A SCHEME OF THE APPROACH OF LAW AS A CONCEPT BASED ON COMMUNAL RELATIONS

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Abstract

This study presents a new approach to the concept of law. Law here is not looked upon as merely an announced and applied reality that was established through a proper procedure and derived from the legitimate power. The question arises: who legitimates the 'legitimate power'? In this study I would like to present the scheme of a definite answer, which originates in the communal existence of the individual.

Keywords: semi-autonomous social field, 'we' consciousness, network, relation, law, community, individual.

'We' consciousness and Law

As the individual and human society is positioned in the centre of the philosophic thinking, the illusoric concept of modernism on the independence of science, as well as the endeavour to regulate everything as a traditionally german principle of legislation are becoming overshadowed.[1]. Legal anthropology, legal sociology and comparative law clarifies that „Begriffjurisprudenz" can be only an imprecise model of the organic network of law. According to this model law is a formal reality supported by authority and sanction. The „ungerechtes Recht" of the Second World War was a severe test of the theory. As a result, for a short period of time the approach of natural law was restored,[2] although it was not widely accepted due to the aversion to religion of Postmodernism and the complexity of the concept that makes it undecodable for contemporary people. As jurisprudence returns to unbearable positivism through system theories (Habermas, Luhmann), scepticism emerges towards law and the rule of law. As it was found out by Csaba Varga[3] in Hungary, law is a living medium that is repeatedly reorganized in society. The theory of autopoiesis, which emerged in the 70's and 80's, means the self-enclosed redefinition of systems, including the system of law. This theory leads to the concept of law as an entity that exists in networks. It was pointed out by experts of the autopoiesis theory that law is not simply a formal text and it cannot be defined from itself (the theorem

[1] This is already noted by C.G. Jung in his work 'The Philosopher's tree', in which he states that 'the empiricist, with more or less success, tends to forget...his or her archetypical explanation principles, namely the psychical factors that are essential in the process of understanding. The hermetic philosopher, on the other hand... considers archetypes the essential parts of empiric world model. in: Filozófusok fája (*The Philosopher's tree*), Budapest 2000, p. 64-65.
[2] Radbruch, G., Grundzüge der Rechtsphilosophie, 1914, 5. Aufl. 1950.
[3] Varga Cs., A jog mint folyamat (*Law as a process*), Budapest 1999, p. 400-408.

of irrefutable theses does not exist). Law is a fixed mental pattern created by the community of people that is subject to constant change. Law is not a rule but working 'we' consciousness. Both 'we' consciousness and law are dynamic and the vehicle of evolution. On a certain historical level of 'we' consciousness modern societies regard law as the balance of legislative or legal executive power. This is a dynamic balance though; social complexity determines the change of normative complexity. This is not simply the legal sociological approach of law in action. Thus, law does not appear and become relevant in social functions but law is a constituent of the emerging 'we' consciousness of society that can appear through communication in more and more complex and formalized way. Regulations as a whole are not law itself but efforts to manifest verbally the legal aspects of 'we' consciousness. This is the reason why legal texts can be beautiful cultural symbols that are examined by comparative law. This is applicable to judicial practice but in this case the verbal manifestation of law is transformed into verdicts. The discipline of comparative judicial process examines the unique aspects of this transformation.

It is the task of network thinking to discover those key actors of society (together with its historical aspects) who facilitated the formation of patterns that – by means of the formalized law – were asserted as legal system and applied as legal practice. The network-based legal theory goes back to the level of legislation and law enforcement. At the basics the theory describes a historical dynamic pattern ('we' consciousness) from which law can emerge in its positive or sociological form. This way the considerations on legal justification of fundamental law, the dependence of sociology on rules, as well as transcendence-oriented solutions of natural law can be avoided.

The results of legal anthropology also point towards the network-based approach. It was found out that Western law is not applicable everywhere since it is difficult to accommodate due to the fact that the roots of law originate deeper than it was thought before. In addition, law cannot be the only solution as the implementation of fundamental law[4] does not change the nation. The government-implemented official law is often inapplicable in practice, particularly when it conveys the will of the few.

