quelques suppléments demandera de longues années à cause des problèmes de publication. Nous avons tout simplement tenté de démontrer et exposer le caractère général des conférences et quelques débats provoquant des vives repliques en illustrant qu'au cours du Congrès le résultat de beaucoup de recherches historiques, un grand nombre d'idées, de suggestions et de propositions ont été soulevées, mais leur élaboration n'était pas de valeur égale et dans un grand nombre de questions elle était insuffisante et incomplète.

C'était également le point de départ de la grandiose conférence de synthèse prononcée par le Secrétaire général Gilissen à la dernière session du Congrès. Il y a ajouté que le nombre des conférences s'est accru d'une façon trop extensive à l'égard des limites de temps des délibérations et, en conséquence moins de temps et moins d'énergie ont été laissés à la discussion libre bien que dans plusieurs cas cela a réussi également.

En tant qu'un des résultats significatifs du Congrès pouvait être enregistré, continuait M. Gilissen, la prise de position développée au cours des débats était, que le droit positif, les principes des lois sont souvent différents de la pratique réelle. Il s'est produit plusieurs fois dans l'histoire que les beaux principes promulgués n'ont pas prévalu et le despotisme a vraiment régné (il a qualifié comme telle la dictature Jacobine de 1793-1794 également.) Sur la base des conférences et des débats il n'est pas moins facile de déterminer la notion de l'individu et celle du pouvoir. Sans aucune doute tout homme est considéré comme « individu » mais le citoyen seul, titulaire des droits est l'homme qui, en vertu des lois possède la capacité de prendre part sous n'importe quelle forme à l'exercice des affaires publiques. L'intérêt de l'individu a été protégé parfois avec plus grand succès par les corps constitués avant la promulgation des droits de l'homme que ne le faisait plus tard l'État. La notion du pouvoir a également changé. A l'époque féodale beaucoup de pouvoirs existaient : pouvoir impérial, pouvoir féodal et pouvoir ecclésiastique. A l'encontre de quelques uns de ces pouvoirs l'individu a réussi de trouver protection au sein du corps constitué dont il était membre, mais il ne trouvait pas protection à l'égard d'autres pouvoirs. Dans l'État bourgeois aussi il existe une divergence du fond entre le pouvoir étatique et la conviction publique, l'opinion publique. L'opinion publique ne réussit pas toujours à diriger le pouvoir étatique. Mais, selon sa vue, on peut également discuter dans les pays socialistes à qui le pouvoir appartient proprement dit, à l'organisme de l'État ou bien au Parti.

Les droits de l'homme ont, sans doute, ajoutait Gilissen, prévalu à l'époque précédant leur formulation, c'est-à-dire avant la naissance de la littérature des lumières et avant sa promulgation notamment précédant la Révolution bourgeoise française. Bien sûr, ces droits appartenaient seulement à certains groupes (ordres) mais parfois ils étaient garantis. Le droit de résistance formulé dans la Bulle d'or hongroise était une telle garantie qui a conservé son influence même à l'époque quand ce principe, répandu dans toute l'Europe au Moyen-Âge à déjavait perdu la force (ce dernier était du rapport du soussigné également accepté par le rapporteur général M. Bardach).

Les droits formulés dans la Révolution Française se sont, dès lors, répandus dans le monde entier, complétés à plusieurs égards, mais leur réalisation complète a des déficiences et toujours reste une tâche à accomplir. Si la Société, par le Congrès, ajoutait une seule pierre au bâtiment grandiose des droits de l'homme, elle mérite d'être fière de son achèvement et de son succès.

A. Degré

From legal customs to legal folkways

Is the inclination to neophyte exaggerations a symptom of our century of merely inevitable teething troubles, characteristic of the epoch of shaping new scientific approaches? Anyhow, it is a fact that the phenomena called *modern statehood* by Marx and *modern formal law* by scholars striving for the reformation of Kantianism are of fundamental importance in the Marxian legal thought. These phenomena are not only central subject of investigation, they also fill an organizing role which can determine both the direction of jurisprudential thought and its system of notions. Maybe it does not need to be proved in detail that the institutional development of several millennia has culminated in

modern statehood which integrates and organizes society on the highest level, and legal development has come up to modern formal law which assures this integration and organization most foreseeably, uniformly and shapably (cf. VARGA, Cs.: "Moderne Staatlichkeit und modernes formales Recht", *Acta Juridica*, in press, sect. 1). All these seem to be quite well, but can the conclusion be drawn that modern statehood and modern formal law, which are only some centuries old product of European development, are simultaneously of such significance that everything not having paved the way for them should be considered as devoid of interest? In the same way it is a commonplace to see the relation between state and law as the one between correlative entities. Does it result from these facts, however, that their relation is also to serve as criterium for defining in absolute terms the scope of jurisprudential research?

In order to reconstruct the basic ways of legal development, all of these facts and considerations are undoubtedly of selecting significance. Notwithstanding, their contribution may not become so exclusive as blocking interest in phenomena outside the main direction of development or as impeding the exploration of the legal complex, by eliminating the phenomena in question from 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 to the evolving of this perspective only. 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 non-recurrent and, consequently it cannot be repeatedly used, as George Orwell nicely formulated, to foresee the past.

