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*From Legal Customs To Legal Folkways**

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Is the inclination to neophyte exaggerations a symptom of our century or merely inevitable teething problems, characteristic of an epoch carving out new scientific approaches? The phenomena called "modern statehood" by Marx and "modern formal law" by scholars striving for a reformation of Kantianism are of fundamental importance in Marxian legal thought. These phenomena are not only central subjects of investigation, they also fill an organizing role which can determine both the direction of jurisprudential thought and its internal logic. Perhaps it is not necessary to prove in detail that the institutional development of several millennia has culminated in modern statehood which is seen as integrating and organizing society at the highest possible level. Nor is it perhaps necessary to prove that legal development has advanced to modern formal law which in its turn assures functions to ensure that integration and organisation of society happens uniformly and according to plan.[1]

All this seems quite well and acceptable, but can we draw the conclusion that modern statehood and modern formal law, which are merely the products of a few centuries of European development, are together of such significance that everything that did not pave the way for them should be considered as devoid of interest? It is also possible to question the assumption that the relation between state and law is the relationship between correlative entities. Does not this assumption of the relationship between state and law allow itself to automatically

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function as a criterium for defining in absolute terms the scope of jurisprudential research?

In order to reconstruct the basic path of legal development, the points mentioned above are undoubtedly of selecting significance. Nevertheless, their contribution may not become so exclusive as to block interest in phenomena outside the main direction of development or to impede the exploration of the legal complex, by eliminating the phenomena in question to the scope of jurisprudential investigation. Comprehending the past through its development to the present (i.e. the idea formulated by Marx, according to which the anatomy of man is a key to the anatomy of monkeys) has tended towards revealing the "historical perspective" and not towards reducing history merely to a restatement of it.

In Hungary, historical and theoretical research within legal science have not met each other in a way that the Marxian Utopia of history conceived of as a single science, could be realized. Historical approaches to law still wrestle with tasks before setting up theory: that is, legal theorizing strives to base itself firmly within a Marxian theoretical framework by borrowing notions and views from philosophy and then applying them, instead of starting from development, the very past of the law. The concepts of assessment and restitution, customary factors in legitimating state power and legal machinery; customary law used as compass, framework and basis of reference for legislation; adherence to all that is traditional, that is deducible from the "good, old law" as a primary source of legal validity: the ordering role all these items might have played for more than thirty centuries seem to shrink to mere ideological references as compared with the emphasis on the recent past centuries which contain the organization of modern statehood and its formal law.

Where does the problem lie? Influenced by precedents such as the historical school of law in Germany, legal anthropological discoveries of primitive law influenced by practical considerations of post-colonial powers, and the revelation of a "living people's law" which existed unaffected by the official law in remote areas of Central-Eastern Europe, a movement began to develop in Hungary at the turn of the century gaining strength during the 1930's and 1940's. This movement aimed at cataloguing rural customs within a framework which allowed for the exploration of modes, customs, folkways etc, of the Hungarian

people. The subject and purpose of this exploration was not merely to discover an informal law living a life beside the official legal system. The researchers were in fact inspired by ideas, which proved to be romantic insofar as they saw in the ensemble of norms collected by them the historically authentic set of relationships characteristic of the Hungarian nation. That is the researchers worked with the theoretical possibility that by discovering a basis of innate norms and translating the basis of such laws to state legislation, would lead to a social reform renewing the whole society. The idealistic nature of all these ideas was demonstrated nearly three decades ago by a cultural team of researchers working along side the Central Committee of the Hungarian Socialist Workers' Party. The team demonstrated the weakness of these romantic ideas by showing their susceptibility to, for example, German racial thoughts. Romantic ideas about "people's law" could easily have been exploited in that the ruling policy during this time had in fact attempted to manipulate and also to integrate the whole movement to its own aim and system.[3] At the same time, a purge was performed of theoretical legal thinking and both the legal character of the non-official law and the admissibility of respective investigations connected with legal policy considerations were denied.[4]

Although the mission of "ideological criticism" might have been suitably fulfilled by analyses of Kuscar,[5] I have to note that ideological criticism does not aim at elucidating a particular event's specific qualities: it aims at criticism of presuppositions which, in a given social context, made the conception of the event in question a weapon in the continuation of class struggles. Consequently, a theoretical answer to the place of the living law cannot be substituted by ideological criticism of the development of formal law.

