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PARTURIENT EUROPE

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REPORTS AND CONFERENCES

Introduction

The title of the issue **No. 73 of Central European Political Review** (CEPSR – CEPoliti Review) is PARTURIENT EUROPE. We publish studies from illustrious social scientist about the international relations and his consequences to EU and Central Europe and about the possible new ways of social science.

In the **CEPSR No. 73** there are some studies about the current international relations and his consequences for Central European. Carlos Flores Juberías wrote a chapter about the problems that have plunged the European Union into the most serious crisis of its long history. One concret sample is the Sargentini Report about Hungary in September 2018. József Szájer in his famous speech about this "LIBE Committee Report" in the EU stressed that the report is a lie. In EU those people talk about the violation of the rule of law and democracy and lecture Hungary, who has no intention to abide by even their own rules at all. They do all of this to get revenge on the Hungarian people who are against mass immigration "What is the rule of law? The rule of law is when not certain people's and certain groups' tyranny, but the law rules."

One of the main goals of the journal editorial board of **CEPSR** is to make it available to the broadest circle of readers from among experts and persons with a serious interest in the issues of the unique space of Central Europe, from the different perspective of international relations, history, political science, sociology, anthropology and art-sociology, respectively. The main reason for publishing the **Central European Political Science Review** is to serve and to enhance Central Europe, to broaden and to spread the thoughts of Central Europeanism, and

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Law and History, Law as History?

On the historicity of law

1. Understanding the Term 'Law'

In every culture that is familiar with law, one meets with a certain duality in the conceptual understanding of law.

Regarding the outstanding role that law plays in solving social conflicts, settling basic human relations and, therefore, safeguarding the final integrity of society (Varga, 1992), every regime of law has a characteristic form of appearance, which facilitates its recognition and identification, and thus, its use as a basis of reference to or justification for processes relying on the law. This appearance can take multifarious forms, but it is mostly connected with (1) certain peculiarities of the usual customary course of *social practice*, (2) certain peculiarities of the *decisions* made by authorities acting in the name of the law, and (3) a certain way and form of *enactment* by the bodies competent to pass laws (Varga, 1993). In contemporary Western culture, taking the ideal of modern formal law as its foundation, the law is generally regarded as an enacted normative text, an institutional system formally defined in such texts, in other words, as a merely formal standard taken as an instrument (Varga, 1996).

At the same time, it is beyond any doubt that this concept of law is not intended either to limit the diversity of legal phenomena or to replace its description. It is merely used—through specific formal indications and consciously undertaken simplifications—to make it easier and safer to find the path leading to the identification of the legal moment. Therefore, it does not limit the validity of the truth that both legal phenomenon and its instrumental

quality become visible exclusively through their influence exerted on society. The conceptual understanding of law as a functioning whole (in "law in books" and "law in action"; Pound, 1910) also involves traditions relating to the entire practice (jurisprudence with the judicial approach to it) and training of the legal profession, that is, the patterns of both professional and public attitudes about the law, the established methods of administering justice by 'applying' the law and—last but not least—the actual significance and role the legal complex has in the life of society, as components of the concept 'law', that is, of the law's ontological reality (and this is juristic deontology, taken as the ideology of the legal profession; Varga, 2012a). Viewed in this way, law is also an integral and, in extreme cases, dominant factor of the culture of society. What is more, it also conveys culture, because it is, as *legal culture*, basically a derivative of the general behavioural, communication-based and, in the first place, political culture of society; at the same time, as a relatively autonomous component of social culture, it shapes the culture of society as a whole.

The complexity of law is defined by its nature. In social existence as a complex of complexes [*Komplex aus Komplexen* in George Lukács' term], law plays a *mediating* role [*Vermittlung* in Lukácsian term]. It is differentiated from other mediating complexes in that it filters all social goals and movements through its own system of requirements by transforming all their tensions and conflicts into specifically legal objectives and motions. This way, its own *system of fulfilment* [*Erfüllungssystem* in the same terminology] makes it independent and distinct from anything that is merely social, i.e., anything differentiated as not pertaining strictly to law. It expresses its growing autonomy in explicit forms through entrenching it via an increasing number of formal symbols. At the same time, its indepen-

dence in the social total complex (i.e., its specific heterogeneity within the overall social hetero- and homogeneity) is only relative and illusory in the final analysis, because, in its entirety, the social process itself is nothing more than the aggregate of interactions given at any one time. In other words, every component in the social totality can only be as significant as the actual role it has played. Thus, only its real functioning in action shows what and to what extent is real in the claim of law to autonomy. To summarise: law is being shaped in interaction with the social totality. This enables its autonomy to develop at all but, at the same time, this makes its interaction relative and, in extreme cases, illusory as well.

