new *donné*s, able to overrun them or to compel them to break new paths, can only result from a momentous historical development, generating such new conditions. Well, such a *donné* can, of course, develop some time in the future; its development may be encouraged, moreover, openly promoted and even accelerated; yet by no means can it be generated from one day to another through a mere selection of some instrument and its temporary application.

As their debate sharpened recently, LEGRAND too has hastened to give more details. As he declared, "a rule is never totally self-explanatory", because this—being in itself nothing but a "surface phenomenon"[35]—cannot mean anything, either. And if we take rules as involving meaning, then,

[35] The term 'surface phenomenon' is used by Viktor Smith in his 'Linguistic Diversity and the Convergence of European Legal Systems and Cultures: Is Legrand's Pessimism Justified?' in [pre-print for] *Langue et Culture* / *Language and Culture* [Copenhagen Studies in Language] 29 (2004), p. 2.

transplantation is a hopeless undertaking from the very beginning. For assignment of meaning to a text or definition of a meaning by a text in a new environment is by far not yet perfected through the mere act of physically transferring a form, symbol or text (or the extension of their respective validity by ordering the same elsewhere). As he goes on, "the rule that was »there« […] is not itself displaced over »here«."—for more is at stake. He is right in declaring that "[a] rule is necessarily an incorporative cultural form." Consequently, it is no use transferring just linguistic signs as nothing but symbols. When we try to get them rooted in another medium and environment, they will develop new meanings more or less independent of the ones grown in their original medium and environment. So one may conclude that "[t]he borrowed form of words, thus, rapidly finds itself indigenised on account of the host culture's inherent integrative capacity." To sum up: no whole can be determined from the part, but the whole will be given (with)in its (new) context—after all, "*extra culturam nihil datur*."[36]

If and insofar as this sequence of intellectual derivation in the contemporary history of science philosophy has any meaning and relevance to our question at all, then it is—for me at least—nothing other than to raise a critical aspect on its own right upon the basis of the Sisyphean work of experimental foundation and research on details and applications. Well, LEGRAND's suggestion, as one of the critical voices, should actually enrich the methodological complexity of the problem's approach, but having itself become one-focussed, it rather warns us to seek caution and modesty, while both theses, the criticising and the criticised, arrive, following their own logic, at their own limiting extreme values. If, therefore, such a scheme of origination as a sequence of development may have any message for us at all, I would find a representation like that below more or less indicative of the path taken recently:

| | | | | | | |
|---|---|---|---|---|---|---|
| legal positivism | | its development | | and gradual | | transcendence |
| ***Comparative Law*** | ⇨ | WATSON | ⇨ | LEGRAND | ⇨ | ***Comparative Legal Cultures*** |
| (DAVID, ZWEIGERT–KÖTZ) | | | | (also FISH as a preliminary) | | |

[36] The further quotes in this paragraph are from Pierre Legrand 'What »Legal Transplants«?' in *Adapting Legal Cultures*, pp. 55–70, in particular on pp. 57–58, 61, 59, 62 and 63. According to a suited statement quoted by him [E. Hoffman *Lost in Translation* (London: Minerva 1991), p. 275], "to translate a language, or a text, without changing its meaning, one would have to transport its audience as well". As Max Rheinstein's classical statement ['Comparative Law – Its Functions, Methods and Usages' *Arkansas Law Review* 22 (1968), p. 419] held nearly four decades ago, "Even words of the same language may have different meanings

In such a scheme, the direction of movement is delineated by classical "comparative law", standing for legal positivism in its approach to law that is, for its part, taken as a posited text, on the one hand, and by "comparative legal cultures", conceiving of the law's actual meaning in its interpretive medium, on the other. More precisely, it is a sequence like this in which WATSON, with a somewhat refined law-positivist heritage in the background, as well as LEGRAND, programming the unconditional break with such a tradition, are given catalyst's roles. It is to be seen that LEGRAND's aim and effect (successful in the debate *hic et nunc*) was the theoretical formulation of a counter-conceptualisation (of negation, no longer practical, up to the extremes); the same role was played by, e.g., STANLEY FISH[37] (besides RONALD A. DWORKIN[38] or CHARLES YABLON[39] on the part of theory, or JAMES BOYD WHITE[40] on the part of launching the American movement of "Law and Literature"[41]) in formulating the foundations, in which the emphasis was shifted from legal text to personal intellectual reconstruction, aiming at understanding in law.

True, radically opposed to both former views, GUNTHER TEUBNER's remark seems—as a third aspect, one excluding both of the former ones—thoroughly founded, claiming that the idea of 'transplantation' with its hor-

in different legal systems", because—as pointed out in our days' classic in hermeneutical approach [Hans-Georg Gadamer *Truth and Method* 2nd ed. trans. J. Winsheimer & D. B. Marshall (London: Sheed and Ward 1993), p. 190], "the meaning of the part can be discovered only from the context, i.e., ultimately from the whole"—what we see here is the realisation that new definitions make headway step by step with more or less success. Consequently—as the pioneer of the "Law and Literature" movement [James Boyd White *Justice as Translation* (Chicago, Ill.: The University of Chicago Press 1990), p. 248] declares—, "every element in the new text has different meaning from the old, for, like the old, the new one acquires its meanings from its context […] and this context is always new". – Albeit a case-study on legal citation, even the title is messaging of one of Pierre Legrand's old articles on 'Form is also Culture' [1994] in his *Fragments on Law-as-Culture* (Deventer: W.E.J. Tjeenk Willink 1999), ch. 4, pp. 35–56 [Schoordijk Institute].

[37] E.g., Stanley Fish *Doing What Comes Naturally* Change, Rhetoric and the Practice of Theory in Literary and Legal Studies (Durham & London: Duke University Press 1989) x + 613 pp.

[38] Cf. with Ronald Dworkin's entire oeuvre, beginning from the publication of his 'The Model of Rule' *University of Chicago Law Review* XXXV (1967) 1.

[39] E.g., Charles M. Yablon 'Law and Metaphysics' *The Yale Law Journal* 96 (1987) 3, pp. 613–636.

[40] E.g., James Boyd White *Heracles' Bow* Studies in the Rhetoric and Poetics of Law (Madison: University of Wisconsin Press 1985) xviii + 251 pp. [Rhetoric of Human Sciences].

[41] Cf., e.g., *Interpreting Law and Literature* A Hermeneutic Reader, ed. Sanford Levinson & Steven Mailloux (Evanston, Ill.: Northwestern University Press 1988) xvi + 502 pp.

ticultural connotations is misleading from the beginning, as it works on a principle of "All-or-Nothing!", while what exactly we have in mind here is launching new and by no means foreseeable events. It is by no mere chance, therefore, that TEUBNER, provocative from the beginning, uses everyday colloquial figurative language instead of professional terms, when he declares that

> "legal irritants […] unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change".[42]

Thus, we can see 'irritants' that 'unleash' some thing—i.e., something that, in reality, does not any longer belong here either (to the world of the donor) or there (to the one of the recipient). Or, that is to say, what is transplanted is a foreign body, expediently wedged in the ongoing processes, on the grounds of its preplanned and expected suitability to stimulate local forces (perhaps otherwise inclined to inaction) to increased action and reaction.

However, in fact I find the basic tenet unclarified, as the debate has unfolded without the parties having ever compromised with one another in their conceptual presuppositions. Notably, in case I accept that

"law = rule"

(that is, law is being traced back to rules, etc., which seems to be close to all positivistic approaches, thus WATSON's quoted view, too), then that which has been transplanted is an entity capable of functioning on its own from then on. Just as a seed, a seedling, etc., also needs an environment (as in our example, soil, water, warmth, and sunshine) to survive and start growing and developing, certainly law understood as a rule also presupposes a favourably empathic environment (thus, above all, the intention to realise the law through operating its rules with the necessary skill, as embodied in the legal profession); however, such an environment is nothing but an instrumental accessory, as one amongst the vast number of necessary additions. For still and by all means it remains the *transplantatum* itself that will play the decisive role, realising itself in the processes of its own life. Howev-

[42] Gunther Teubner 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' *The Modern Law Review* 61 (1998) 1, pp. 11–32, quote on p. 12.

er, in case the rule element anyway present in the law[43] is nothing more than an instrument and, as such, just one (even if endowed with special referential channelling ability) of the tools applied while standardising legal processes (and this view is probably not far from LEGRAND's opinion), then we arrive at the acceptance that

"*transplantatum* = nothing but an object"

(that is, an object merely) that gets operated as an instrument by the one who may just happen to get it. Consequently, whoever happens to get hold of it will be in a position to use it for a purpose and in a way he is culturally inclined to anyway (as a function of his institutional and personal motivations, and so on).

If we, with the above insights in mind, wish to remain truly consistent, we no longer have to say—because we no longer want to describe the everyday operation of a legal system, functioning in a settled state of balance between stability and necessary change, but the mechanism of a legal renewal enforced through legal transfer—that

"law = positivation + (interpretive medium of the rule, etc. + whole of the legal culture)"

in a normally ongoing process, but rather that we have wedged, from outside and inorganically, in the process some new element (until then unheard of) that may have gone on more or less organically until such an in-

[43] Upon the affirmative answer—supported by the description of a minimum "legal order" in Aleksander I. Solzhenitsyn *The Gulag Archipelago* I–III (New York: Harper & Row 1974, 1973, 1978)—of Antony Allott *The Limits of Law* (London: Butterworths 1980), pp. 255–256, could I take the stand—in my 'Liberty, Equality and the Conceptual Minimum of Legal Mediation' in *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy, ed. Neil MacCormick & Zenon Bankonwski (Aberdeen: Aberdeen University Press 1989), ch. 11 {reprinted as 'What is Needed to Have Law?' in my *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995), p. 47 [Philosophiae Iuris]}—according to which "In Alice in Wonderland, Alice and the others might have believed at the beginning that, in the Queen's game of croquet, croquet was really played. However, they soon had to realize from the Queen's orders and their implementation that, instead, it was only the Queen's game that was being played. And even though they may have become confused about the nature of so obscure a game, that did not change the fact that there was a game in progress, and it had rules, although there was actually but one rule reconstructable and foreseeable, namely that the Queen alone was competent to set all the further rules."

trusion was made. Thereby, we have exposed this element to movements that were in any case going on, thus leaving it at the mercy of the mostly unchanged actors who will then use it in a way and to purposes, with an intensity and drive, either with the inclination to adapt it back to their earlier ideals (ending in the sabotage of any genuine legal renewal) or with a commitment cherished exactly at the original birthplace of that element (and thereby promoting genuine change); in any case in the way (with the intensity, etc.) that they find feasible to formulate (and interpret) the outcome according to their worldview, professional ethos and legal culture within the accepted standards of justification; as they intend and are in a position to substantiate it, that is, in so far as and in as much as it is available to them to actually enforce it. Accordingly, the *transplantatum* is now exposed to a totally unforeseeable future which, dependent on mere chances, is impossible to interfere with. For, as a new component of the store of legal instruments (no longer depending on its own force), it can, so-to-say, be used a r b i t r a r i l y and/or s a b o t a g e d (or, one could say: also abused and misused, only provided that that may any longer have meaning here) in any direction.

Nevertheless, in a context like this, TEUBNER's above perception—marking an otherwise obvious opposition—seems to have outlined a kind of intermediary situation. For it is true that through the "evolutionary dynamic", he inserted a new factor into the process, on the one hand. On the other, the "fate" of the rule in question could only be in the focus of this entire analysis if we judged the legal process from the perspective of a seamless teleology (i.e., purposefully as imposed from outside and from above, extorting the goal set inexorably), which is simply not the case. For, providing that nothing but a tool has been inserted into the process as a *transplantatum,* then it is by no means purely itself but it is its impregnation by (carrying and mediating) a given (and not another) culture that makes it what it is: that is, for the purpose for which it has once been created, used and transferred, and ultimately will be handed down to generations to come as well.