During the past two decades, no theoretical advance concerning the relationship between living law and formal law has been made. Both ethnography and jurisprudence have done their own job, that is, continuing their own investigations without striving for a inter-disciplinary approach. Ethnography has continued to mapp customs and order of the peasant society, sociology of law has continued to take interest in, among other things, the traditional forms of shaping social behaviour, preserved as a historical heritage,[6] even though the sociology of law's attention is now focused on the disfunctional effect of the

exclusive or overemphasized reliance on the law and not on the separation of legal phenomena from other spheres.

A Hungarian scholar, E Tárkány Szücs, devoted nearly 50 years of his life to legal ethnographical research. After several books[7] and a number of studies he has now enriched the literature of legal ethnology with an imposing, masterly syntheses, *Magyar jogi népszokások* (*Hungarian Legal Folkways*, Budapest: Gondolat 1981, 903 p.) The monograph is an attempt to offer both a systematic survey and at the same time a historical, ethnological and legal analysis of legal folkways in Hungary 1700–1945. The ordering principle the author adapted is based on a logically developed system. Entries include for example, *person*, including the person and society in terms of birth, death, personality and rights; *marriage*, in general choosing the partner for life, engagement, marriage service; *family*, in general, relationship and affinity; *ownership*, in general original acquisition, labour, sale of goods, estate succession; *control; conflict;* and *coercion*. All aspects of Hungarian life are classified and compromised according to the author's own knowledge and what has been gleaned from the entire research of Hungarian ethnography, printed as well as unprinted original documents and vast number of fieldwork notes which are the results of work carried out by himself and others.

As for the "people's legal traditions" in general, Tárkány Szücs emphasizes their nature embedded in practical life, their historical character and adaptability as the main features of his analysis (p. 30). According to his definition,

> by legal folkway a rule influencing human conduct is meant, which is being established and enforced neither by the state, the church or any other national organization, nor by a person exercising power, but which has been developed, maintained and traditionalized from inside as a result of actual practice; it expresses the conviction of the majority of different, more or less comprehensive communities of the society on the basis of their supposedly or actually existing autonomy; it serves for the harmonization of the interest asserting themselves in social relations concerning especially persons, material culture and public affairs, it formulates interdiction, permission or command and is being enforced socially by traditional means. The conditions of the realization of this rule are, first, its experimental character, secondly, the common conviction of its justness, and, thirdly, its lasting preservation in the interaction betwen the individuals, the community and the authority. (p 41)

The "genus proximum" (the rule-character) and the "differentia specifica" (the legal nature) which are circumscribed here will be defined in yet another way. In connection with qualifying phenomena as legal folkways, he writes: as to the human conducts deducible from various oral traditions, description and documents,

> their regular repeatedness, the shaping and the increasing frequency of the cases, as well as their customary character are defined depending on to what extent they have been socially recognized as components of a rule; their legal nature depends on whether the relation of life in question has been the subject of legislation either by contemporary positive law or by states in their history". (p 28)

Therefore one of the criteria legal ethnology adopts will be the law, namely the law issued by the state. It is precisely this criterium that formed the backbone of one of Tárkány Szücs's earlier definitions: it is

> human behavior... which is accepted and applied customarily by any socially defined community, even if it is with the aid of fiction it enters the field of law.[8]

This is what appears also in Gy Bonis definition. His definition is as follows:

> legal custom: custom of legal contents or significance, valid in a small community.[9]

Eventually Szücs admits that it is in fact "quasi-legal character and significance" which are the main features of the subject of legal ethnology. And so in connection with a correction in defining his subject as *legal* "folkways" he explains that the point in question is not some separate legal entity but one of defining the *constitutants*, or aspects, or elements of organic and coherent folkways, only isolated by the researcher:

> legal folkway is not differentiated from other folkways; people cannot make any difference between folkways in general and legal folkways.[10]

Thus one can conclude that it is not the present-day conditions of law that should be projected back to past conditions to gain an understanding of law, but law itself should be conceived of as the product of continuous development. That is, if we start from the social functions to be traced behind a given event in order to understand it, I think we will obtain conceptually more certain puncture of the law's societal development:

□ The "etatisation" of the law, that is the law manifests itself as the law of the state, expresses a universal tendency in historical development. For now the quality of the law as being "law" is merely the result of a self-qualification directed to state activity, law is defined as what appears as such in the actual practice of state organs. "Customary law" then is a variant of law defined in this way as a) a historical antecedent, then b) a framework and finally c) a supplement of enacted written law which is conceived of as representing a higher phase of development.