2. Law and History

Differentiation between these understandings of law assumes a decisive importance when we examine the relationship between law and social change, as well as law and history, respectively. The law, seen merely as a formal instrument and in its form as an instrument, creates completely different relationships than the law, examined as a regime of orderly interactions in its practical functioning and social effect, which gets treated as an integral component of the life and culture of society.

2.1 Law as Instrument

In the development of the law as a mere instrument, the formally defined specificity of the legal sphere plays a near dominant role. Socio-historical factors have little if any direct influence on the shaping of this mere *instrument*. In other words, even motives that are purely incidental from the point of view of the historical process and concrete social challenge may have a decisive influence on how and through exactly what the instrumentality of the law will

react, that is, what will be transformed into what, and what it will develop into when it responds. In philosophical terms, the growing tendency of socialisation [*Sozialisierung* in Lukács' terminology; cf. Varga 2014] in social development explains this illusory autonomy. *Socialisation* means *mediatedness* gaining ground historically step to step in social relations, and *indirectness*, increasingly characterising interactions. It also means that directness and uni-directionality wane and gradually disappear even from apparently simple teleological processes. There remains nothing but interim mediations. Moreover, the process itself becomes increasingly multi-directional with several opportunities to develop toward various end points and, at the same time, it becomes socially conditioned, distilled to an increasing extent. That is, the other social complexes participating in this composite movement also display their relative autonomy and specificity in an increasingly pure and definite manner. Accepting this involves nothing but sober realism, as against the inspiring belief in universal evolution: *instrumental continuity* is recognised thereby as the main component in the development of law as an instrument. It means that new answers to increasingly new challenges are usually not generated through the development of new instruments but rather—for purposes of intellectual economy, and also due to the forces of habit, inertia and imitation—through re-interpretation, re-combination or transplantation of the already available ones. All this naturally involves a host of sources of errors, as well as the possibility that conditions completely alien to the nature and merits of the issue will gain a decisive influence. In this way, for example, the question of what old or foreign legal solutions were available or known in the given place and at the given time may assume a key importance when selections are made.

To give an example: let us consider how the regulation of responsibility for an ox goring a man to death was transmitted in the cultures of Mesopotamia for centuries—from the Laws of Eshnunna through the Code of Hammurabi to the book of *Exodus* in the Old Testament. Not only the identical substantive and procedural solutions, characteristic of the region, were inherited, but also the historically incidental extra regulation linking responsibility to one precondition, namely, that the owner had to be notified of the ox's inclination to gore, officially and in advance. Or, let us consider how the Scots law, having developed in the shadow of English law, took the decisive steps on the road to modernity in just a few decades towards the middle of the 17th century, while its conceptual system covering the fields of private law began to depart from the contemporary English tradition in order to achieve a final organisation according to the classical model inherited from Justinian. The explanation for the rapid change lies in the availability of certain treatises of law, which in the late 16th to mid-17th centuries relied on English sources and traditions in their practical material but turned for assistance in their exposition and systematisation to concepts and conceptual distinctions known from the Code of Justinian (Watson, 1974; Varga, 2014).

Therefore, our conclusion can only be that law taken as a mere instrument has a relatively free scope of movement in history. Our starting point here can only be that there is *no equivalence between means and ends*. Different means can serve the same social end with equal or, at least, similar efficiency, depending on the established traditions, habits and stimulations. At the same time, the instruments at the law's disposal constitute only one component—flexibly defining the general framework for action—of the influence exerted. This is so because, by itself as a norm-text,

the law is merely an abstract entity, which can only be actualised through the concrete practices of interpretation and social or juridical application (Varga, 1971; 2010). Consequently, it is futile to attempt to reconstruct human history by starting out from the law as a closed set of formalised texts, or to draw clear-cut conclusions regarding the law from the development of history. Naturally, parallelism undoubtedly exists. For example, "legal archaeology" is just as (though, in contrast to certain excessive opinions, I believe, not more) relevant regarding the exploration of the whys and wherefores of the historical processes of the past as the archaeology of working tools, practices of settlement or ritual habits and beliefs.