It is also important to take into consideration the legal techniques of a given culture by which its own 'we' consciousness is represented. Appropriate use of legal techniques can result into a properly working legal policy. The use of legal techniques, though, must not be determined by the temporary priorities of a political party. Principles of legal decisions, such as consistency or the principle of avoiding contradictions and excess regulations should not be ignored by intimidating the judiciaries or implementing new codes in one or two month's time.

It is an important fact though that legal systems of the European nations and European Union are facing major changes. The previous models are becoming more and more inapplicable due to the persistent economic crisis and its inadequate management. The change will probably happen rapidly[5] since legislation is unable to

[4] Hans Kelsen himself pointed out that pure legal study is incomplete since it can never reach further than its own world, in other words the legally relevant will not be evaluated according to aspects beyond legal system, such as legal politics or legal dogmatics. A closed system like this does not take into account that words and texts (as they consist of words) are not completely unambiguous. Meaning is always determined by the extra-lingual medium. Language itself is a product of 'we' consciousness consequently it cannot serve as the permanent basis of 'pure law'.

[5] Allott, A., The Limits of Law, London 1980.

follow the accelerating social changes; more specifically the formalized manifestations of the law's social patterns emerge in delay. This is to be corrected by legal practice that is the sociological manifestation of law. By the examination of several traditional legal cultures Allott points out that tswana, kikuyu or busman tribes consider law as a matter of the whole community[6], bringing the law coming from 'we' consciousness and its formalized manifestations close to people. The whole embu tribe is present when the law is accepted by slow applause and religious ceremony. The whole community takes part in debates when conflicts are solved within the tribe.

The question of validity

The validity of law is merely an abstraction. Validity is not the prerequisite or general criterion, but the impact of the law. The pyramid of validation is a model and not the reality. Validation in reality arises integrated in the community. Allott discusses the bases of legal system (validity) independently from the legal system keeping in mind that law is an autonomous system. This autonomy is justified by the community's approval as a mandatory normative instance.

Thus law is a necessary tool of regulating the society based on the community aspects of human existence ('we' conscience). This tool is equipped with power by communities, cultures or states. It is essential to define clearly who wields the power in order to have a well-functioning legal system.

It is becoming clearer that the difference between 'developed' and 'undeveloped' legal systems is not in basic operational patterns but lies in those formalised and verbalised systems that manifest law. Macaulay states that the difference between savage and civilised societies is smaller as it seems. Considering mainly legal sociological aspects, John Griffiths defined the basis of this similarity with the concept of semi-autonomous social field (SASF)[7]. This similarity is underlined by S. F. Moore, who analysed the norm-creation methods of a Chagga society living at Mount Kilimanjaro and a textile factory in New York. He found that the methods are remarkably similar as they are both based on personal relationships. Presents or „supposed friendships" are tools of the system that, supplemented with external rules and the customs of the profession, integrate the goals of law, economic effectiveness and individual ambitions. It is hardly possible to separate different normative levels and practice[8].

It is a future task to identify this power. It is certain that historical patterns of community relationships determine the actors who as a whole represent power. Power does not only affect law enforcement but also different levels of legislation, consequently this aspect needs to be examined in both cases. Thus law enforcement and legislation must be analysed by means of legal sociology. In his study on SASF's

[6] Varga Cs., A jog mint folyamat (*Law as a process*), p. 371.
[7] H. Szilágyi I., Jog és antropológia (*Law and Anthropology*), Budapest 2000, p. 239-271.
[8] This was apparent in Hungary when in a research, financed by the LEADER development program the dominant individuals in the group accommodated to external norms, while they diverged from the unsupervised content-related requirements and realised their goals keeping in mind the personal interests determined by sample providers. That.is the reason why 70% of the equipment for the otherwise senseless and expensive playgrounds were ordered from the same supplier.