□ □ Because "legal custom" or "legal folkways" have other qualities they cannot be equated with customary law. Notwithstanding, the legal complex as a partially social complex is not considered exclusively from the point of view of another partial complex, the state, but from a social totality, if one starts with the basic functions the state and law have been established to fulfill, there will be a relevance in view of the legal complex.

Notably, legal custom fulfills basically the same functions of law in societies and in developmental phases of society in which, due to the logic of the historical process and/or to other special reasons, (a) there is no proper state and law organization, (b) law does not reach large number of social groups because of a low-level of organization or because of indifference; or (c) law fails in its actual practical implementation. The first two cases (taking into consideration the ancient and present-day forms of primitive law as the subject of legal anthropology and ethnology) seem to signify a *sui generis* culture which is conceptually disparate. Consequently, even a legal custom which arose from a failure of the organization of state and law (i e the third case) becomes part of a subculture only if it ceases to be a historical relative disparate phenomenon, by becoming integrated into the state and law organization as instead a variation of law, asserting itself through its practical realization.

□ □ □ A legal custom is transformed into a "legal folkway" as the state and law organization assume and fulfill functional concerns in their entirety. A legal custom continues to exist only within a functional framework as one of the surviving folkways, as a flavorable supplement to the state and law organization, having perhaps merely symbolic significance.

The very subject of qualifying behavior as legal custom or law or of establishing firm criteria for the process of separating the behavior is difficult. The boundaries for the sphere of the *law* are drawn by the *practice of its being recognized as such by the state.* It

means that within the scope of the enforceability of state power, the whole process is in point of principle arbitrary, and is in point of fact a function of expediency and of other such considerations which have a part in the exercise of power. On the other hand boundaries for the sphere of *legal custom* are being traced out *by the customary practice of the community recognizing it as traditional.* Here is also room for manipulation for the actual boundaries are always only given in the spontaneous attitudes of the community.

Customary law and *legal custom* are phenomena in a continuous historical formation. However, it seems to be verifiable now that in their historical genesis they have been derived from the same roots, consequently, they are separate formations and not subdivisions of each other. At the same time, it is to be noted, however, that their relative independence is only transitional, even if it spans several millennia.

In contrast to the merely spontaneous practice of community, *the law*, is characterized by externality and reification, due to its state organization, and, as a surplus effect of its force, its state organization will put an end, sooner or later, necessarily, to the parallel paths and ways of customary law. Integration is the final victory of the law, transforming all that has substance in common into a division of itself.

Independent of the interpretations of the connections between *law* (i.e., customary law and the written enacted law), *legal custom* and *legal folkway* and also their historical change, one thing may be taken for granted: none of them can be seen as a monolithic mass with clearly demarcated boundaries. Once they have obtained parallel existence, law and legal custom become differentiated from one another as to their respective scope of territory, persons and subject though at the same time they remain norm systems complemented to and even to some extent correlated to, each other. And owing to the circumstance that their recognition as a specific quality is a function of different criteria, *viz.* the recognizing practice of the state resp. of the community, they may have common domains along their borders. In point of principle this commonness is always transitional, although it can last for long periods. Correspondingly, the connection between legal custom and legal folkway can be similarly characterized.

As to the present and the future of legal folkways, some conclusion can be drawn from Kulcsár's statement. Namely,

provided that "what are called legal customs are in their great majority connected with traditional social ties, particularly family ties in the traditional sense, or else with the society of village as a traditional community" ("Ethnological research . . .", p. 23), their mere survival even as a lag is a function of to what extent the decay of traditional communities of traditionality as a social ordering principle will be irreversibly perfected by social integration.

By way of an epilogue, in his *Magyar jogi népszokások* Szücs refers to situations which he consider the germs of legal folkways, taking shape now on a larger social scale. He sees excessive rents and tipping as a distortion which covers also a trend to re-feudalization of the present-day Hungarian socialist development. The expansion and devastating effect of these have become headstrong due to the inconsequence and powerlessness of institutional solutions which are aimed at making the economy functional and efficient. This is the reason why the law cannot impede the development of legal folkways. As the most it moderates but at the same time legitimates them, although both *excessive rents and quasi-obligatory tipping* are based upon taking advantage of unequal situations in a unilateral way and, as suggested by the historical analogy with acrid irony, "in their more dangerous formal structure these remind us of one of the most odious institutions of the feudal era, *viz*, the so-called 'dry toll' of the landowners", when, as a matter of fact, there was no more services establishing the title of toll (p. 827). Tárkány Szücs does not give case studies here, but indications only. But in any case if we wish to sketch a line of development according to the logic of legal folkways, this can foreshadow a frightful prospect.