Referring to some examples, it can hardly be ascertained on the basis of economic or political conditions alone what was the determining factor in Western legal development that caused its splitting into patterns that diverged later on as the Civil Law and Common Law—despite the common Roman traditions (Stein, 1969; Caenegem, 1989). Equally, it is impossible to deduce from social development and its challenges alone why and how free contractual forms became institutionalised in one system, whereas in another system the legal construction of the trust—still unrivalled in its extreme malleability—became established (Bolgar, 1953). On the other hand, however, if legal regulation is taken as a starting point, a researcher influenced by our present culture may, sometime in the distant future, hardly be able to gather the harsh reality of history through reviewing, for instance, the Soviet Constitution adopted in 1936. This is so because it served as the normative basic charter for building Soviet society from the Stalinist period, through the post-Stalinist transitional years and the attempts at renewal by the 20th and 22nd Congresses of the Soviet Communist Party under Khrushchev, up to the new

Constitution adopted in the Brezhnev era in 1977. Or, how could any future researcher imagine the hardships of Hungarian history under the Soviet occupation, based on the early open and definite constitutional declaration of the right of public assembly? After all, the Soviet-patterned Constitution of the year 1949 may seem to have been severed through circumstantial regulation since the fall of the Communist regime in 1989/1990, although we alone, the witnesses of this history from the late 1980s until now, can know that all this simply reflects the replacement of mere verbalism with detailed regulation in order to generate a genuinely democratic practice.

The dilemma remains basically the same if the law as an instrument is not interpreted as a concrete solution, but as a form of normative definition of such a solution in a norm-text. Well, whether it be customary law, judicial law-making, legislation (codification) or the forms of arrangement of legislation (revision and consolidation), in most cases it is possible to pinpoint a clearly definable series of historical events that give the procedure or form concerned its typical characteristics, thereby also providing its ideal type. In this way, at the first approach, European customary law can be correlated with the Middle Ages, precedent-law with the English legal development, the 'code' with the work of Justinian, and codification with the civil law issue of the French Revolution. However, taking a closer look at these, it is immediately obvious that this is but the absolutising projection of certain achievements of European civilisation as universal. This is inadmissible, because it would mean the reduction of individual products of cultural development to their local conceptualisations in the form of so-called "folk-concepts", characteristic of typified carriers of culture—in other words, extending what is historically particular to being universal. In any event,

whichever variation of a procedure or form in law manifested in the history of the development of civilisation is explored, it immediately becomes clear that, under differing conditions, any of them could successfully fulfil any social function that the law has ever been able to serve (Varga, 1991).

Therefore, the functional typology of codification is identical with the typology of the law itself. Equally, it can be said that precedent-law, as it appears in the British, American, South African, Israeli or so-called mixed legal systems, could successfully serve both socio-legal preservation and change everywhere. In a similar way, customary law, which developed in Europe during the Middle Ages, had a different role in Hungary during the 16th and 17th centuries, divided into several parts by Turkish and Austrian conquerors, where its non-official consolidation by Werbőczy's *Tripartitum* (Werbőczy, 1524; Rady, 2015) served as an effective means of preserving national, and within that, legal unity. And obviously, even farther away is the role that so-called primitive customary law could play in its own apparently formless regimes.