Sally Falk Moore[9] points out that implementation of a new regulation does not necessarily involve real social change. The theory of network-based legislation goes beyond this by stating that the evolution of legislation is a sort of social effect embedded in 'we' consciousness that can differ from the embeddedness of law enforcers, consequently two mainly independent social networks develop. The description of SASF is an important step in understanding the social aspects of law but it is not a concept that could definitely prove that law is not simply the product of community thinking but its constitutive element. Moore examines law and society together but does not assert that law and society are different approaches to the same social network. He observes properly that the entire community (the relation of each individual with all the others, six degrees) can be broken down to units that only partly regulate themselves and are situated in a larger regulatory environment. These are called semi-autonomous fields. In our investigation we must add to these aspects the factor of time, which we simply might call history. It is not accidental that the close connection of law, culture and society was discovered by legal anthropologists in historical (primitive) legal cultures.

Law was often regarded merely as a formal institution – this is why senseless questions arose such as the legitimation of law, while law is not simply a logical construction. Law is the life of community, evolutional advantage. The same way, society is not the multitude of systems and subsystems but a community that can be modelled by the multitude of social systems and subsystems as it was presented by Weber. At the same time he realized that these models often do not have impact on life. He points out that it is often impossible to place law in the economic sphere for lack of effective legal pressure. „It is obvious that individuals who continuously take part in market relationships motivated by their own interests will have a lot more realistic knowledge on market interest relations than legislators and officers who are responsible for execution…".

The semi-autonomous social fields (SASF)

SASF's are those that are suitable to establish norms or prevent the execution of the given norms within a network. Moore realised that these fields can be defined with their functions and it is not possible to describe them (in our own terminology they are rather dynamic patterns) with their structure (as they do not fit in his concept of designed structure). The research of social networks makes it possible to model the structure of SASF's. The description of the structure may contribute to understand the structure of the entire network. It is becoming obvious that states themselves can only behave as SASF's since their norm development is frequently facilitated or prevented by their external environment. It is necessary to note that real restrictions are often more important than adaptation. The resistance of society can hinder the enforcement of totalitarian or non-realistic law.

The sovereignty, inviolability and autonomy of government legislation is similar to the emperor's new clothes: in many aspects it does not exist at all. As Griffiths points out: „it is amazing that despite all efforts legislation is obviously completely inefficient" On the other hand it has more important role in our existence

[9] S. F., Moore, A félautonóm társadalmi mező (*The semi-autonomous social field*), in H. Szilágyi, A jog … p. 138-146.

than we would think. „We should be amazed that legislation has any effect on behaviour."

We do not agree with the view thogh that „it is a great mistery of legal sociology and social life how written letters transform into regulated behaviour". Reality is the opposite: the demand for regulation (law) appears in 'we' consciousness (relation should necessarily be accompanied by regulation), this demand is verbalised or instrumentalised in the form of different normative orders (law, ethics, religion) and the related institution system[10]. Although the verbalised and instrumentalised levels are only the surface: the origin of law lays in the community of people and the related patterns (network).

We can assert that SASF model called forth the following changes:

- Instead of the previously accepted atomistic individualism, in which the society is merely a group of people, it assumes an organised society (the existence of the human being is possible only in community), but it does not describe the rules that regulate network-like society (presents only the functions of the network and considers the network of its relations undescribable).
- Instead of the supposition of a perfect chain of execution, where the communication between governmental power and individual is without distortion, observes how different spheres of interest affect legislation (the constant transformation of law), although it does not consider the network-like nature of legislation and the direct connection between legislation and law enforcement.
- The concept of the state as a normative monopoly is taken over by the idea in which state is an instrumentalized part of a complex relation system (a partly autonomous actor of normative control), sovereignity is a partly true supposition, does not describe obviously the role of the network of relations between the states and neglects the effects that other (economic or religious) subsystems, that are also responsible for the forming of states, make on legislation.