It is open to question, however, how one of the elements of the law can come to the fore. The element I have in mind is generally not a point of the usual definitions of law, though its existence is testified by history as it grows a decisive moment in critical situations. I mean the *legitimacy of the law*, i.e., the minimum consensus in the law as the main agent of social ordering issuing in law and order. Historically, the law was first legitimated by its customary nature, later by the lawgiver's charisma supplementing it. This charisma in its only rational content has lately become laicized in so far as being transformed by being built, into the expediency of legislation. As is known, the legitimacy of modern formal law is reduced to its formation according to the law's formal requirements and that is to say that the mere

possibility of taking into consideration the content of that legitimacy is eliminated by a reference to the peculiarly sovereign (absolutistic, then democratic) constitution of the state. However, not even a relatively settled practice legitimates, if the cases is a naked fact of taking unilateral advantage of a power situation. Nevertheless, if it becomes established institutionally by being integrated in a legal system, it will also be covered by the legitimacy of the entire system. An appeal to natural law (reminiscent of Antigone's gesture) can however make an attempt to illegitimate it. The question is, however, not merely the ideological background of acts but also the reified functioning of a reified system. That is why the "objectified" quality of its "legal" character cannot be altered by a contradictory ideological judgement.

On the other hand, in the case of legal folkways there is a possibility of making this quality unattainable or of destroying it. I mean the distinction G. Lukács considered important enough to emphasize both in 1920 and 1923 in his *Legality and illegality*,[11] as still insoluble and not even present in the masses' consciousness in making use of a revolutionary situation. This distinction is made between the prevailing law and order regarded as *the only authentic and legal law* and as a *mere factor of power*. In the latter case,

> the law and its calculable consequences are of no greater (if also no smaller) importance than any other external fact of life with which it is necessary to reckon when deciding upon any definite course of action. The risk of breaking the law should not be regarded any differently than the risk of missing a train connection when on an important journey.

The historical example of "dry toll" is peculiar in so far as it is not socially mobile but instead steady. And permanently assigned roles were concerned, which could obtain the surface or the semlance of legitimacy due (1) to resignation, (2) to accepting it as something derived from the very structure of the system, and also (3) to the ancient wisdom according to which even if it is such, *this* is the power. Distortion of socialism in Hungary arises from basically unsolved but not in point of principle unsolvable problems. Consequently, I would like to believe that there is an opportunity of choosing between accepting the practice as a normative standard and viewing it as a mere environmental component which has to be taken into consideration on rational grounds of expediency for the time being. At the same time, it is

obvious that such a distinction in itself would not cure reality; at best - if approvable - it can promote the restoration of it on the level of and simultaneously for theory.

Notes

1. Cf. Varga, Cs "Moderne Staatlichkeit und modernes formales Recht" in *Acta Juridica* (in press, sect 1).
2. Should the case be that latter, historical science would be similar to political ideology only taking in respect those who, in order to support the gained victory, are being considered as ancestors or allies. It should be noted, however, that the role of political ideology is nonrecurrent and, consequently it cannot be repeatedly used, as George Orwell nicely formulated it, to foresee the past.
3. Kortárs, II (1958 p. 9.
4. Kulcsár, K. "Anépi jog és nemzeti jog" (Peoples Law and National Law).
5. Kulcsár, K. *Állam-és Jugtudományi Intézet Ertesitöje, IV* (1961) 1-2, ch. III-IV.
6. Kulcsár, K. "Ethological Research into the Law - Today" in *Comparative Law - Droit comparé 1978* ed. Szabó, I & Péteri, Z (Budapest: Akadémiai Kiadó 1978, pp 23 et seg.)
7. *Márély népi jogélete* (People's Legal Life in Mártély) Kolozsvár 1944; *Vásárghelyi Testamentumok* (Testaments From Vásárhely) Budapest 1961.
8. Tárkány Szücs, E. "Results and Tasks of Legal Ethnology in Europe" in *Ethnologica Europea* I (1967) 3 p. 215.
9. *Magyar Néprajzi Lexikon* (Hungarian Encyclopedia of Ethnography) II, ed. Ortutay, Gy. Budapest 1979 p. 685.
10. Mártély Népi Jogélete, p. 43.
11. Lukács, G. "Legality and Illegality" in *History and Class Consciousness* (transl., R. Livingstone) London: Merlin Press 1971 p. 266, 263.