In view of the above, nothing—"not just statutory rules [but] institutions, legal concepts, and structures", through the confused multitude of mutual borrowings, as WATSON could characterise the thousands of years of legal development—can appear here any longer as just something uninterpretable without a hermeneutic culture in the background, but also as something that itself is nothing more than sheer technicality. That is, it is a tool—an instrument in a technological procedure—that may only be applied in the hands of someone who has first taken hold of it. Irrespective of the ethos by which it is decorated, it cannot be a self-sustaining force able to influence and to domi-

nate the one applying it. It is simply not in a position to define whether it will be applied or not, and to which purpose. Having come to a similar conclusion a quarter of a century ago, I formulated, as an expression of the feeling that something was wanted from his explanation, that

> "law can be compared to human techniques. They arise in a given medium to meet given requirements throughout history; however, once they have arisen in history, they become also utilisable beyond the original conditions of their emergence, within varying contexts, as the common cultural treasure of humankind. And that means that law is relatively open-ended as one of the elements from within the huge t e c h n i c a l store of instruments in the social *Gesamtprozess*."[44]

Technicality not only presupposes the paradigmatically specific ways and manners, criteria and sensitivities of legal thought (notably, the requirement that eventually it has to strive in order to be able to derive validity through a chain of posited inferences and also to justify the result reached in any way after the decision itself has in fact been made).[45] It is, moreover, not just mutuality of legal technique and doctrinal study of law (that is, it is only the doctrinal study of law [*Rechtsdogmatik*] that can in the last resort afford some kind of guidance for the legally and logically free choice between the always available opposite techniques pre-defining logically contrary conclusions),[46] but, in the final accounting, technicality that will also

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[44] Varga 'Jogátültetés…' [note 19], p. 297.

[45] Cf., by the author, 'Presumption and Fiction: Means of Legal Technique' [co-authored by József Szájer] *Archiv für Rechts- und Sozialphilosophie* LXXIV (1988) 2, pp. 168–184 {reprint in Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE Project on "Comparative Legal Cultures" 1994), pp. 169–185 [Philosophiae Iuris]} and *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], passim.

[46] Cf., by the author, 'Doctrine and Technique in Law' in <www.univie.ac.at/RI/IRIS2004/Arbeitspapieren/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc> {abstract in *Law and Politics – In Search of Balance* Abstracts: Special Workshops and Working Groups [IVR 21st World Congress] ed. Christofer Long (Lund: [Media-Tryck] 2003), pp. 10–11} and '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) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75 & 'Goals and Means in Law' *Jurisprudencija* [Vilnius: Mykolo Romerio Universitetas] (2005), No. 68(60), pp. 5–10 & <http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf> or <http:www.thomasinternational.org/projects/step/conferences/20050712budapest/varga1.htm>.

presuppose that everything—conceptuality, tradition of interpretation, the set of underlying value-preferences and so on—at all available in law will exclusively be denoted by those having recourse to them (and active in the given cultural medium) to mean exactly what they have meant when selected out and used in actual practice. Or, taken by itself, there is no 'rule' and 'principle, 'general norm' and 'exception', or any other structuring element in law. It is our legal technical tradition that makes us both build such components in legislation and follow precedents in adjudication; but the ultimate question of what exactly is what can eventually be revealed only in the course of the ongoing process—by describing after the fact what has been made out of what and what has been used as what in the actual process.[47]

Techniques with tools without residue had already aroused debates in social philosophy one and a half centuries ago when, for instance, FERDINAND LASSALLE declared the reception of Roman law to be a misunderstanding of old traditions that KARL MARX regarded as inevitable. Well, in that controversy it was GEORG LUKÁCS a century later who responded to the quandary in his late (and published only posthumously) social ontology. For he held that practical objectivities are to be assessed from the perspective of present needs at any time; therefore, no epistemology can stand for ontological considerations. Otherwise speaking, epistemological assessment of ontic components of existence can hardly lead to anything but misunderstandings.[48]

## 3. Contrasts in Transfers of Law

Situations of transfers of "law" in the WATSONian extended sense of transferring "rules" have become less and less characteristic of the actual developments and events of the past half century.

*Contrasts*

True, it was in fact as a result of the upswing period following World War II that various forms of legal transfer started to spread. However, both in the

[47] Cf., by the author, 'Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context' in *La structure des systèmes juridiques* [Collection des rapports, XVI[e] Congrès de l'Académie internationale de droit comparé, Brisbane 2002] dir. Olivier Moréteau & Jacques Vanderlinden (Bruxelles: Bruylant 2003), pp. 291–300.

[48] Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985; 2[nd] [reprint] ed. 1998), pp. 126–130.

case of countries that started to build their own independent legal system after the end of colonial subjugation and in the case of other Afro–Asian or Latin-American states struggling against their retarding legacies, the direction of progress was first set under the slogan of "Europeanisation", then, more and more definitely, under that of "Westernisation" and, later on, "modernisation"—denoting in fact unambiguously the capitalist forms in economic and institutional terms and the corresponding modes of thoughts. And since the Soviet Union became an imperial centre not only in military terms but also as an expansive power striving for hegemony, the extension of its sway—beyond the vast Central and Eastern European region—over Third-World countries was practically equal to exporting to them Soviet-type "socialism". All this amounts to saying that the division of the world in two monolithic power blocs during the cold war period also involved the world's ideological splitting into two. In our still over-ideologised world—strikingly characterised by the neo-utopianism of the programme of »ending the history«[49]—, most preplanned legal transfers purport to be the export of rules either *in toto* or in part exclusively, as an instrument of mediated domination. For, on the whole, these aim at the target countries joining totally (ideologically, politically, economically, and in their organisational frameworks) one or another (past or still surviving) power bloc, introducing the latter's lawyerly ethos, worldview and institutionalisation (with the same rules and other structuring elements or as adapted somewhat to local conditions).

Or, in contrast to centuries of ideological disinterest (from the Roman law reception, via the Japanese modernising change-over of laws and the Turkish secularising codification, to the "fantasy-law" of the Ethiopian Civil Code promulgated in 1960[50]), when reform could be achieved by being reduced to some rules' adoption without ideological overtones, in the recent decades most legal reforms through external patterns—as if directed by some totalising *Gesamtplan*—are pushed ahead as civilising efforts with a "missionary hubris"[51] in mind in the new ideological contexture. This is

[49] Cf. Francis Fukuyama *The End of History and the Last Man* (New York: Free Press & Toronto: Maxwell Macmillan Canada 1992) xxiii + 418 pp.

[50] For the latter and only in this sense, cf., e.g., René David 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' *Tulane Law Review* 38 (1962–1963), pp. 187 et seq. and Jacques Vanderlinden *Codifying for Developing Countries* A Case-study of the Ethiopian Civil Code (Addis Ababa: Haile Selassie I University 1965).

[51] This becomes characteristic of this era—James A. Gardner *Legal Imperialism* American Lawyers and Foreign Aid in Latin America (Madison: University of Wisconsin Press 1980) xii + 401 pp.—as a constant concomitant of such processes.

how legal history, from a simple take-over of rules in the past, arrives now at re-appropriation of overall patterns with the brutal purpose of making an entire social philosophy—including views, conceptual paths and institutionalisations as well—be adopted by third societies.[52]

*Criticisms*

The way in which the American movement of "Law and Development" attempted in an enormous enterprise, which failed to be realised, to transform the giant Latin-American subcontinent into a kind of a minor replica of the Northern one is exemplary. The ease with which the exporters used (and are used[53]) to present their own arrangement as the exclusively worthy and liveable (and, therefore, unconditionally pursuable) pattern of civilisation for the whole of mankind, is now seen with merited criticism. No doubt, what followed was immense disappointment on encountering the meagre results. As the American dream is now re-assessed in cool detachment, in a counter light directed against itself and stripped, viewers start to realise the nature of its underlying primitive mechanical worldview (transcended in Europe through the sociological debates at the turn of the 19th and 20th centuries, maybe and hopefully once and for all), in terms of which law and legal rules are portable and autonomous, and can therefore be transplanted;[54] furthermore, the assessment also reveals that "no other country uses lawyers and legal institutions so extensively and expansively", because "[v]irtually nowhere is litigation the weapon of social transforma-

[52] The present American practice is now usually described as the worst of such processes, for it fails to take notice of how thoroughly ideological it is to offer 'the' starting point, by presenting acceptance of their formalisms as a panacea, forgetting about the difficulties and implied impediments while implementing them in practice. See Thomas Carothers 'The Rule of Law Revival" *Foreign Affairs* 77 (1998), No. 2, pp. 95–106.

[53] As pointed out several times—by, e.g., Armin Höland 'Évolution du droit en Europe centrale et orientale: assise-t-on à une renaissance du »Law and Development«?' *Droit et Société* (1993), No. 25, pp. 467–488—, the same was repeated on America's behalf after the collapse of communist regimes, only perhaps more cynically, that is, pessimistically about the success, and, for this very reason, aimed at quickly squeezing out as much profit as possible. See Stephen F. Cohen *Failed Crusade* America and the Tragedy of Post-Communist Russia (New York & London: W. W. Norton & Company 2000) xiv + 304 pp. {reviewed by the author 'Failed Crusade: American Self-confidence, Russian Catastrophe' in his *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008), pp. 199–219 [PoLíSz Series 7]

[54] Eric Feldman 'Patients' Rights, Citizen's Movements and Japanese Legal Culture' in *Comparing Legal Cultures* ed. David Nelken (Aldershot: Dartmouth 1997), pp. 215–236, quotation on p. 217.

tion." This means that the United States of America "is almost unique in the extent to which it entrusts the general lawmaking process […] to its courts." Or, stated simply, American political life is full of repulsion (with victory always and at any price in view) against real problems and against facing them. In light of the "reluctance of American politicians to make decisions that cost votes", this feature, constituting a negative check & balance, explains why, for instance, it is "[t]he courts […that...] perform the task of protecting minorities against political majorities." Although—as they could have realised earlier, even based on the well-founded conclusions of Hungarian MARXist legal sociology back in the socialist era[55]—all this constitutes a historically particular environment with the consequence that "[t]he factors underlying […] cannot be reproduced elsewhere".[56]

In addition, it is by no means only the culture offering itself as a model that has simply disregarded these facts. It has just posed itself in a superior position from the beginning—conceited in mentality, and maximising its own advantages and profits. Therefore, it is not by chance that the initiative to supply models has subsequently been bitterly judged as having embodied "a privileged status" with an "artificially privileged access to power", along with "an implied superiority of their own domestic »development« over foreign »underdevelopment« expertise", in which "unfamiliarity with the target culture and society" was one of the decisive features. The blame is made even worse by the fact that this ignorance was both irresponsible and cynical, marked from the outset by a "relative immunity to consequences" in practice.[57]

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[55] Cf., e.g., Kálmán Kulcsár *Modernization and Law* (Budapest: Akadémiai Kiadó 1992). – It may occur by far not by chance that the intellectual schemes marshalling and controlling transition in the post-socialist region in Europe—the New York-accredited Central European University in Budapest and the University of Chicago topical projects publishing the *East European Constitutional Review* in outcome—staffs specialists of Latin American development (with Spanish as exclusive foreign language) as experts with no local (regional) knowledge and field experience whatsoever.

[56] Thomas M. Franck 'The New Development: Can American Law and Legal Institutions Help Developing Countries?' *Wisconsin Law Review* 12 (1972) 3, pp. 767–801, the first quote and the one before the last on pp. 782 and 784, the others on p. 783. According to another summary, focussed mainly on Asian instances—Pip Nicholson *»Roots and Routes«* Comparative Law in a Post-modern World' [ms] (Melbourne: University of Melbourne Asian Law Centre 2001), p. 22—"court [is taken] as a forum in which individuals can exercise (universal and essential) rights that are integral to the rule of law", from the aspect of which any other approach, view and tradition will be "devalued, either explicitly or implicitly."