2.2 Law as Culture

However, the moment that the law is viewed in its social reality, i.e., in action and together with the preconditions and effects of its functioning, we come to a different conclusion. In this case, law is regarded as a part of general social culture, as something embedded in this (historically determined and, at the same time, history-shaping) culture. It is exactly due to these cultural roots and the corresponding attitudes and mentality that it can sometimes display surprisingly strong continuity, and even, at times, resistance, in the face of the storms of history, which may compel the most drastic changes. Therefore, while the fate of the law as a mere instrument is the direct issue of actual

might (whatever it may be), it can turn into a powerfully autonomous and self-asserting entity as a component of history if it grows into a tradition. For the law, conceived of as a part of general culture, is a complex phenomenon which shapes history from the outset. Naturally, it is clear from the point of view of any historical or socio-ontological reconstruction that this does not involve a uni-factorial definition but, in the first place, a *filtering role that gives a form*, and through this filter, also selects, shapes, and turns it into specificity. It means that the legal complex (in a way similar to any social complex that has developed its relative autonomy and peculiarity) reacts to the challenges of its environment in its own way. It reacts to the most heterogeneous inputs with its homogenising outputs, which themselves are quite external and alien to the inputs arriving from the environment. In this way, it will eventually shape the practical realisation and effect of the outside changes, as its relative autonomy and developed specificity enable it to integrate these changes into its own system, by adjusting them to its own structure and structured reaction. And such a well-developed (though relative) independence of action and reaction can, in extreme cases, determine the nature and even the outcome of the events.

Let us consider how the Confucian tradition—invariably, but with extreme adaptability—has for thousands of years shaped the concept and the entire fate of the legal phenomenon in China and Japan. This is so because the Western pattern of social regulation, embodied in the guarantee of individual rights and codified in all its details in advance, ready-made for application, often continues to fight for its recognition only from the periphery of judicial practice, although the modernisation programmes of socio-economic transformation aimed at promoting the Western pattern and mentality have for almost a century set as

their objective the replacement of this traditional legal ideal. Or, let us consider the lasting effect of the mixing of the Byzantine and Mongolian heritages on the development of the genuinely Eastern (orthodox) region of Europe (from Russia and Bulgaria to Romania and Serbia) primarily with respect to the exclusivity, unity and charismatically rooted legitimacy of power, the identification of a variety of state activity with law and the lack of legal constructs (like the hypostatisation of a 'social contract') designed to differentiate between society and the state—at least ideologically (Szamuely, 1974). Or, let us consider how the ancient fundamental freedoms—one after the other subdued and made dependent on royal might and grant by the European absolutisms—remained intact in the British legal development, and became the basis of a legal culture firmly fenced round with legal guarantees that is striking a characteristic of the Anglo–American legal mentality even now. This legal culture is one that has so far successfully avoided the threatening perspective of having its values degraded into mere instrumentality and being forced to experience the self-destructive defencelessness of legal positivism in the face of power, and the destruction caused by legal machinery directly controllable through political impulse.

3. Law as History

All this leads to a double conclusion: if the law is viewed in its entirety, and not as stripped to a mere instrumentality, it turns out to have its own history as well, and through this, it also acts as a factor shaping the history of mankind.

It is remarkable that the programme of *historicity* was formulated in contrast to the emptiness and lack of productivity of scientific positivism in the middle of the 19th century: "We know only one single science, the science of history." (Marx, 1932, p. 10) However, it would

be incorrect to arrive from this at some sort of a mystical history—one that is complete in itself, in which every achievement and stage of development is nothing but a simple derivative. This doctrine establishes the priority of the logic of history, embodied in evolvement and formation, over any immanent logic; at the same time and in contrast to any unidirectional causal determinism, it also carries the presentiment of the complexity of historical self-determination. By now, we are already aware that, ontologically speaking, existence consists of interactions actually taking place. The total motion emerging from these at any given time will determine, among other things, which side proves to be stronger in a given interrelationship, to be "over-riding" or "over-weighty" as the "predominant moment" [as expressed in terms of Lukács]; in other words, which one will, in the final analysis, define the direction and outcome of the motion resulting from the interaction. In addition, we also know that, due to the progress of socialisation (i.e., *Vergesellschaftlichung* in Lukácsian term), which increases the number of complexes participating in the overall social movement and the evolvement of their specific independent ways of reaction), it is hardly feasible to envisage or programme with certainty what will exercise the final influence on the given process and how it will do so. And this necessarily leads to the conclusion that the *totality approach* provides the only theoretical framework for the successful reconstruction of what is actually taking place in social processes. This approach starts out from the emerging whole to establish which factors have successfully participated in the process leading to this whole, given at any time. It also starts out from there when it tries to assess *a posteriori*, where and in which direction the overriding factors exerted an influence, as well as how and to what extent they were shifted in the above mentioned process of mutual definitions.