In Hungary, historical and theoretical researches in legal sciences have not met each other in a way that the Marxian Utopia of history conceiving of as of the single science, could be realized. Historical approach to law still wrestles with tasks before setting up a theory: legal theorizing strives to draw up itself in the Marxian concept, by borrowing notions and views from philosophy and then applying them, instead of starting from development, the very past of the law. Assessment and restitution of which is customary as the factor legitimating state power and its legal machinery; customary law as the compass, framework and basis of reference of legislation; adherence to all that is traditional, i.e. deducible from the "good, old law" as the primary source of legal validity: the ordering role all they may have played for more than thirty centuries seems to shrink to mere ideological reference as compared with the some centuries past of the organization of modern statehood and its formal law.

What does the problem lie in? Going back to antecedents like the historical school of law in Germany, the legal anthropology discovering primitive law influenced by practical interests in the British, American, and past continental colonial powers, or the revealing of *a living people's law hardly affected by the official law* in some remote areas of Central-Eastern Europe, a movement began to develop in Hungary at the turn of century and to strengthen in the 30's and 40's, which aimed at cataloguing rural customs within the framework of the exploration of modes, customs, ways, etc. of Hungarian people. The subject of this exploration was not merely considered as the law living beside the official one. For the researchers were 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, characteristics of the Hungarian nation. They also meant that in the case of making this set of norms the basis of state legislation it would lead to a social reform renewing the whole society. The idealistic nature of all these ideas was demonstrated nearly three decades ago by the cultural team working beside the Central Committee of the Hungarian Socialist Workers' Party. The team also pointed to the weakness these romantic ideas had shown in face of the German racial thought, which could have been instrumental in that the ruling policy had attempted to manipulate and also to integrate the whole movement in its own aim and system (*Kortárs*, II [1958] 7, p. 9). At the same time, a full exclusion 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 (KULCSÁR, K.: "A népi jog és a nemzeti jog"

[People's law and national law], *Állam- és Jogtudományi Intézet Értesítője*, IV [1961] 1–2, ch. III–IV).

As far as the mission of *ideological criticism* is concerned, it seems to have suitably been fulfilled by both analyses. I have to note, however, that ideological criticism does not aim at elucidating phenomena in their specific qualities: it aims at criticism of presuppositions which, in a given social context, made the conception of the phenomenon in question a weapon in the continuation of class struggles. Consequently, a theoretical answer cannot be substituted by ideological criticism.

During the two past decades, no theoretical advance has been made. Both ethnography and jurisprudence have done their own job, i.e. continuing their own investigations without striving for truly interdisciplinarity. Ethnography has continued mapping customs and order of the peasant society, sociology of law has continued taking interest in, among others, the traditional forms of shaping social behaviour, preserved as a historical heritage (KULCSÁR, K.: "Ethnological research into the law—today", in: *Comparative Law—Droit comparé 1978*, ed. Szabó, I. and Péteri, Z. (Budapest, Akadémiai Kiadó, 1978 pp. 23 et seq.), though its attention is now centred on the disfunctional effect of the exclusive or overemphasized reliance on the law and not on the separation of legal phenomena from other spheres.

In Hungary, E. TÁRKÁNY SZÜCS is the scholar who has been able to devote nearly half a century of his life to researches carried out on legal ethnography up to now. After several books (*Mártély népi jogélete* [People's legal life in Mártély] [Kolozsvár, 1944], *Vásárhelyi testamentumok* [Testaments from Vásárhely] [Budapest, 1961] and a number of studies he has now enriched the literature of legal ethnology with an imposing, masterly synthesis TÁRKÁNY SZÜCS, E.: *Magyar jogi népszokások* (Hungarian legal folkways), Budapest, Gondolat, 1981, 903 p. The monography is an attempt to offer a systematic survey of legal folkways in Hungary, spanning between 1700 and 1945, and to give their historical, ethnological and legal analysis at the same time. The ordering principle the author adapted is a logically developed system. To its entries—*viz.* person (person and society, entering the society, death, personality and his 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), controlling and conflict and coercion—everything is classed what the author had learnt from the whole of the Hungarian ethnography, printed and manuscript documents, as well as a huge number of fieldworks carried out by others and by himself.

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 (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 interests 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 experimented character, secondly, the common conviction in its justness, and, thirdly, its lasting preservation in the interaction between the individual, the community and the authority" (p. 41). The *genus proximum* (*viz.* the rule-character) and the *differentia specifica* (*viz.* the legal nature) which are circumscribed here will get defined in another way, too. In connection with qualifying phenomena as legal folkways, he writes: as to the human conducts deducible from various oral traditions, descriptions 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 subject of legislation either by the positive law on the level of the age or by states ever 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 behaviour... which is accepted and applied customarily by any socially defined community, even if with the aid of fiction it enters the field of law" (TÁRKÁNY SZÜCS, E.: "Results and tasks of legal ethnology in Europe", *Ethnologica Europea*, I (1967) 3, p. 215). This is what appears also in Gy. BÓNIS' definition. It reads as follows: "legal custom: custom of legal contents or significance, valid in a small community" (*Magyar Néprajzi Lexikon* [Hungarian Encyclopedia of Ethnography], II, ed. Ortutay, Gy., [Budapest, 1979], p. 685). Eventually TÁRKÁNY SZÜCS admits that *quasi-legal character and significance* are the main features of the subject of legal ethnology. And so in correction with his terming his subject as legal *folkways* he explains that the point in question is not some separate entity but one of the constituants, or aspects, 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" (*Mártély népi jogélete*, p. 43.).