[57] Bruce Zagaris 'Law and Development of Comparative Law and Social Change: The Application of Old Concepts in the Commonwealth Caribbean' *University of Miami Inter-American Law Review* 19 (1988), pp. 549–593, quotes from p. 555. – Country-specific micro-analy-

The final balance can therefore be but devastating. Accordingly,

> "the law and development movement was largely misdirected [...:] ineffectual, if not harmful as technical assistance, and peripheral as scholarship."[58]

So, after a complex social and political evaluation of the whole venture is made the balance cannot be other than remembering[59] situations of one-time subjugation to exploitative trading relations and land seizures, while recalling the eventuality that the colonial era is not necessarily over, as nowadays legal modernists may represent the same legal 'merchants' who once pursued profit for trading companies from the 17th century onwards.[60]

ses are indeed preferred to simply forwarding general theoretical models by Elliot M. Burg in his 'Law and Development: A Review of the Literature and a Critique of »Scholars in Self-Estrangement«' *The American Journal of International Law* 25 (1975), pp. 492–530.

[58] John Henry Merryman, David S. Clark, Lawrence M. Friedman *Law and Social Change in Mediterranean Europe and Latin America* A Handbook of Legal and Social Indicators for Comparative Study (Stanford: Stanford University Press & Dobbs Ferry, N.Y.: Oceana 1979), p. 18 [Stanford Studies in Law and Development], quoted by Zagaris [note 57], *ibidem*. – As one of the earlier formulations of this crushing criticism, Lawrence M. Friedman 'On Legal Development' *Rutgers Law Review* 24 (1969), pp. 11–64 objected to the ignorance of legal culture, serving as a medium for any reform, spellbound by an instrumental rationalising aspiration. – John Henry Merryman 'Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement' *The American Journal of International Law* 25 (1975), pp. 457–491 complains of actions taken without previous inquiry, through which developmentalists universalised the prevailing American mainstream with not even taking account of its own historical preliminaries as a kind of practical experience either. – The first self-criticism [David M. Trubek 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' *Yale Law Journal* 82 (1972) 1, pp. 1–50] mentioned "ethnocentrism" and "evolutionism", in so far as history was viewed as a series of identical stages to be repeated by all societies. The second one [David M. Trubek & Marc Galanter 'Scholars in Self-estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' *Wisconsin Law Review* (1974) 4, pp. 1062–1102] complemented it by "naïvety", failing to represent legal reality not only of the developing world but of the United States as well.

[59] As E. Goldsmith *The Way* An Ecological World View (London: Rider 1992) remembers on p. 285, "The colonial powers sought to destroy the cultural patterns of traditional societies largely because many of their essential features prevented traditional people from subordinating social, ecological and spiritual imperatives to the short-term economic ends served by participation in the colonial economy [...] the young were deprived of that traditional knowledge which alone could make them effective members of their societies".

[60] David F. Greenberg 'Law and Development in Light of Dependency Theory' *Research in Law and Sociology* An Annual Compilation of Research [Greenwhich, Connecticut: JAI] 3 (1980), pp. 129–159.

*Alternatives*

All this is to say that the question has been gradually elevated to social policy heights, with the nature of globalisation in its focus. After all, do we act narcissistically, inflicting our traditions on others, or can we support any foreign people selflessly, helping them to find their own way to optimum improvements? Is our interest driven by mere selfish hunger for more power, or by helpful intentions? Eventually, which pattern do we prefer, between the stunt of will hypnosis by a circus showman, or a gardener's humility attending all around at all times? True, it may be difficult to withstand the temptation of the former,[61] yet only a way leading back to the lessons drawn from experience can be successful in the long term.

Just to quote some examples from amongst the formulations of the dilemmas of our day, it may happen that a rights-based rule of law, mainstream in the United States, would only de-stabilise a society lacking in resources.[62] Or, for want of the cultural conviction that law has in the meantime transformed from a peremptory instrument of direct state intervention into a neutral mediator between equal parties, business life may stand fast, rejecting even an attempt at reforming the old law (or touching upon any law).[63] The Western ideal of law may itself prove to be defective as depending upon accidental historical particularities, once it is established that the introduction of a market economy may conflict with democratisation, for it may divide society by giving preference to minorities that have been privileged anyway from the outset to do business as they are accustomed to,[64] or because democracy can

[61] Jose E. Alvarez 'Promoting the »Rule of Law« in Latin America: Problems and Prospects' *George Washington Journal of International Law and Economics* 25 (1991), pp. 281–331 speaks invariably, in connection with the aid programs organised presently by the US Administration of Justice, of infliction of human rights ideals, notwithstanding the conflicts it may give rise to. – Carol V. Rose 'The »New« Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' *Law and Society Review* 32 (1998) 1, pp. 93–140 finds the basic underlying imperialistic attitude unchanged and therefore quite questionable whether or not the movement as such should at all be continued.

[62] Ugo Mattei 'The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions' in *Transplants, Innovation, and Legal Tradition in the Horn of Africa* ed. Elisabetta Grande (Torino: L'Harmattan Italia 1995), ch. 3, pp. 111–129.

[63] Kathryn Hendley 'Legal Development in Post-Soviet Russia' *Post-Soviet Affairs* 13 (1997), No. 3, pp. 228–251.

[64] As exemplified by South Africa, Kazakhstan and Vietnam, cf. Amy L. Chua 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' *Yale Law Journal* 108 (1998), pp. 1–107.

unduly favour corruption,[65] or because instead of any particular of the rule of law—it being so vague and confusing—, only partial objectives ought to be set, while nevertheless reminding us of the need to resist the urge to over-sell initiatives, since that could undermine sustainability in any case in the long term.[66]

Therefore, there is already a conceptual shift in proposals that aim, for instance, at gradual progress, by counterbalancing the lack of a complete series of exhaustive textual regulations that could have been transplanted with strict criminal law and a de-emphasis of civil liberties,[67] or transcending the old (socialist) law in several steps, starting out from a basic, rudimentary and framework-creating foundation of (e.g.) property, contract, and company law, to be followed and refined (when these are already rooted) by a social, environmental, antitrust (etc.) sensitivity built upon them.[68]

## 4. Conclusions

With this, we have arrived at the practical illustration of our theoretical conclusion: encouraging a culture's own improvement alone.[69] Because the observer, if empathetic towards both directions, may know (and can also empirically generalise) that few laws are drafted, fewer are enacted, still fewer are implemented, and almost none induce the prescribed behaviours, for drafters tend to fall back on one of three counter-productive strategies: letting laws result from a compromise of interest group bargaining, invoking the criminal law to ban the problem, or copying foreign law. The solution requires foreign consultants not to act as bill drafters, but to assist local

[65] While, at the same time, rule of law in a "consultative" status is still considered acceptable by Wei Pan *Democracy or Rule of Law?* China's Political Future [ms] [presented at Conference on China's Political Options at Vail, Colorado, 19–21 May 2000].

[66] Stephen J. Toope *Programming in Legal and Judicial Reform* An Analytical Framework for CIDA [Canadian International Development Agency] Engagment [ms] [report] (1997) 25 pp.

[67] Richard A. Posner 'Creating a Legal Framework for Economic Development' *World Bank Research Observer* 13 (1998) 1, pp. 1–11.

[68] Thomas W. Waelde & James L. Gunderson 'Legislative Reform in Transition Economies: Western Transplants – A Short-Cut to Social Market Economy Status?' *International and Comparative Law Quarterly* 43 (1994), pp. 347–378.

[69] Robert D. Cooter 'The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development' *Annual World Bank Conference on Development Economics* 1996 (Washington: The World Bank 1997), pp. 191–217.

drafters in the process in order to build up indigenous drafting capacity.[70] For, eventually, the destiny of modernising reform is up to the selective force of the targeted system;[71] moreover, the latter's environment may determine the law's eventual fate.[72] This is the message that can also help to outline directions, schools of thought and topical interests in which historico-comparative and theoretical studies are to be developed in the future.

For it is better to find out first what the soil and its living milieu needs, and the gardener may come afterwards.

[70] In respect of China, Laos, Sri Lanka, Mozambique, and the South African province of Gauteng—as in most of the developing world—, it is concluded by Ann Seidman & Robert B. Seidman 'Using Reason and Experience to Draft Country-Specific Laws' [draft, unpublished, intended to include in *Making Development Work* Legislative Reform for Institutional Transformation and Good Governance, ed. Ann Seidman, Robert B. Seidman, Thomas W. Walde (Kluwer Law International 1999) as ch. 13].

[71] Robert B. Seidman *The State, Law and Development* (New York: St. Martin's Press 1978) 483 pp.

[72] Jan Van Olden 'Legal Development Cooperation: Transplanting or Transforming Legal Systems' in *Legal Development and Corruption* CILC Seminar in Tribute for Jan Van Olden, The Hague, December 10, 2002, pp. 8–12 in <www.cilc.nl/seminar-publication/>.

# The Dangers for the Self of Being Self-centred
## On Standards and Values*

*A representative volume was published in Rome in 2003, on the 25th anniversary of the Papacy of John Paul II under the joint editorship of the Italian Senate and the Vatican. The volume was edited by the Roman professor Massimo Vari, emeritus Vice President of the Italian Constitutional Court. The publication includes papers by renowned lawyers from all over the world, elaborating further the thought of the Holy Father raised on diverse occasions. Csaba Varga, Professor of the Faculty of Law at the Pázmány Péter Catholic University of Hungary was included amongst the approximately four hundred and twenty authors—who were cardinals, scholars, as well as leading authorities of legal practice.*

• From the series of the shorter or longer contributions, it emerges as a common opinion that Catholic tradition is by no means just a venerable heritage but also a strategic force, with a growing importance in the present state of the world.

*One might think that on such an exceptional occasion, the authors aim at nothing other than paying obligatory tribute to a celebrated person…*

• Quite the contrary. The authors all seemed to be pleased to have an outstanding forum like this, offering them a unique opportunity to give expression to their painful or alarming experiences and strong hopes collectively. We live in an age of ethical relativism, with essential issues like what is the right behaviour being increasingly pushed into the background and the question of what is the truth in legal practice becoming mostly a function of procedural steps. The focus is being gradually shifted from evaluation of the behaviour itself to a fight between accusation and defence, and the judgement rendered depends most visibly on nothing but the ingenuity of the lawyer. Under such conditions it may be vital to recognise that the two-thousand-year-old CHRISTian tradition can serve as the last reserve of standards and values in the dangerous age of human freedom, lost in the wilderness of the contemporary world.

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* Interview of Tamás Kipke in *Új Ember* ['New Man', a Catholic weekly] LX (June 18, 2004) 25, p. 3.

Ever since law entered the scene it has had two ways before it. One is the practice of Roman Law, which holds that human freedom can be limited exclusively by agreements and contracts in the field of civil law. This attitude has become absolutised in our modern world. As against this approach, there has always existed the tradition built on Natural Law, which is not reluctant to distinguish between good and bad, as it claims that there are values and standards, independent of any human bargain.

*In the common mind, the concept of Roman Law is associated with the idea of order and regularity. Your words seem to contradict this… You appear to suggest that something has reached a state of degeneration here. How could we have gotten this far?*

• Roman Law used to be, back in its age, *"ars"*, that is, both art and craft, so that it could include the human entirety, moral standards and moderation in some way. This may perhaps have been feasible because it was not the property of one caste, limited to lawyerly law. Society was held together by some sort of underlying collective moral ethos that had a crucial role in regulating human relations. Law served to confirm this symbolically. It was ultimately resorted to only when coercion was inevitable. In the modern age, freedom of thought—associated with the idea of freedom of contracting—slowly eroded all other forces holding society together, including this collective ethos. This process laid such a terrible added burden on the regulatory capacity of law that it is scarcely capable of bearing it alone. In consequence, the law avoids answering what you may do. Instead, it tries to circumscribe as precisely as possible how you can or cannot fight the other party. In our days, my action cannot be limited otherwise than by the action of others, and my freedom can only be limited by the freedom of others.