For example, it would be worth analysing how the overriding role, usually attributed to the economic sphere in Marxism, is differentiated and how it actually disappears in the case of the countries divided after the Second World War (for instance, Germany and Korea). For the economy, as a partial element of the social set-up, is conditioned on politics, whereas politics is directly conditioned on external power relations. Therefore, it is politics that performs the basic switching (determining the direction) at the first partings and plays a role in all successive shiftings of points as well. And what all this involves is not the replacement of a uni-factorial determination of the given kind by one of another kind, but a complex process of determination, including a set of partial self-determinations, in which even those so-called overriding factors at the most may have a role under certain circumstances, whereas in other circumstances they give way to a movement possibly in an opposite direction, perhaps running counter to the former. (This example is all the more valid, because this co-ordinating role of policies and human intervention can be observed not only in the case of those divided societies but also in the general progress of all societies, as well as how they drift into conflict, handle their internal crises and shape their manner of reaction and ability of adaptation.)

The second conclusion follows from what has been said above about the law as a component of culture. At the same time, it is also directly connected with the relativity of the law's autonomy in society. How do I understand this? As is well known, when considering the progress of socialisation we have to take into account increasingly complex processes of determination in which the place of law is increasingly less defined through conscious planning, while other factors come easily and (at least, measured on a human scale) enduringly to the forefront to assume an

overriding role, downgrading law to an ancillary position. In such a case, we can fight for the protection and further development of the values of civilisation, embodied by the law, only through deepening the roots of the law, taken as a component of culture. This means that fighting for law and order is not only a merely instrumental task to be considered within the context of social challenge and legal response. For the fight for law and order presupposes a striving to establish (and re-establish) tradition and found (and re-found) culture. This explains why a peremptory decision is not enough to establish and solidify law and order. It can only be the issue of the consistent work of generations to make political and legal culture into an everyday standing practice, imbued and also identified with the basic cultural values of society. Therefore—and it is now on the Eurasian agenda spanning from Central Europe to the Pacific (Varga, 1995; 2008)—, any struggle for law and order is at the same time a struggle to establish well-rooted legal traditions, which prepare for the future by the evolvement of their specific values, and, thereby, contribute to ensuring an optimum defence against the possible storms of any future.

In our age, several nations struggle with the lack of adequate, socially and politically desirable traditions. The survival of old—and now sometimes dysfunctional—mentalities and ways of behaviour is most often explained by the lack of traditions. However, as soon as there is a chance for development and to draw upon the local (national, etc.) past, it emerges that the actual problem is by no means seated exclusively in the lack of antecedents or the need to start from the level of a *tabula rasa*. The underlying difficulty is that the tradition concerned did not prove to be strong enough to be properly integrated into the general social culture, to be able to sustain, regenerate and renew itself, and withstand, in unfavourable times, being carried

away by currents of a different direction, and eventually reduced to a small fragment retained in past memory.

In the Central European region, for instance, there is much talk about the lack of democratic traditions. What reflects the existence of this lacking is, paradoxically, nothing but speaking about the lacking at all, that is, admitting a discontinuity, which in itself is an attempt to cut off the threads, although perhaps invisible yet in effect, leading from the past to the present, and to sweep the still existing traditions from memory—this way further encouraging the reduction of their already meagre resources. Even if, for example, in the Hungary of the era of "the actually existing Socialism" (as it was officially named, somewhat embellishingly) it was not to become the usual practice to subject laws to the control of constitutional review, and administrative decisions to the control of administrative courts, and thereby make the rules of the state-and-society-game a public affair, while, at the same time, and in an indirect way, re-legitimising them—well, all this cannot obliterate the fact that, before the Communist take-over in this country in 1948, marking a caesura in the survival of traditions, there existed a considerable rural and provincial self-government, a multi-party system, a tolerance that also applied to the political opposition (only provided that they too observed those rules of the game), a flourishing life of associations and societies and, what is more, in addition to the judicial control of election, a rather well-developed supreme administrative jurisdiction; and, in the final account, all this does embody, alongside the numerous ideas and achievements of the national independence struggles and the lessons of parliamentary battles during several remarkable decades of legislation, a democratic tradition and stimulation that is not at all negligible. However, the mosaic-like character of those Central European traditions