If it is not the present-day conditions of law that are projected back to past conditions but law itself will be conceived of as the product of continuous development, i.e. if we start from the social functions to be traced behind the given phenomenon in order to apprehend it, I think we will get a conceptually more unambiguous picture of the law's societal development:

□ The "etatisation" of the law, i.e. the law manifesting itself as the law of the state, expresses a most universal tendency in historical development. For now the quality of the law as law is but the result of a self-qualification directed to state activity: *law* is what appears as such in the actual practice of state organs. *Customary law* is a variant of law defined in this way, as *(a)*a historical antecedent, than *(b)*a frame, and finally *(c)*a supplement of enacted written law conceived of as representing a higher phase of development;

□□ Having other qualities, *legal custom* cannot obviously be equated to customary law. Notwithstanding, if the legal complex as a social part complex is not considered exclusively from the point of view of another part complex, *viz.* the state, but from that of social totality, by setting out from the basic functions the state and law have been established to fulfil, there will be a relevance in view of the legal complex. Notably, legal custom is to fulfil basically the same functions in those societies and developmental phases in which, due to the logic of historical process and/or to special reasons, *(a)* there is no state and law organization proper; *(b)* it does not touch considerable social groups because of the low level or the indifference of organization; or *(c)* it fails in its actual implementation into practice. The first two cases (taking into consideration the ancient and present-day forms of primitive law as subject of legal anthropology and ethnology) seem to sign a *sui generis* culture, disparate conceptually. Consequently, even the legal custom issued from the failure of the organization of state and law (i.e. the third case) turns into a subculture only insofar as it ceases to be a historically relatively disparate phenomenon, by getting integrated into the state and law organization as a mere variant of it, asserting itself in its practical realization;

□□□ A legal custom transforms into a *legal folkway* as the state and law organization assumes and fulfils the functions concerned in their entirety and it continues existing only within these frames as one of the surviving folkways, as a colouring supplement of the state and law organization, holding perhaps symbolic significance only.

As to the criterium and the subject of qualification and the very process of separating these notions from each other, the differences are significant indeed. The boundaries of 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 considerations having part in the exercise of power. On the other hand boundaries of the sphere of *legal custom* are being traced out by the *customary practice of the community recognizing it as traditional*. Although there is a room for manipulation here, too, for all that the actual limits are always given in the spontaneous attitudes of the community.

Customary law and *legal custom* are phenomena in a continuous historical formation considering both themselves and their inter-connection. However, it seems to be verifiable now that in their historical genesis they have been derived from the same roots, consequently, they are separate forma-

tions and not subcultures 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, but necessarily, to the parallel paths and ways. Integration is the final victory of the law, transforming all that has substance in common into its own subculture.

Independent of the interpretation 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 outlines marked clearly, and given for once and all. Once they have got 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 with, 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, mostly close to their bordering lines. 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 characterized similar way, too.

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* TÁRKÁNY SZÜCS refers to situations which he considers the germs of legal folkways, taking shape now on a social scale. He sees excessive rents and tipping such a distortion covering also a trend of 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 have aimed at making possible to run a real economy indeed. This is the reason why the law cannot impede their development. At 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 service establishing the title of the toll (p. 827.). Tárkány Szücs does not give here case studies but indications only, so the qualification is still open as a matter of estimation. Anyhow, 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 in this and similar respects. The element I have in mind is generally not a point of the usual definitions of law, though its existence is testfied 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, law was first legitimated by its customary nature, later by the lawgiver's charisma supplementing it. This charisma in its only rational content has got later laicized in so far as to transform, 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, even a relatively settled practice does not legitimate either, if the case is the naked fact of taking unilateral advantage of any power situation. Notwithstanding, if it becomes established institutionally by being integrated in a

legal system, it will also be covered by the legitimacy of the whole of the system. An appeal to natural law (reminding of Antigone's gesture) can make an attempt to illegitimate it though. The question is, however, not merely the ideological background of acts but also the reified functioning of a reified system, and 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* (in his *History and Class Consciousness*, transl. R. Livingstone [London, Merlin, 1971], pp. 266 and 263) 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 one* 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 not socially mobile but steady and unchangeably assigned roles were concerned, which could obtain the surface or semblance of legitimacy due to resignation, to accepting it as something derived from the very structure of the system, and also to the ancient wisdom according to which even if such it is, *this* is the power. Anyhow this point denotes the verge of analogy, too. Distortions of socialism in Hungary arise 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 is 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 provable—it can promote the restoration of it on the level of and simultaneously for theory.

Cs. Varga