*In fact, earlier it was not law, either, that defined what was good or bad. So is the problem maybe rooted in the fact that the moral background has disappeared from behind the law?*

• Undoubtedly, yes. We here at the University also deal, out of theoretical and historical interest, with the functioning of old societies and other civilisations. Students are surprised to learn that law once used to regulate only certain sectors of a society's life. There was no need for more, as the community's life and behavioural norms were basically governed by the common ethos and morality.

This is further coloured by culture's role in the basic conditioning of human mentality. For instance, the European individual—as a citizen of the small-sized Greek *polis* or of the immense Roman empire alike—had a rather individualistic approach to life. This presupposed from the outset certain problems would arise; properly speaking, it also generated them. By contrast, CONFUCIans in China felt it their natural moral duty to strive for resolution of conflicts once they had arisen. For the Mandarin authority administered formal justice only in exceptional cases, when the initiative for conflict-resolution of those concerned did not operate effectively for some reason, and in order to retaliate for moral slackness.

*The situation today seems as if we want to have a traffic policeman at every corner, instead of teaching the Highway Code and appreciating politeness… But how could a change be commenced?*

• Ancient Greeks were convinced that truth and justice—that is, the moment of *"dikaion"*—do exist, and even if not always visible at once, it can be found and identified with relentless search. CHRIStianity, too, reminds us of this and also of our responsibility and the limits of our freedom. JOHN PAUL II pointed to it repeatedly in his addresses on the world's most pressing problems. Each of us contemplating on any path of life can realise the danger that can arise if instruments are turned into ends (my paper in the volume[1] also focussed on how we may search for goals in law), and many defects, burning problems and painful needs of our troubled age arise exactly from this error. A genetic surgeon ignoring the fact that his discipline is a means and not a goal may cause unpredictable damages. And this holds true for the nuclear scientist, as well as the psychologist, the teacher and the lawyer. A person with no standards, who regards himself or herself as the utmost value, is simply dangerous to the individual and to the rest of the world as well.

*Do you, as a lawyer and as a Christian, expect the Church to stir up the people of our day?*

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[1] By the author, '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) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75.

• Yes, I do, aware of the fact that, as a member of the Church, I myself—in company of many others—have my own part to play in this. It is the Holy Father who encourages this, himself serving as an example. We must draw attention to the fact that the CHRISTian heritage embodies vital information for Humankind. That is, the teaching of the Church is not just one of the worldviews you can freely choose from and also change. From the CHRISTian realisation that the first sin was human consciousness' loss of temperance and standards, it can also be clearly concluded that a measured approach to life is a value, crucial for survival.

# APPENDIX

# Theory of Law – Legal Ethnography
## Or the Theoretical Fruits of the Inquiries into Folkways*



*1. Encounters*

Anyone who grew up in Hungary in my time and experienced the conditions then, could have become accustomed to ascertaining that, on the one hand—invariably as excitingly as ever—legal ethnography is present as a concept, and on the other, this is located somewhere in-between, belonging to a "no man's land" as to which neither we, professionals in jurisprudence, nor experts of genuine ethnography have any competence.

As a young man in the early 1960s, I could already get at a low price offprints and issues of periodicals that were scrapped at that time as coming from the detested interwar period, in which reputed authors had treated law-regulated customary regimes.[1] Their appeal for me at that time was the mutual pressure of fire and water: during our legal studies (milling intellectuality as taught soullessly, and therefore odious from the outset), we began reading them with uncorrupted excitement as it was hardly imaginable what kind of parallels might result from a popular conduct lived through as naturally given to the alienatingly artificial world-construction of law. In civil law, however, codified for the very first time precisely during our studies, we could learn about Hungarian popular legal traditions in re of parental succession, moreover, about their past official recording and compilation in view of future codification, which had been achieved by Miklós Mattyasovszky and Károly

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* Introductory lecture for the international conference at the the University of Pécs High School Faculty at Szekszárd in 2008 and subsequently published as 'Jogelmélet – jogi néprajz, avagy a népszokásvizsgálatok teoretikus hozadéka' *Társadalomkutatás* 26 (2008) 3, pp. 275–298 & <http://akademiai.om.hu/content/v778k4q3p4061h56/fulltext.pdf> {and reprinted as 'Jogi néprajz – az elméleti jogi gondolkodás nézőpontjából (A jogi népszokásvizsgálatok lehetséges teoretikus hozadékáról)' in *Jogi néprajz – Jogi kultúrtörténet* Tanulmányok a jogtudományok, a néprajztudományok és a történettudományok köréből, ed. Mezey Barna & Nagy Janka Teodóra (Budapest: ELTE Eötvös Kiadó 2009), pp. 26–46 [ELTE Jogi Kari Tudomány 1].

[1] Mainly articles by Edit Fél and László Papp, as well as the issues of *Társadalomtudomány* [Social science].

TAGÁNYI following the theoretical vision of the last grand format civilist thinker, BÉNI GROSSCHMID. In our rationalising arrogance, at the time all this affected me as a matter of curiosity: as a burden or handicap, owing to the unshakeable prevalence of the subconscious.

Beyond the panorama offered by BARNA HORVÁTH and JÓZSEF SZABÓ in the interwar period (then kept nearly secret and banned from implementation), it was the legal-sociological overview by KÁLMÁN KULCSÁR[2] that opened my eyes to the genuine richness of the ways it was possible to think on and in law. Although the classical synthesis by ALBERT HERMANN POST[3] (thrown out from a metropolitan academic library) had already been saved by being placed in my personal library, I thought of such an ethnological foundation as still belonging to pre-history and not to be taken too seriously if the arrival of the reign of reason became at stake. This basically negative evaluation of the scientific status of legal ethnography, filling with doubts its possible fruits through the self-conceit of the alleged rationalism of socialist legal policy,[4] might have been concluded in concurrence with a deeper insecurity and ambivalence of patriotic attraction and intellectual impetus, unless I had seen the one-sided over-rationalism and partisan criticism of CARL FRIEDRICH SAVIGNY and his *Volksgeist*-idea as a root motive. At the same time, I had to reconsider the genuine message of a personal event. Returning from Budapest to the nerve-clinic of my native Southern city, the old university town of Pécs, due to a head-injury suffered through a minor accident, one-time almost class-mates, then young doctors (including the neurologist IMRE SZIRMAI, now emeritus in Budapest), informed me that in regional practice BERTALAN ANDRÁSFALVY's papers on national minorities[5] were used, since the consequences of panic-reactions they treated were exact du-

[2] Kálmán Kulcsár *A jogszociológia problémái* [Problems of the sociology of law] (Budapest: Közgazdasági és Jogi Kiadó 1960) 269 pp.

[3] Albert Hermann Post *Grundriss der ethnologischen Jurisprudenz* I–II (Oldenburg & Leipzig: Schulze'sche Hof-buchhandlung A. Schwartz 1894–1895).

[4] By Kálmán Kulcsár, *A jogszociológia problémái* [note 2], pp. 113–125 and 'A népi jog és a nemzeti jog' [Popular law and national law] *Az MTA Állam- és Jogtudományi Intézetének Értesítője* I (1961) 1–2, pp. 153–193 as well as 'Marxizmus és a történeti jogi iskola' [Marxism and the historical school of law] *Jogtudományi Közlöny* X (1955) 2, pp. 65–85.

[5] By Bertalan Andrásfalvy, 'Bäuerliche Lebensform: Modelle und deren ökologischgesellschaftliche Bedingungen im südlicher Teil Ungarns im XVIII. Jahrhundert' in *Settlement and Society in Hungary* ed. Ferenc Glatz (Budapest: MTA Történettudományi Intézete 1990), pp. 159–187 [Études historiques hongroises I] and 'Modelle bäuerlicher Lebensformen in Südungarn im 18. Jahrhundert' in *Die schwäbische Türkei* Lebensformen der Ethnien in Südwestungarn: Ergebnisse der Tagung des Instituts für Donauschwäbische Geschichte und Lan-

plicates of the behavioural variations described in ethnography. This was the reason why the first question they raised to me as a patient was where I had come from and where did I belong to.

All this turned if not to excitement then to respectful sympathy towards someone pursued and his cause, when, having become acquainted with ERNŐ SZÜCS TÁRKÁNY by chance at a Ministry of Justice conference, I learned from whispering corridor talk that behind the solid surface of his mining law doctrine there also existed a submerged scholarly world within him, notably, in his recording of the living patterns of thought of village society in Hungary, which were not yet allowed to be heard. And this must have been as much of interest as the observations and theorisation by SÁNDOR KARÁCSONY on the thought-patterns of the Hungarians, made half a century ago. As I did not perceive academic fora as appropriate to discuss such important issues, I began to pay attention to relevant works in general and their Danubian region specialisation in particular; moreover, I published review articles to call professional attention to the discipline itself, occasioned first by a comprehensive French evaluation, then by a Romanian, respectively Serbian *opus*es monographising its issues.[6]

The turning-point arrived as the result of an incident when I was invited to Lund in 1977 to head a PhD course on rationality, LUKÁCS and the feasibility of legal ontology, at its Faculty of Sociology. Having visited the sole Scandinavian Institute of Sociology of Law there, at the dining table I was surprised how much director PER STJERNQVIST knew about our region. He spoke about BALTAZAR BOGIŠIĆ (1834–1908) as the pioneer of legal ethnog-

deskunde in Tübingen vom 10. und 11. November, hrsg. Márta Fata (Sigmaringen: Thorbecke 1997), pp. 43–62 [Schriftenreihe des Instituts für Donauschwäbische Geschichte und Landeskunde].

[6] Jean Poirier 'The Current State of Legal Ethnology and its Future Tasks' *International Social Science Journal* XXII (1970) 3, pp. 476–494 {& 'Situation actuelle et programme de travail de l'ethnologie juridique' *Revue Internationale des Sciences Sociales* XXII (1970) 3, pp. 509–527} [reviewed by the present author in *Jogi Tudósító* V (1974) 8–10, pp. 19–20 {& reprinted in his *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Legal theories, legal cultures: Surveys & overviews in legal theory & comparative law] (Budapest: ELTE "Összehasonlító jogi kultúrák" projektum 1994) xix + 503 pp. [Jogfilozófiák], pp. 467–469}; Romulus Vulcănescu *Etnologie juridică* (Bucuresti: Editura Academiei Republicii Socialiste România 1970) 339 pp. [reviewed in *Állam- és Jogtudomány* XV (1973) 4, pp. 659–660 {reprinted in his *Jogi elméletek*…, pp. 295–296}]; Đurica Krstić *Pravni običaji kod Kuča* Analiza relikata / metodologija / prilozi za teoriju obièajnog prava (Beograd: SANU Balkanološki institut 1979) 234 pp. [Srpska Akademija Nauka i Umetnosti, Balkanološki institut, Posebna izdanja 7] [reviewed in *Állam- és Jogtudomány* XXIII (1980) 4, pp. 762–764 {reprinted in his *Jogi elméletek*…, pp. 297–298}].

raphy[7] from our Southern neighbourhood; he mentioned EUGEN EHRLICH's *lebendes Recht* not as an earlier Galician historic curiosity but as the inspiration for all sources of law at all times. This was given credibility by his work, welcomed by the Lund Academy, to promote modernisation of Swedish sylviculture,[8] which, despite apparent gaping boredom, through an exhaustive conspectus of leasehold built up a model from the lasting components of various centuries-old customary practices that could serve as a pattern for a most traditional and fundamental industry of modern Sweden.

In the paper of KÁLMÁN KULCSÁR,[9] director of the Institute of Sociology, then Deputy Secretary-General of the Hungarian Academy of Sciences, I saw rather a gesture rehabilitating an older friend and his academic interests than a genuine revaluation heralding a turn in science policy.