speaks of one certain condition more eloquently than anything else. Notably, in their totality, they were still fragmented, stunted and inadequately integrated into community practice and values. Therefore, as traditions, they failed to have roots deep enough to withstand the winds blowing in the opposite direction, and to filter at least some of their direct effects through their own medium. Or, their extinguishment is simply proof that they did not have enough strength to survive, in other words, to exercise an effective influence against the actually overriding factors. (It is an open issue, fortunately unanswered by history, what would have been the destiny of Western Europe and England in case of an effective control—military occupation followed by alleged (but terroristic) consolidation—by the Red Army's Bolshevik barbarism.)

Repeating the basic question: law as history? The message conveyed by an unbiased examination of the issue is that the ethos of theoretical and practical work on the law can only be born when the jurist realises both the significance of the given power to shape society, and the maxim according to which the jurist, as an engineer of the formal mechanism of exerting influence and mediation within society, by working in the present, labours for the future as well. As a specialist of law taken as a culture, it is then possible to sense indeed that the object and also the issue, or the end product, of his or her work is history.

4. The Law's Historicity Disciplined

Accordingly, history is one of the main poles of relationship to law. By historicity of law not only the purely internal and technical components of the law's individual instruments are meant but also the embeddedness of legal phenomena in contexts of development; that is, the concrete *hic et nunc* of their evolvement within the paradigm

of challenge and response, as Arnold Toynbee once termed it (Schmand and Ward, 2000). On the other hand, historicity emphasises the factor of traditions in legal development. In the modern era three currents of legal thinking focused on such historical inquiries: the historical school of law [*historische Rechtsschule*] in Germany, historical jurisprudence in England, and Marxism—which was born between the former two but developed in its full display in a more recent past. All three currents were variations of the evolutionism dominant in the 19th century, bringing the idea of legal evolution into focus, according to Peter Stein, an "assumption that changes in the law followed a predetermined sequence of stages parallel to stages of social evolution" (Stein, 1986, p. 294).

4.1 Historische Rechtsschule

The German historical school of law was formed at the beginning of the 19th century in opposition to local efforts at reforming civil law through codification. It intended to prove that law was something other, and more, than the mere product of legislation and that its contents were not governed by the allegedly universal comprehension of humans but rather by the particular character of the society to which it was applied. "Statutes are not the only sources of juristic truth"—announced Gustav Hugo's program (Hugo, 1812), and Friedrich Carl von Savigny—inspired by Edmund Burke's conservatism and Johann Gottfried Herder's concept of nation—described law as "the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin", which was developed "by internal silently operating powers, not by the arbitrary will of a lawgiver" (Savigny, 1831, pp. 24 and 30). Startled by the romantic terminology of *Volksgeist*, the famous 'popular spirit', its critics declared Savigny's school to be non-philosophical

[*unphilosophische Schule*] Gans, 1827, p. 163), a-historical, moreover, anti-historical [*ungeschichtlich, geschichtswidrig*] (Gierke, 1903), as having recourse to biologistic mystification (Schield, 1978–1979, p. 295) if not simply actualising the past (Klenner, 1978–1979, p. 141). Yet, in the light of today's complex historico-sociological and anthropological reconstruction of the factors and processes of legal change, it can rather be interpreted as an early and sensible description.

4.2 Historical Jurisprudence

Historical jurisprudence was born at Cambridge from Sir Henry Maine's lecturing efforts at providing a proper legal theory for his students; this would meet the requirements of a positivistic scientific ideal but would overcome Jeremy Bentham's and John Austin's speculative and unjustifiable stance in which law was just the command of the sovereign. He found both example and analogy in a magisterial work in classical foundation of geology (1830), according to which changes in the earth's surface were not caused by periodic and unpredictable, sudden catastrophes, but were rather the result of regular physical forces in constant but gradual, and almost imperceptible, change (Lyell, 1830–1833; Stein, 1980, p. 88). Ironically enough, neither the evolutionary line he portrayed "From Status to Contract" nor "Fiction, Equity and Legislation" he had defined as the three successive instruments of legal change proved to be sustainable. The lasting effect of his classic *The Ancient Law* (1861) was that it provided an analytical framework to approaches that later became known as legal anthropology and legal sociology (Szabadfalvy ed., 2000). It is to be noted that the Cambridge commemoration of this magisterial oeuvre's having been published 150 years ago followed in Budapest with Peter Stein's presence, as the second translation ever made—after Мэн (1873) had been done—was

