THEORY OF LAW. LEGAL ETHNOGRAPHY, OR THE THEORETICAL FRUITS OF INQUIRIES INTO FOLKWAYS

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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 off-prints 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 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),

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[1] Mainly articles by Edit Fél and László Papp, as well as the issues of *Társadalomtudomány* [Social science].

it was the legal-sociological overview by Kálmán Kulcsár (1960) 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 (1894-1895, 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 (Kulcsár 1960: 113-125, 1961, 1955), 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 (1990, 1997) were used, since the consequences of panic-reactions they treated were exact duplicates 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 Ernö 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 Danube 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 *opuses* monographising its issues (Poirier 1970, Vulcănescu 1970, Krstić 1979; their contemporary review reprinted in Varga 1994).

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 Stjernquist knew about our region (for an international overview of the pioneer era from Siberia and Western Europe to America, Tagányi, 3-25). He spoke about Baltazar Bogišić (1834-1908) as the pioneer of legal ethnography from our Southern neighbourhood (1874, as well as 1867, 1879, 1901, posthumous 1984); 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 (Stjernqvist 1968-1969; 1962, 1964, 1973), 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, director of the Institute of Sociology, then Deputy Secretary-General of the Hungarian Academy of Sciences (1978a, 1978b), I saw rather a gesture rehabilitating an older friend and his academic interests than a genuine revaluation heralding a turn in science policy.

As a result of our Institute for Legal Studies moving to the Royal Castle area and the Institute of Ethnography becoming our neighbour, Ernö Szücs Tárkány[2], 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 whom I was happy to meet again regularly[3]. Encountering them was a nice experience, which also initiated a review of the former's *opus magnum*, *Hungarian legal folkways* (Tárkány Szücs 1981). 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 (Varga 1983).

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

[2] Between 1975-1982, a senior researcher. 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.

[3] Between 1985-1989, a head of section.

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[4], it led me to the elaboration of a concept of law, still justifiable today (Varga 1986a, 1992).

2. *Disciplines*

As we look for the identity of *legal ethnography*, 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 *legal anthropology* as the colonisers' description of prevalent normativity found in colonies. Accordingly, legal anthropology deals with those ordering the means of 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 respectively German and 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 *legal ethnology*. (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 Volk-*

[4] "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 15 January 1985.

skunde.[5]). 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.

The naming of *legal pluralism* 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 the 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[6], 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 *aboriginal law* 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 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 (Kramer 1974, Köstlin 1976, for a British version, Bradney 2000) may now indeed be the crazy shopping before Christmas or the (sub)culture of Turkish guest workers today, albeit we might perhaps class their aspects worth investigating in another disciplinary field. We could also contemplate on the fact that the related prob-

[5] I can only suspect that the naming in, e.g., Maunier 1938 – like the one of *culture*, taken over from the German language – might be felt as too Germanic, due to its roots.

[6] 'Unofficial law', 'folk law' or 'people's law' are usually to complement its naming.

lems of Roma life are investigated under the title of legal pluralism internationally (Weyrauch 2001, 2003), 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 Roma 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 *topoi*, 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[7]. 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[8]. 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 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 (timely synthesised in Szabó 1988, Sárkány 2001) its conclusions (which were finally collected in Darian-Smith 2007). 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

[7] 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.

[8] There are anthropologies of law – e.g., Lampe 1988, Rouland 1988, Broekman 1993 – 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. From bordering fields, cf. also Schmidt 1982 and Sack 1991.

and relative isolation. The science-historical overviews of the discipline (e.g., Nagy 2002, Köhegyi 1995 & 1996, 1997) 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 Socialism, pushed to the margins by its rationalising (sometimes too narrow-minded) demand (nevertheless, cf. Georgesco 1978).

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, and 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 it, 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 (e.g., Banyó 2000, Pongrácz 2001). We can only hope that 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* [*Volkskunde*] the same aspects as in history, legal history, symbol research, or literature or the arts: raw material, exemplification, message, quasi-empirical but externally already developed data – to be used in his/her *anthropology of law or an 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 preference 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 (on a limiting zone, e.g., Assier-Andrieu 1982). 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[9].

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

[9] Interestingly, Twining (1973: 576) has an inverse view on American legal anthropology, anthropologists being characterised as procedure-oriented, in opposition with the rule-centredness of lawyers.

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 some decades ago (as a pioneering work in Hungary, cf. Kulcsár 1967), 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[10].

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[11] and interpretation –, a task that is practically nearly impossible,

[10] 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 (Szilágyi 1988, 1989).

[11] 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 diffi-

which has transformed the majority of legal anthropologies formulated up to the present day into too subjective an undertaking anyway from the outset, i.e., into an instance of (Western) cultural hegemony by the force of the last interpretation achieved[12].

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 *building-up* and *operation* 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 given a quarter of a century ago (referred to as Varga 1986a) 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 under differing conditions that were formed in an independent way, 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

cilement 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.

[12] During the period I spent at Yale Law School I was able to talk with Professor Pospíšil several times. In his overwhelming criticism of the past and present American cultivation of 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 *understanding & description from inside*, in order to found comparative theorisation.

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 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. [Ehrlich 1918: 291; cf. Ziegert 1998]

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. [Weber 1956: 23, 25].

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 phenomenon – 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. [Pospíšil 1971: 39]

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) (Twining 2007: 34), 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") [Twining 2007: 5].

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*" (Lévy-Bruhl 1950, LeRoy 1990; cf. Varga 1966). Meaning that - in other words - the formulation summarizes the elemental components, the *nucleus*[13] 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 (Griffiths 1986: 38). 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 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." (Teubner 1992: 1442). 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

[13] 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 (Amselek 1964).

> a body of regularized procedures and normative standards, considered justiciable 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. [de Sousa Santos 1995: 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 Bukowina" as a basis, declaring that, on the one hand, it "has proved hopeless to search for a criterion delineating social norms from legal norms." (Teubner 1997: 13). 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 (2004) – 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[14] of diverse legal discourses." Namely "It is neither structure nor function but the binary code which defines what is the 'legal proprium'[15] in local or global pluralism." [Luhmann 2004: 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

[14] The word 'hierarchia' derives from the Greek *hieros* = 'sanct' (as in *hierarkhia* = 'pontifical reign'), opposite to its modifier *hetero* = 'other, different'.

[15] That what is common to all members without being part of the definition itself.

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 (Tamanaha 2007: 72). 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, 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") (Sack 1992, xiii): "Where do we stop speaking of law and find ourselves simply describing social life?" (Engle Merry 1988: 878) 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 (de Sousa Santos 1995: 429). Or, the ripened result of our glorious self-awareness could hardly be anything other than arriving at "hopeless confusions" (Tamanaha 2000: 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." [Roberts 1998: 105]

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. [Varga 1986a, 1988, 1994: 279-280, 451-452].

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 (Benda-Beckmann 1994: 6; 2002: 72; cf. also Trotha 2000) – where those proceeding in the name of 'law' will also live through their conformism by becoming convinced that whatever their conformism is 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)." (Tamanaha 2000: 313).

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 *naming*, 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 (e.g., Belley 1997).

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, 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 (for its demand, cf. Varga 1986b). 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.

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