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[7] Baltazar Bogišić *Gragja u odgovorima iz razlièespecialnih krajeva slovenskoga Juga* (U Zagrebu: U knjižarnici F. Zupana 1874) lxxiv + 714 pp. [Zbornik sadasnjih pravnih običaja u južnih Slovena / Collectio consuetudinum juris apud Slavos Meridionales etiamnum vigentium 1] [reprint Beograd: Unireks 1999]. Let me mention here some of his further relevant books: *Pravni običaji u slovena* Privatno pravo (U Zagrebu: U štampariji D. Albrechta 1867) viii + 196 pp.; *Aperçu des travaux sur le droit coutumier en Russie* (Paris: L. Larose 1879) 22 pp.; *O sabiranju pravnih običaja* Poslanica omladini u Pravničkom društvu na Beogradskoj velikoj školi ([Paris: [n. p.] 1901]) 8 pp., and, as a posthumous source-publication, [Valtazar Bogišić] *Pravni običaji u Crnoj Gori, Hercegovini i Albaniji* Anketa iz 1873. g., red. Tomica Nikčević, urednik Mirčeta Đurović (Titograd: Crnogorska akademija nauka i umjetnosti, Odjeljenje društvenih nauka 1984) 443 pp.

An extensive international overview of the pioneer era from Siberia via Western Europe to America can be found in Karl Tagányi *Lebende Rechtsgewohnheiten* und ihre Sammlung in Ungarn (Berlin & Leipzig: de Gruyter 1922) 128 pp. [Ungarische Bibliothek 3] in ch. I, pp. 3–25.

[8] By Per Stjernqvist—cf. <http://en.wikipedia.org/wiki/Per_Stejernquist>—, 'Political Use of Legal Forms' in *Scripta minora* Studier utg. av Kungl. Humanistiska Vetenskapssamfundet i Lund 1968–1969: I, pp. 41–51 [reviewed in *Jogi Tudósító* VIII (1977) 17–18, pp. 4–7 {reprinted in his *Jogi elméletek*… [note 5], pp. 268–271}], 'Landownership in Sweden' and 'Effectivity of Legal Instruments in Swedish Land Planning' in [Istituto di Diritto agrario internazionale comparato Firenze] *Atti della prima Assemblea* (Milano: Giuffrè 1962) & *Atti della seconda Assemblea* La pianificazione e i suoi limiti in agricoltura, istituti giuridici e strumenti creditizi (Milano: Giuffrè 1964) [reviewed in *Jogi Tudósító* VIII (1977) 19–20, pp. 27–29 {reprinted in his *Jogi elméletek*…, pp. 323–325}], as well as *Laws in the Forests* A Study of Public Direction of Swedish Private Forestry (Lund 1973 [reprint 1976]) 212 +XV pp. [Skrifter utg. Av Kungl. Humanistiska vetenskapssamfundet i Lund 69].

[9] Kálmán Kulcsár 'A jog etnológiai kutatásának problémája – ma' [Ethnological research of law – issues raised today] *Valóság* XXI (1978) 9, pp. 1–11. Cf. also his 'Utószó' [Postscript] to William Graham Sumner *Népszokások* Szokások, erkölcsök, viselkedésmódok szociológiai jelentősége [Folkways: Sociological significance of customs, morals, behaviours] (Budapest: Gondolat 1978), pp. 965–992 [Társadalomtudományi könyvtár].

As a result of our Institute for Legal Studies moving to the Royal Castle area and the Institute of Ethnography becoming our neighbour, ERNŐ SZÜCS TÁRKÁNY,[10] returning here in his later age, could be my distinguished lunch-partner twice a week, with a cosy coffee-party afterwards. This practice continued with BERTALAN ANDRÁSFALVY, ethnographer at Pécs and later on minister of culture, who withdrew there, and we were happy to meet again regularly.[11] Encountering them was a nice experience, which also initiated a review of the former's *opus magnum* on Hungarian legal folkways.[12] In search of a common field of competence, I cleared points of connections between the two disciplines in a writing which was also favourably received in Sweden.[13]

A new and somewhat differing story began for me with LEOPOLD POSPÍŠIL and the anthropological theory of law, as I expressly felt the need for my multifactoral view of law (as officially positivated / judicially enforced / socially acknowledged, with all three in competition for priority amongst themselves) to be confirmed by an external source. I found an appealing presentation with purpose, albeit by chance. Although he expressed his hope both in correspondence and during my visit at Yale that I wouldn't use his work as a theoretical springboard, but as an empirical example,[14] it led me to the elaboration of a concept of law, still justifiable today.[15]

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[10] Between 1975–1982, a senior rearcher. After his death in 1984, his widow—in a bitter letter to me on 7 December 1986—complained about the uncertainty of his archival legacy's fate at the Institute.

[11] Between 1985–1989, a head of section.

[12] Ernő Szücs Tárkány *Magyar jogi népszokások* (Budapest: Gondolat 1981) 903 pp. [Társadalomtudományi könyvtár].

[13] By the author, 'From Legal Customs to Legal Folkways' [in Hungarian 1981] *Acta Juridica Academiae Scientiarum Hungaricae* 25 (1983) 3–4, pp. 454–459 {reprinted in *Tidskrift för Rättssociologi* [Lund] 2 (1985) 1, pp. 39–48 as well as in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xi + 530 pp. [Philosophiae Iuris], pp. 427–436}.

[14] "I hope [your comments on my theory] will be based on empirical data, as scientific theories and arguments should be, and not on what MARX or anybody else said."—he wrote to me in his second letter from the Peabody Museum (New Haven, Conn.) on 14 January 1985.

[15] Cf., by the author, *Anthropological Jurisprudence?* Leopold Pospíšil and the Comparative Study of Legal Development [in Hungarian 1985] (Budapest: Institut of Sociology [of the] Hungarian Academy of Sciences 1986) 34 pp. [Underdevelopment and Modernization: Working Papers] {re-edited as '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, Waseda University, ed. Institute of Comparative Law, Waseda University (Tokyo: Waseda University Press 1988), pp. 265–285 & '»Law«, or »More or Less Legal«?' *Acta Juridica Hungarica* 34 (1992) 3–4, pp. 139–146}.

*2. Disciplines*

As we look for the identity of l e g a l e t h n o g r a p h y, perhaps an intuitive approach is the most promising. Its subject is a customary network, also prevailing in the presence of the state's law, mostly at its periphery, which effectively assures its respect in less formalised ways. Or, typically, this is the part of the customary usages of the decisively peasant population (mountain sylviculturists, ranchers and farmers) of Central Europe, which has features most (actually or apparently) parallel with (valid) state law.

Once we envision what lies behind all this Hungarian peasantry or shepherding on mountains, we find a limitation on l e g a l a n t h r o p o l o g y as the colonisers' description of prevalent normativity found in colonies. Accordingly, legal anthropology deals with those means of ordering the society (with their operations and practical effects), which, by preceding the formal establishment of law, do serve as substitutes for law.

From a Central European point of view and from a legal philosophical perspective as well, the two directions of *rechtliche Volkskunde* and legal anthropology are the genuine historical building blocks and separate traditions, which arose in differing interests. It is notable, however, that legal ethnography and legal anthropology sprang from their German, respectively English mother sciences, and were formed about the same time, mostly by non-lawyers.

However, when the research (mainly in Germany and France) targeted a general examination of the diversity of popular comportments, that is, the means of making order in society, and the historical types of how to implement the ideal of *ordo*—instead of their own (historical or contemporary) folkways—, they marked it as l e g a l e t h n o l o g y. (It is useful to know that the French named their legal ethnographical description as *ethnologie juridique* in want of any other way to express (or translate) *rechtliche Volkskunde*.[16]) Beyond the fact, however, that interest in legal ethnography usually covers cultures not studied by legal history, because they are not taken as direct or genetic predecessors, or are ones with a poor written legacy or formal institutionalisation, whilst the stimulation for legal anthropological research was provided by natives/autochthones who were subject to conquest through colonialisation—well, I don't see any disciplinary or otherwise substantive difference.

[16] I can only suspect that the naming in, e.g., René Maunier *Introduction au folklore juridique* (Paris & Bruges: Éditions d'Art et d'Histoire 1938) 38 pp. [Publications du Département et du Musée national des Arts et Traditions populaires]—like the one of *culture*, taken over from the German language—might be felt as too Germanic, due to its roots.

The naming of l e g a l p l u r a l i s m was quite similarly as a result of accident. Albeit plenty of institutions, conferences and fora bear the name, it hardly differs from the above mentioned. Its historical or contemporary surveys target norm-systems organised according to some specific (popular, religious, professional or other) principle in competition with the prevalent state law's all-covering principle. Its specificity is only given by its investigation into symbiosis, conflicts, and everyday work. It is made relatively distinct in that, between state law and its competitors (as its name, borrowed from legal sociology,[17] also shows), it was launched as a jurisprudential trend and methodology for investigation in contrast to the former means by which past forms of the civilisational variety or customary networks colouring but not challenging the state norm system were investigated, which at the most focused on instances of competition and concurrence in fact with state law as a means of societal norming [*Normierung*].

Finally there is a new movement, in the form of research into the legal conditions of aborigines, which issued from the global cult of human rights. Accordingly, even now the main sources of a b o r i g i n a l l a w have been partly a kind of Christian sense of guilt, partly a political move resulting in guaranteeing some rights and assuring some demands, with open perspectives towards the future, of course, which in time may even lead to processing of its normative stuff and doctrine.

Amidst such eventualities, incidental formulations born in the heat of challenge, it would be more than difficult to try to classify any concrete research into any of the above or similar categories unambiguously, while we need to be aware of the fact that no answer yet given is fully incidental, unprecedented, and channelled. For instance, the most self-gratifying field of the Austrian legal ethnographical tradition may now indeed be the crazy shopping before CHRISTmas or the (sub)culture of Turkish guest workers today,[18] albeit we might perhaps class their aspects worth investigating in another disciplinary field. We could also contemplate on the fact that the re-

[17] 'Unofficial law', 'folk law' or 'people's law' are usually to complement its naming.

[18] As a classical approach in contrast to them, cf. Karl Sigismund Kramer *Grundriss einer rechtlichen Volkskunde* (Göttingen: Schwartz 1974) 172 pp. and *Das Recht der kleinen Leute* Beiträge zur rechtlichen Volkskunde (Festschrift für Karl-Sigismund Kramer zum 60. Geburtstag) hrsg. Konrad Köstlin & Kai Detlev Sievers (Berlin: Schmidt 1976) xiv + 218 pp.

With its treatment from within, the British legal historical tradition— e.g., Anthony Bradney & Fiona Cownie *Living without Law* An Ethnography of Quaker Decision-making, Dispute Avoidance and Dispute Resolution (Aldershot: Dartmouth 2000) vii + 187 pp. [Socio-legal Series]—may also belong to the above group.

lated problems of Roma life are investigated under the title of legal pluralism internationally,[19] while we do so in turn as applied legal anthropology. Moreover, this is more convincing for me, as most of the case-studies interpret and treat those Gipsy concerns that result from other conflicts than sheer deviance either from the side of state law, as a human rights affair, or—and mostly in cases of mutual misunderstandings between state authorities and them—as classical anthropological *topos*, focusing on mentality, as a collision of mentalities.

Turning now to the spectre of theoretical legal thinking, it has to be stated that, even if it seems to be a triviality, there is no legal theory whatsoever built on legal ethnography as the scholarly exploration of legal folkways. Or, it is drawn from, and nurtured by, ethnography invariably.[20] And as such, it considers its basic task exhausted by description: the intellectualised collection, interpretation and classification of relevant data. What emerges from additional disciplines is, however, no longer legal anthropology or *ethnologie juridique* but rather a theory of law proper, building upon such considerations; that is, in its historical form, *ethnologischer Jurisprudenz*, and considered as the modern approach today, anthropology of law.[21] Approached from the opposite perspective, at the same time the theoretical foundation and conclusion built and building as a result of legal ethnography are part

[19] Cf., e.g., *Gipsy Law* Romani Legal Traditions and Culture, ed. Walter O. Weyrauch (Berkeley: University of California Press 2001) xiv + 284 pp. and Walter O. Weyrauch 'The Romani People: A Long Surviving and Distinguished Culture at Risk' *American Journal of Comparative Law* 51 (2003) 3, pp. 679–689.