provided in the then Budapest by a contemporary Hungarian legal philosopher; this case also complemented by the latter's notes, annotations and postface, in length and depth of an added monograph themselves (Maine Sumner, 1873). For the translator (1846–1901) was a famous social scientist himself, authoring, among others, Pulszky (1888) as well.

4.3 Marxism

Marxism forged a genuine principle from historicity by taking evolutionism seriously. "The anatomy of man is a key to the anatomy of the ape. Rudiments of more advanced forms in the lower species of animals can only be understood when the more advanced forms are already known." Well, this thesis of Marx from his *Grundrisse der Kritik der politischen Ökonomie* (1857) throws light upon his belief that the question on the nature of the open, latent potentialities inherent in the paths of development can only be answered retrospectively as assessed from the more perfected state(s) actually achieved. It is exclusively this perfected state that offers criteria for defining what the meaning and actual significance of the perspectives on development may have been (Varga ed., 1993). Today's theories are opposed to this. By respecting the principle of historicity, they do not construct any sequence of events as embodiments of the laws (taken as of teleologies) of any philosophy of history.

4.4 Conclusions

According to Frederic William Maitland, "[h]istory involves comparison" (Maitland, 1911, p. 488). Comparative approach has already shown that

(a) law lives its own life to a considerable extent, largely independent of its direct conditions, and that

(b) it develops mostly by following its own inertia through borrowing from alien patterns (as noted by Alan Watson) (1988).

Today's more differentiated knowledge about law (Varga, 1994; 2012b) suggests that

(1) Law is composed not only of rules, nor merely of rules and principles. In solving social conflicts, law, through an intermediating filter, is primarily a culture of mediation (in the philosophical sense of Lukács' *Vermittlung*) with its own sensibility, conceptualisation, ways of channelling, and skills of handling. It provides a medium for having recourse to principles and rules in the resolution of conflicts, through which the principles and rules referred to in the procedure obtain their standardised (that is, interpretable and justifiable) significance and meaning in the given culture.

(2) This very culture is historical, as it is carried on by human praxis traditionalised from the past, reconventionalising conventions through their continuous re-actualisation.

(3) Therefore, neither immobility nor leaps in development can be characteristic of law. Furthermore, this is why neither following external patterns nor purely internal development can be its exclusive characteristic. What is actually the case can only and necessarily be the outcome of some compromise.

(4) This compromise is historical by definition. It is aimed at providing a pragmatic response, and it can only do this through relying on the memory of the past and/or the experience of others, as processed and filtered through its own medium (informed by its world-concept, ideologies, Utopias, and so forth) (Varga, 1978 and 1979). It has to be used, not simply understood. Therefore, to talk about its *mis*understanding could only prove the *mis*perception of the basic setting, the ontological nature of which cannot be

understood in mere epistemology. „Je prend mon bien où je le trouve" [I take my value where I find it]—said Molière's character, since the only thing that matters is not "What is it made from?" but "What is made out of it?".

(5) Throughout its life, the multifactorial character of law becomes one of the sources of this multifactoriality itself. Enacted rules (*legislation*), patterns enforced by authoritative decisions (*precedent*), and behaviours accepted as legal by the community (*custom*) compete with each other as practical components of law, in a constant maelstrom to determine what will prevail as the law in the given society. This is to say that the law's actual composition can be reshaped by either side. For overcoming others can only be temporary, and the struggle for which of them is to dominate will ever continue.

(6) In consequence, positive law is exposed to modification by alternative strategies: through formal (textual) amendments and/or by changing (re-conventionalising) its contextual (conventional) environment (Varga, 1984).

(7) In a historical perspective, all effects cumulate and finally will conclude with a change in law.

Literature

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