[20] E.g., „l'ethnologie juridique est la branche de l'ethnologie qui étudie les phénomènes juridiques." In <http://www.universalis.fr/encyclopedie/G970921/ETHNOLOGIE_Ethnologie_juridique.htm>.

[21] There are anthropologies of law which are by no means built on genuine anthropological descriptions. Some of them aim at anthropologically founding the modern state law or illustrating its selected aspects solely. Cf. e.g., Ernst-Joachim Lampe *Grenzen des Rechtspositivismus* Eine rechtsanthropologische Untersuchung (Berlin: Duncker & Humblot 1988) 227 pp. [Schriften zur Rechtstheorie 128]; Norbert Rouland *Anthropologie juridique* (Paris: Presses Universitaires de France 1988) 496 pp. [Droit fondamental]; Jan M. Broekman *Droit et anthropologie* (Paris: Librairie Générale de Droit et de Jurisprudence 1993) 215 pp. [La pensée juridique moderne].

From bordering fields, cf. also Frank-Hermann Schmidt *Verhaltensforschung und Recht* Ethologische Materialien zu einer Rechtsanthropologie (Berlin: Duncker & Humblot 1982) 183 pp. [Schriften zur Rechtstheorie 98] and *Monismus oder Pluralismus der Rechtskulturen?* Anthropologische und ethnologische Grundlagen traditioneller und moderner Rechtssysteme, hrsg. Peter G. Sack, Carl Wellman & Mitsukuni Yasaki (Berlin: Duncker & Humblot 1991) xv + 443 pp. [Rechtstheorie, Beiheft 12].

of the social theory of ethnography: it is decisively drawn from, and branches out of, it, and, in a direct way, it will also nurture—substantiate as an *addendum* to—it.

After all, such a statement ought to join a professionally self-critical remark as a matter of course, namely, that once the demand for the anthropological foundation of law is at all taken seriously in our near and farther regions where we cultivate legal ethnography, we ourselves should draw from the social theory of ethnography[22] its conclusions.[23] However, I cannot remember whether or not I have ever met a legal philosophical, theoretical, sociological or anthropological treatment having drawn inspiration from socio-ethnographical conclusions.

Perhaps just this, the cultivation of legal ethnography "basically within a historical perspective", has also generated its own share of its poor results and relative isolation. The science-historical overviews of the discipline[24] make clear that its great historical eras (at the turn of the 19th to 20th century, between the World Wars as well as in some attempts after World War II) coincided with one specific mission. Notably, as it was used in Russia in the early and late 19th century, it strived for a possible synthesis between the wisdom represented by popular traditions and rational construction through modern legislation; and, although the underlying historical conditions were still uniform in Russian/Hungarian law, had to face the demand of comprehensive civil law codification. Perhaps this is one of the reasons why the discipline was ambivalent throughout and hardly tolerated during

[22] For a timely synthesis, see László Szabó *Társadalomnéprajz* Egyetemi jegyzet [Socio-ethnography] (Debrecen: Kossuth Lajos Tudományegyetem Bölcsészettudományi Kara 1988) 394 pp. and *Magyar Néprajz* [Hungarian ethnography] ed. Attila Paládi-Kovács, VIII: Társadalom [Society], ed. Mihály Sárkány & Miklós Szilágyi (Budapest: Akadémiai Kiadó 2001).

[23] For a magisterial collection, see *Ethnography and Law* ed. Eve Darian-Smith (Aldershot: Ashgate 2007) xxi + 586 pp. [The International Library of Essays in Law and Society].

[24] E.g., Teodóra Janka Nagy *A tradicionális népi önkormányzatok jogtörténeti vizsgálata a Dél-Dunántúlon* különös tekintettel a föld- és faluközösségek felbomlásának időszakára [Legal historical examination of traditional popular self-governing bodies in South-Transdanubia, with special respect to the period when the land and village communities dissolved] (Szekszárd: [Graphis Press Kft.] 2002), ch. 2, pp. 15–39 on p. 3, as well as, by Mihály Kőhegyi & Teodóra Janka Nagy, 'Bónis György és társai jogi népszokásgyűjtése Tápén' [The collection by György Bónis and associates of legal folkways at Tápé (A source publication)] in *A Móra Ferenc Múzeum Évkönyve* Studia Ethnographica 1 (1995), pp. 195–249 and 2 (1996), pp. 185–233, and 'Adalékok a jogi héphagyománykutatás történetéhez' [A contribution to the history of investigations into legal folk traditions] *Cumania* 14 (1997), pp. 207–233.

Socialism, pushed to the margins by its rationalising (sometimes too narrow-minded) demand.[25]

It is hardly imputable as a misconceived undertaking to SZÜCS TÁRKÁNY that at the end of his life, as a lonely fighter almost without support, when he could have finally summarised the conclusions of his professional life in a book-size publication, he first of all collected, interpreted and classified the facts hitherto registered in one *corpus.* Namely, he did the same as ZOLTÁN KODÁLY with folk-songs, JÁNOS BERZE NAGY with folktales, and others with other subject matters: he typified, systematised, that is, interpreted his empirical subject in an ordered form as component parts of one grand treasure, and handed over it to posterity as one reasonably arranged unit. Notwithstanding the fact that one of the recurring topics of all our discussions, as I have emphasised, was the embedding of legal ethnography in a socio-ethnographical context, i.e., a theoretical and systemic generalisation, on the one hand, and the search for the suitability of drawing theoretical-legal conclusions, on the other, this might have obviously been the fruit of another creative (yet unavailable) decade and of a second synthesis, of the empirical synthesis at the most. We should rather rejoice at the realisation that there are students and followers who, as the rich bibliographic testimony of recent decades shows, found materials abundantly and almost inexhaustibly worth collecting and processing.[26] We can only hope that,

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[25] Nevertheless, see, for the same period, V. A. Georgesco 'La méthode du juriste ethnologue en Roumanie' *Revue Roumaine des Sciences sociales* 22 (1978) 1, pp. 191–207.

As signs of resurgence, see, e.g., *Homo juridicus* Материалы коференции по юридической антропологии [Conference proceedings on legal anthropology] ред Н[аталина] И[вановна] Новикова & А[лексей] Г[ригоревич] Осипов (Москва: Российская Академии Наук Институт Єтнологии и Антропологи им. Н. Н. Миклуххо-Маклая 1997) 254 pp.; *Человек и право* Книга о метней школе по юридической антропологии [Man and law: Book on the school of legal anthropology] ред. Н[аталина] И[вановна] Новиковна & В[алерий] А[лександрович] Тишков (Москва: „Стратегия" 1999) 194 pp.; *Обычное право и правовый плюрализм* Материалы XI Международного конгреса по обычномо праву и правомы плюрализму, август 1997 г., Москва [Customary law and legal pluralism] ред. Н[аталина] И[вановна] Новикова & В[алерий] А[лександрович] Тишков (Москва: Российская Акдемии Наук Институт Єтнологии и Антропологии им. Н. Н. Миклуххо-Маклая 1999) 251 pp.; *Обычай и закоп* Исследоания по юридической антропологии [Custom and the law] ред. Н[аталина] И[вановна] Новикова & В[алерий] А[лександрович] Тишков (Москва: „Стратегия" 2002) 398 pp. as well as, additionally, Dahua Wu *Min zu fa lü wen hua san lun* [On the legal culture of ethnic minorities] (Beijing Shi: Min zu chu ban she 2004).

[26] For a few topics especially attractive, see, e.g., Péter Banyó 'Birtoköröklés és leánynegyed: Kísérlet egy középkori jogintézmény értelmezésére' [Succession of property and maiden section: Attempt to interpret a medieval law-institution] *Aetas* [Szeged] 3 (2000), pp. 76–92

encouraged by the present conference, more researchers will be ready for further interdisciplinary approaches, rethinking the messages within a socio-ethnographical or theoretical-legal framework with the aim of ending in an individual theory.

*3. The Lawyerly Interest*

Does some mystical longing or romanticism, or perhaps only a compulsory respect for our common national past, substantiate the sympathetic interest of legal theoreticians towards legal ethnography? Well, I would think that such a mentality may perhaps enhance it but in the long term of social generality this may hardly be determinant. For, I think, the theoretical lawyer appreciates in the treatment of legal ethnography [*Volks kunde*] the same aspects as in history, legal history, symbol research, or literature or the arts:[27] raw material, exemplification, message, quasi-empirical but externally already developed data—to be used in his/her anthropology of law or ethnological jurisprudence to be developed. Otherwise speaking, his/her interest lies in looking for chances to use that material processed in one scholarly field for testing and/or reconsidering a new theorising, for refinement and enrichment from another point of view, that is, attempts at reconstruction at another level and within a distinctly methodologised discipline, transformation, or further differentiation of the newly generated response.

Perhaps the richest contribution of legal ethnography to socio-ethnography is the exploration of the elements of *ordo*, that is, of contents (purposes and instrumental behaviours) expressed by the given folkways and the explanation of the considerations (values, pragmatism and common sense) having motivated them. For in the case of legal ethnography as a part of ethnography, a legal folkway is an ordering/ordered response to a challenge in social existence: know-how that, if validated, will assure a certain prefer-

and Judit Pongrácz 'Werbőczy Hármaskönyvének nyomai a 20. századi magyar jogi népszokásokban' [Marks of Werbőczy's *Tripartitum* in Hungarian legal folkways of the 20th century] in *Folytatás* Folklorisztikai tanulmányok, melyekkel tanítványai köszöntik a hatvan éves Voigt Vilmos professzort [Folklore studies of disciples greeting the 60 years old Professor Vilmos Voigt] ed. Vilmos Ambrus, Krisztina Péter & Judit Raffai (Budapest: ELTE BTK Folklore Tanszék 2001), pp. 171–188 [Artes populares 18].

[27] There is a course already introduced, cf. István H. Szilágyi 'The Chronicle of a Death Foretold: A Free Afterospection' in [IVR 24th World Congress: Global Harmony and Rule of Law {September 15–20, 2009, Beijing, China] *Abstracts* Special Workshops and Working Groups, I ([Beijing: Academy of Jurisprudence of China Law Society & China Legal Exchange Center 2009), pp. 487–490.

ence with an acknowledged favourable effect. Or, we could also state that ethnography is interested in describing customary ways so that it may thereby arrive at a formulation of the recurrently constant message that already has been distilled into or as a rule. On the other hand, in the case of theoretical jurisprudence, the research interest lies in how these elements of order can be transformed into an order in practice, i.e., the mechanism of normative operation and its specific dynamics.[28] Otherwise expressed, it is legal scholarship to describe how secondary norm-systems are formed and exert an effect, and in which ways these will adapt to, as built in, a frame determined by the state's law.[29]

In both we can see a common problem: the actual depth of interaction amongst various norm-systems as they function in society. It is a sociological truism that in the same way as facts do not go to court themselves, our things do not elicit scholarly interest by chance either. For, in the final account, instead of targeting objects directly, science addresses the human interest attached to and embodied by them. Societal or professional (etc.) public discussion will select, name, concretise, lift out from its environment that which will later be created, through the focus of scientific examination, a subject of knowledge, envisioned from now on as an independent active factor. Accordingly, on the one hand, 'custom', 'folkways', 'legal folkways' do also "exist" since we have described and named them, and formulated a problem out of their prevalence as an active component. On the other, the more the analysis is about objects of knowledge, reified in given forms and seen as the operator of the functioning of self-reifying institutional systems, the more powerful the motivation will be to presume their nominal, i.e., thoroughly ideological, autonomy as an actual determining force. Or, if there is legal ethnography, we may speak about legal folkways as well. If we have developed the science of positive law, we may already construct the virtual actuality of *Rechtsdogmatik*, too. Albeit we can learn from the sociology of law research based on empirical investigations of data, commenced

[28] On a limiting zone, cf., e.g., Louis Assier-Andrieu 'La codification des usages locaux aux XIX$^{e}$ et XX$^{e}$ siècles: Quelques éléments pour une approche ethnologique de la formation du droit' in *Appropriation et utilisation de l'espace rural* Loi et coutume: Pré actes du colloque national de l'Association des Ruralistes Français, 1982, Tours (Paris: [Association des Ruralistes Français] 1982).

[29] Interestingly, William Twining 'Law and Anthropology: A Case-study in Inter-disciplinary Collaboration' *Law & Society Review* 7 (1972–73) 4, pp. 561–583 on p. 576 has an inverse view on American legal anthropology, anthropologists being characterised as procedure-oriented, in opposition with the rule-centredness of lawyers.

some decades ago,[30] that not even the positivity of law and its formalised operation constitute an independent active force in society: through actual social processes, formalised normative systems can also interfere by their own moves flowing from uninterrupted interactions. The actual societal effect of sanctioning, which must always be individual and exceptional in principle, may be measured mostly amidst continued cultural interaction among those active normative orders.[31]

With respect to the relation of legal ethnography to legal theory, the most conspicuous finding may perhaps be that both are built upon the same cultural pedestal, namely, that it is taken for granted from the beginning that legal ethnography examines behavioural patterns of such a (more) traditional community within the reach of the state, which features a development's variant within the bounds of a basically identical development, representing a part of the overall structure. Therefore, it does not need to accomplish cultural accommodation and transformation—repeated translation[32] and interpretation—, a task that is practically nearly impossible, which has transformed the majority of legal anthropologies formulated up to the present day into too subjective an undertaking anyway from the out-

[30] As a pioneering work in Hungary, see Kálmán Kulcsár *A jogismeret vizsgálata* [The examination of the knowledge of law] (Budapest 1967) 43 pp. + tables [Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete: Társadalom és jog 1], followed by additional volumes in the series.

[31] Its topic-specific approach could have induced that the ethnographical overview on the antecedents of fishing legislation, with research regarding poaching and the collision between public administration and popular lot led to a complex treatment. Miklós Szilágyi 'Ahogyan a törvény megszületett: Történeti–néprajzi elemzés' in *1888. XIX. Törvénycikk a halászatról és végrehajtási utasítása* [As the law came into existence: Historical-ethnographical analysis of the Law XIX of 1888 on fishery and its executive instruction by Ottó Herman & Dr. Konrád Imling] (Veszprém: [Pannon Nyomda] 1988), pp. 5–40 and *Néphagyomány – népi mentalitás – állami igazgatás* az orvhalászat tükrében [Folklore, popular mentality and state administration regarding poaching] (Budapest: Magyar Tudományos Akadémia Néprajzi Kutatócsoportja 1989) 128 pp. [Életmód és tradíció 3].

[32] For example, „La vulgarisation du vocabulaire juridique conduit parfois à grouper sous le même terme des institutions d'une similitude très approximative et à créer ainsi un rapport artificiel difficile à maintenir. La précision des termes du droit s'accommode difficilement d'une confusion et d'une incohérence qu'explique, sans doute, l'emploi quasi général d'une terminologie occidentale inapte, dans bien des cas, à exprimer la signification profonde d'institutions particulières dont on ne trouve pas l'équivalent exact: l'abus naît de la volonté de rapprochement ou de l'impuissance à forger des expressions plus adéquates." In <http://www.universalis.fr/encyclopedie/F961121/DOT_ethnologie_juridique.htm>.

set, i.e., into an instance of (Western) cultural hegemony by the force of the last interpretation achieved.[33]

Behind all this, we find invariably a dilemma arising today and all the time the next day.

*4. Law and/or Laws*

In its origins, our jurisprudence has been formed from antique roots out of a normative formation, partly state-enacted, partly destined to strip the *ordo*-ideal underlying (as hidden in) the created world: from the b u i l d - i n g - u p and o p e r a t i o n of this *normative stuff*—overlapping as one functioning unit but distinguishable for its analytical purport. How may an Asian or Alaskan tribal custom or the usage of plains peasants or highlands shepherds enter this field? How may it transform into jurisprudence that, regarding its subject, is itself mainly cultural anthropology or ethnography? Our answer is short, but the tentative formulation[34] given a quarter of a century ago is invariably defensible: an aspect will be legally relevant if the functionality (or actual function) will cover that of the law—in its place and time, under given conditions. We should note: this is not a case in which phenomena (aspects) identifying themselves as 'law' will, thereby, be extended but one in which it is revealed that functionality ascribed to the law may have also been (or may be) filled by factors that were formed in an independent way under differing conditions, mostly not even having encountered the phenomena asserting themselves as 'the law'.

From the point of view of today's academic fashion of so-called legal pluralism, acknowledgement of the theoretical feasibility of declaring law from the state's navel-string is usually traced back to the early Central European investigations, laying the foundations of sociology, of the turn of the 19th to the 20th centuries. On the one hand, this resulted from the reality perceived and described in Czernowitz (of the Austro-Hungarian Monarchy's Galicia) by EUGEN EHRLICH (who grew up and was nominated as a professor

[33] During the period I spent at Yale Law School I was able to talk with Professor POSPÍŠIL several times. In his overwhelming criticism of both the past and the American presence in legal anthropology, he considered the greater part of its cultivators (whether revered in the outer world or not) unreliable. Using secondary sources made their oeuvre a re-interpretation of local interpreters only. He demanded his PhD students should (1) choose a culture other than their home one and (2) participate in fieldwork after having become familiarised with both its language and underlying culture—so that data collection could lead to u n d e r s t a n d i n g & d e s c r i p t i o n f r o m i n s i d e, in order to found comparative theorisation.

[34] See note 55.

there), who realised the hard fact of *lebendes Recht* ['living law'] as an ordering force and also concluded, among others, that

> "[c]riminal law is lacking in power, once it were forced to mobilise forces not available in society itself; since it may strive for anything only provided that for reaching it, criminal law has the ability through [the mobilisation of] the force hidden in the people."[35]

On the other hand, analysing the relationship between economy and society, MAX WEBER had in turn to declare as a principle with conceptual consequences that

> "[i]t does not involve a problem for sociology to arrive at the recognition of the possibly common prevalence of diverse, moreover, mutually inconsistent, valid orders"

—and in this conceptual world not even the law itself needs definitely to be enacted or directly supported by the state.[36]

Or, as generally things do not name and denominate themselves—as in mathematics, geometry, and similar systemic sciences as well (owing to whose ideal jurisprudence also once gained its formal perfection), where only a systemic self-definition constitutes the internal differentiation and grants a relatively discrete isolation for the thusly differentiated entity, so that the self-definition of the validity of positive law may owe its relevance, if any, to its formal construction and systemic self-closure—it is not just self-evident and given by itself, what is called law (and when, and, mainly, by what interest). Let me recall a deep science-methodological remark of LEOPOLD POSPÍŠIL, who has represented for me a most authentic legal anthropologist:

> "Law as a theoretical and analytical device is a concept which embraces a category of phenomena (ethnographic facts) selected according to the criteria the concept specifies. Although it is composed of a set of individual phenomena, the category itself is not a phenome-

[35] Eugen Ehrlich *Die juristische Logik* (Tübingen: Mohr 1918; 1925 [reprint Aalen: Scientia Verlag 1966]) vii + 337 pp. on p. 291. Cf. also K[laus] Alex Ziegert 'A Note on Eugen Ehrlich and the Production of Legal Knowledge' *Sydney Law Review* 20 (1998) 1, pp. 108–126.

[36] Max Weber *Wirtschaft und Gesellschaft* Grundriss der verstehenden Soziologie, hrsg. Johannes Winckelmann, Studienausgabe (Köln & Berlin: Kiepenheuer und Witsch 1956), pp. 23 and 25.

> non—it does not exist in the outer world. The term of 'law' is consequently applied to a construct of the human mind for the sake of convenience. The justification of a concept does not reside in its existence outside the human mind, but in its value as an analytical, heuristic device.[37]

Accordingly, there is a phenomenon identifiable by observation, based on some actual reference, which is suitable for the observer to create certain categories out of it and its *simile*. The purpose of category formation is also obvious: to make it possible for us to analyse normative systems that also substitute for law or compete with the law in given historical formations in their (conceptual or methodological) parallelism to law.

During recent decades, the demand for general jurisprudence has been strengthened (perhaps facilitated by the spectacular international sweep of legal sociology and legal anthropology independent of legal pluralism's becoming a movement),[38] that is, the need to reconsider the traditionally European-rooted pre-assumptions that, as a result of the challenge of globalisation, perhaps are seen as too simplified, according to which—for instance—

> "law consists of two principal kinds of ordering: municipal state law and public international law (classically conceived as ordering the relations between states: »the Westphalian duo«)".[39]

Well, in order to base the transcendence of the classical concept of law through its extension, attempts at setting criteria for it immediately have been undertaken. One of their classic—French—forms is the effort of HENRI LÉVY-BRUHL, splicing Roman law and similar ancient formations in large-scale legal sociology, in order to summarise the elemental components of a legal existence in some form of *„la juristique"*,[40] meaning that—in

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[37] Leopold Pospíšil *Anthropology of Law* A Comparative Theory (New York: Harper & Row 1971) xiii + 385 pp. on p. 39.

[38] William Twining 'General Jurisprudence' *University of Miami International & Comparative Law Quarterly* 15 (2007) 1, pp. 2–60 and especially p. 34.

[39] *Ibid.*, p. 5.

[40] Henri Lévy-Bruhl 'Science du droit ou »Juristique«' *Cahiers internationaux de sociologie* VIII (1950) 1, pp. 123–133 {reprinted in his *Aspects sociologiques du Droit* (Paris: Rivière 1955)}, as well as Émile LeRoy 'Juristique et anthropologie: Un pari sur l'avenir' *Journal of Legal Pluralism and Unofficial Law* (1990), Nr. 29, pp. 5–21. Cf. also, by the author, 'Henri Lévy-Bruhl és a jogszociológia' [Henri Lévy-Bruhl and legal sociology] *Állam- és Jogtudomány* IX (1966) 1, pp. 151–158.

other words—the formulation comprises in itself the elemental components, the *nucleus*[41] of legal nature.

In recent decades, a leading Dutch legal anthropologist has suggested we should regard "the self-regulation of a »semi-autonomous social field«" as the basis for analysis of unity and diversity of normative forces ordering society.[42]

By this, he indeed specified some minimum basis in so far as he, thereby, defined the law's ability to self-generate and, thus, self-operation in self-generation had been defined.

In his implicit answer, a German author put this latter into a liberatingly (law-)equalising framework, as "legal pluralism rediscovers the subversive power of suppressed discourses". At the same time he created specification, too, since "[b]oundaries of law are one among many structures that law itself produces under the pressure of its social environment."[43] Or, this records the competition of normative systems exerting an influence on our lives, and that its environment forces only the one described as 'legal' to self-limitation.

A Portuguese lawyer-sociologist has already given a definition launching a new theoretical paradigm. Accordingly, law is about

> "a body of regularized procedures and normative standards, considered justicable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force."[44]

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[41] Today, the new terms sprawling may be logically justifiable in own contexture, responding the actual challenge. Beyond it any generalised use can only increase terminological confusion.

In the text, 'juridicity' had to be used instead of 'legal existence', but *juridicité* stands already for the core-components of law in a KELSENian tradition of KELSEN-criticism. See, e.g., Paul Amselek *Méthode phénoménologique et théorie du droit* (Paris: Librairie Générale de Droit et de Jurisprudence 1964) 464 pp. [Bibliothèque de Philosophie du Droit II] [reviewed by the author in *Állam- és Jogtudomány* I (1967) 1, pp. 309–311 {reprinted in *Jogi elméletek*… [note 5], pp. 24–26}].

[42] John Griffiths 'What is Legal Pluralism?' *Journal of Legal Pluralism* (1986), No. 42, pp. 1–55 on p. 38.

[43] Gunther Teubner 'The Two Faces of Legal Pluralism' *Cardozo Law Review* 13 (1992) 5, pp. 1443–1462 at pp. 1443 and 1442.

[44] Boaventura de Sousa Santos *Toward a New Common Sense* Law, Science and Politics in the Paradigmatic Transition (New York & London: Routledge 1995) xiv + 614 pp. on pp. 114–115.

That is, it takes such an ordering function as a common ground, featuring both relative autonomy and actual efficiency, which is simultaneously founded upon an ordered state of thing and the reality of sanctioning.

Ultimately, the already mentioned German author (returning to his autopoietic perspective), re-inspired by the principled limitlessness of EHRLICH's *lebendes Recht*, considered the idea of a "global Bukovina" as a basis, declaring that, on the one hand, it "has proved hopeless to search for a criterion delineating social norms from legal norms."[45] Or, as stated openly, other law-like formations did once exist, do now exist and may as well exist in the future. On the other hand, out of such law-like-formations those that are—in terms of NIKLAS LUHMANN's autopoietic theory[46]—open for processing external information but closed in their internal operation, as they are controlled from inside and they process, in all their steps, such pieces of information in a self-closing way according to criteria provided by them, will justify themselves as having genuine juridicity. Because, as he writes:

> "[l]egal pluralism is then defined no longer as a set of conflicting social norms in a given social field but a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal."

This is to say that while LUHMANN, based on the above mentioned "Westphalian duo", reduced state law and inter-state law to the binary code of legal/illegal as a definition, TEUBNER considered the materialisation of such a code to be already achieved in the concurrent presence of actual legal pluralisms. According to him—as he continued its clarification—

> "[t]his is in no way a view of »legal centralism«. […] It creates instead the imagery of a heterarchy[47] of diverse legal discourses." Namely "It is neither structure nor function but the binary code which defines what is the »legal proprium«[48] in local or global pluralism."[49]

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[45] Gunther Teubner '»Global Bukowina«: Legal Pluralism in the World Society' in *Global Law without a State* ed. Gunther Teubner (Aldershot & Brookfield, VT: Dartmouth 1997) xiv + 614 pp. [Studies in Modern Law and Policy], p. 13.

[46] Cf., e.g., Niklas Luhmann *Law as a Social System* [Recht der Gesellschaft, 1999] trans. Klaus A. Ziegert (Oxford & New York: Oxford University Press 2004) viii + 498 pp. [Oxford Socio-legal Studies].

[47] The word 'hierarchia' derives from the Greek *hieros* = 'sanct' (as in *hierarkhiâ* = 'pontifical reign'), opposite to its modifier *hetero* = 'other; different'.

[48] That what is common to all members without being part of the definition itself.

[49] Teubner '»Global Bukowina«…' [note 44], pp .14–15.

Thereby, he presented a sparkling and immensely complex proposal (hidden in its pretended simplicity), for the law's specificity is defined by the principle(s) of its operation, instead of its built-up constitutivity or social functionality. This criterion—as we may add to it—already includes the attributes earlier authors had suggested to be the criterion, namely, the law's ability to self-generation / self-operation / self-reproduction.

In its effect, however, all this is not yet unproblematic, since the same literature also provides alarming examples. An author sees law even "in more esoteric forms, like mafia law or squatter law" too.[50] Another, from the United States, in a way characteristic of the political fight vindicating the revival of Afro-tradition hidden in a scientific shirt, rejects "law as a Eurocentric enterprise". For hardly dissembled despotism (suppression and exploitation) is from the outset revealed in the "objectification [...] inconceivable" starting with the Romans' externalising, formalising and homogenising the law. As a replacement, the emancipation of "a non-material, spiritually-infused universe"—without "any separation between law and morality, between science and belief[50/a], between practicality and justice"—is the programme to be achieved.

It is proper to raise the concern that such limitlessness threatens us with the perspective of being lost in a gulf if nothing is said. If research is going on through opening gates without closing them, invariably the call for help is sounded (sometimes by the same gate-openers) on this path (aggravated by the fact that "everything is in flux and none of the old assumptions remain unchallenged"[51]): "Where do we stop speaking of law and find ourselves simply describing social life?"[52] Since—as my Portuguese friend proceeded on—"this very broad conception of law can easily lead to the total trivialization of law: if law is everywhere it is nowhere" indeed.[53] Or, the ripened result of our glorious self-awareness could hardly be anything other than arriving at "hopeless confusions".[54]

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[50] Brian Z. Tamanaha 'Enhancing the Prospects for General Jurisprudence' *University of Miami International and Comparative Law Review* 15 (2007) 1, pp. 69–84 on p. 72.

[50/a] Kenneth B. Nunn 'Law as a Eurocentric Enterprise' *Law and Inequality* 15 (1997) 2, pp. 323–371, quotes on p. 346 and, twice, 369.

[51] Peter Sack 'Introduction' to *Law and Anthropology* ed. Peter Sack & Jonathan Aleck (Aldershot, Hong Kong, Singapore & Sydney: Dartmouth 1992) xxxi + 527 pp. [The International Library of Essays in Law and Legal Theory: Legal Cultures], p. xiii.

[52] Sally Engle Merry 'Legal Pluralism' *Law & Society Review* 22 (1988) 5, pp. 869–896 at p. 878.

[53] Santos *Toward a New Common Sense* [note 43], p. 429.

[54] Brian Z. Tamanaha 'A Non-essentialist Version of Legal Pluralism' *Journal of Law & Society* 27 (2000) 2, pp. 296–321 on p. 321.

The proposals running counter to the conceivable final conclusions of unforeseeability-cum-uncontrollability are primarily of a methodological nature, witnessing, however, balanced wisdom, the gladly recorded success of a mutual learning process. According to the first possibility, further research is unconditionally encouraged, without renaming the phenomenon concerned either in a research hypothesis or as the result to be concluded, for there is a reward also in cognising more about the subject of the examination. The British classic of African legal anthropology warns that

> "[w]here the project is to recover formerly »suppressed discourses«, we should begin that process in their own terms, not by telling them what they »are«. This means resisting the temptation to co-opt them into that enlarged domain that an explicitly legal pluralism implies."[55]

The second possibility is the functionality I devised and described a quarter of a century ago. According to it, investigation is in principle only carried out within the total social framework of the phenomenon, in the context of interactions that can be observed as a recurrent tendency, identifying functions relevant to law, in terms of which

> "[l]aw is (1) a global phenomenon, embracing society as a whole, (2) able to settle conflicts of interests that emerge in social practice as fundamental, while (3) prevailing as the supreme controlling factor in society."[56]

Fortunately enough, the international literature, too, deals with such an option. For instance, the very concept of legal pluralism is worthy of rational consideration based exclusively on comprehensive historical processes[57]—where those proceeding in the name of "law" will also live through their conformism by becoming convinced that whatever their conformism is

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[55] Simon Roberts 'Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain' *Journal of Legal Pluralism* (1998), Nr. 42, pp. 95–106 at p. 105.

[56] Cf., by the author, 'Anthropological Jurisprudence?' [note 14], pp. 279–280, reprinted in his *Law and Philosophy* [note 12], pp. 451–452.

[57] First of all, by Franz von Benda-Beckmann, 'Rechtspluralismus: Analytische Begriffsbildung oder politisches-ideologisches Programm?' *Zeitschrift für Ethnologie* 119 (1994) 1, pp. 1–16 at p. 6 and 'Who is Afraid of Legal Pluralism?' *Journal of Legal Pluralism and Unofficial Law* (2002), Nr. 47, pp. 37–82 and especially on p. 72. Cf. also Trutz von Trotha 'Was ist Recht? Von der gewalttätigen Selbsthilfe zur staatlichen Rechtsordnung' *Zeitschrift für Rechtssoziologie* 21 (2000) 2, pp. 327–354.

based upon and enforced by is their law. According to the final conclusion, opening gates whilst protecting ourselves from their demolition,—"[l]aw is whatever people identify and treat through their social practices as »law« (or *Recht*, or *droit*, and so on)."[58]

We had better start realising from the beginning that here and now our developments are contextualised by an oppressively overweight presence of American intellectualism, whose hyper-rational basic mentality lies in ensuring the importance of an almost cultic irrationality as to n a m i n g, identified with the solution itself. For their art of scientific writing is reduced predominantly to setting model schematas for themselves and then steadily denominating them—and as if spiritually returning home from boxing-match, in its liberating flush, they are convinced of the justice done, if the winner is kept without a knockout in the ring, independently of whether their intellectual embryo was fine or destined to be alien to life anyway. But when it is also considered that previously the search for "law" inside and outside of the law proper was the sweet fruit of the Prussian mania for order focussing on the idea of a system (that is, of thinking progressing within sharp borderlines), perhaps we will also arrive at a more balanced wisdom, with which we started our reasoning anyway, since legal scholarship consists of steady reconsideration and nothing else, in the course of which we rethink our concept of law continuously.

Or, formulating the issue more simply and unambiguously: what we are debating here is something secondary, and the direction of its solution is defined by the starting standpoints that we can formulate in the ongoing scholarly controversy—instead of any *sine ira et studio* eternal universality. Therefore, it is no wonder either if any move now (swinging out or over) will induce just a contrary direction, following its own way. If the pendulum happens to have been poised towards monism, with the exclusivity of the state's law, then standing up for pluralism will be the *bravado* reply. And once we change from there to here, the charm of temptation will already tease us from the other side.[59]

### *5. Conclusion*

Legal ethnography and any comparable descriptive historical approach are part and parcel of both mother-disciplines in their inter- and infra-disciplinarity, in their own way. We have to be pleased with its presence and revival,

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[58] Tamanaha 'A Non-essentialist Version…' [note 54], p. 313.

[59] In a similar sense, see Jean-Guy Belley 'Law as Terra Incognita: Constructing Legal Pluralism' *Canadian Journal of Law and Society* 12 (1997) 2, pp. 17–24.

waiting for it to become a movement again. Its contribution to the social theory of ethnography is important and its legal historical, anthropological and sociological output also stands to reason. Unfortunately, no social theoretical grand synthesis is yet born in our legal theory.[60] Nevertheless, I am sure that such a grand synthesis can hardly be formulated without legal ethnographical considerations. Promoting the encounter among ethnography, legal history and theoretical investigations into law is, therefore, exemplary from the outset, as it may promise a more complete vision and visibility of the common subject 'law' by mutual enrichment.

[60] Cf.—as a mere demand—by the author 'Macrosociological Theories of Law: From the »Lawyer's World Concept« to a Social Science Conception of Law' in *Soziologische Jurisprudenz und realistische Theorien des Rechts* ed. Eugene Kamenka, Robert S. Summers & William Twining (Berlin: Duncker & Humblot 1986), pp. 197–215 [Rechtstheorie, Beiheft 9] {re-ed. with some modification 'Macrosociological Theories of Law: A Survey and Appraisal' *Tidskrift för Rättssociologi* III (1986) 3–4, pp. 165–198 & reprinted in his *Law and Philosophy* [note 12], pp. 43–76 and translated as 'Teorias macrosociológicas del derecho: Panorama y valoración' [trad. Juan José Gil Cremades] in *Anuario de Filosofia del Derecho* [Nueva Epoca] V (Madrid 1988), pp. 23–53}.

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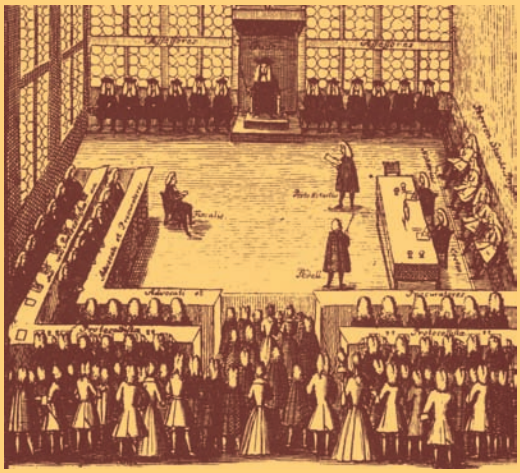

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