The pattern generated by SASF is a self-regulating system aiming always at the most optimal life conditions. Naturally, the aims of certain patterns are not identical with the interests/values/aims developed in other patterns. This is the reason why some patterns have obstructive function. It is possible that civil disobedience, the opposition or economic power do not let the government's will of totalitarian legislation prevail and become legal practice. This can turn out the opposite way as well: certain rules that are not incorporated in the government's legislation practice may effectively work in business, management of tenders or public procurement. In reality, through the existing connections, each individual is present on each level of regulation process. In other words, the individual is only a few steps away from the legislator, from those who enforce the law or hinder its enforcement. By simple actions such as electing an MP, driving a car or buying something in a store individuals shape the future of the country and the entire world. Categorizing actions according to their economic, political or legal aspects are merely descriptions and not the manifestations of reality's so far incomprehensible complexity. Due to the

[10] In his work called Critica del sapere, Roma 1996, C. Huber defines institutional intentionality that connects the possibility of human understanding in a phylosophical sense to certain social institutions.

technological development it is necessary to invent a new model of the society's normative ability in the near future. Most probably each element of this model is already present in public discourse but it has not been organized in a structure yet. As the first step in this process it would be reasonable to identify the existing SASF's and discover their aims and functions.

Norms are not only present in terms of law, international norms of different legal systems, religious or moral norms also need to be taken into consideration. These are all based on 'we' consciousness. In the case when the new normative system is not based on this it has to face ineffectivity. It is evident for legal anthropologists that it is impossible to force so-called underdeveloped cultures to accept the law of developed countries. Developed law can only serve as a model that implementing communities can accommodate to their customs. In this case the developed law can be helpful, otherwise it arises resistance. Note the following: „In those cases when the instructions of the innovation offices are neglected in most cases the barrier of development is not the common law, and people of the village are not against development; they do not accept ideas that are propagated by arrogant and unintelligent people.[11]" The situation is similar in the case of religion. The Chinese mission of the Christians is a good example in which the aggressive proselytization of the Franciscan mission resulted into the extermination of Franciscans. An opposite example is the inculturation method of the Jesuits, when Christianity was presented as the realization of Confucianism, among others by Matteo Ricci. This is also true for the implementability of moral norms, which can only be accepted when their implementation is preceded by proper social initiation.

It is a major mistake when the desire for regulation takes control of the legislator, who intends to solve everything by power. This can result into the development of a strong bureaucracy and a servile legislation without any long-lasting achievement. The more aggressive is the urge to regulate the bigger is the opposition that can be turn from 'quantitative' into 'qualitative' in a moment. When law does not accommodate to society it becomes rejected. Forced legislation can be so hasty that administration is not able to catch up with it, consequently it is totally impossible to follow for the average citizen. The wise legislator prepares regulations and shapes society simultaneously. It is a mistake to suppose that relying merely on democratic methods is enough to transform the need for regulations – that is present in 'we' consciousness – into law by means of the parliament. It frequently happens that execution or an external element (economy) takes control and forces MP's – who were elected in a democratic way – to implement law that is different from the legal pattern present in our 'we' consciousness.

This is why it is of major importance to describe these patterns and methods. It is possible that Western-European or European legislation is far away from what is present in the 'we' consciousness of the individuals. This discrepancy can result into a major catastrophe in taut situations in which the negative omnipotence (its total capacity for self-destruction) of the individual reveals[12].

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[11] von Benda-Beckmann, F., Bűnbak és mágikus varázsszer (*Scapegoat and magic charm*), in H. Szilágyi, Jog…, p.238. The introducing quotation from Lousbury is even more relevant: : 'We must deeply admire the infinite ability of human mind to resist useful knowledge.'

[12] As a part of a research carried out in 2011 we examined fund-distribution groups of LEADER development program to analyse the formation of patterns (relations") that determine what norms are considered acceptable by the whole community. It was peculiar that norm system that developed in the community was conflicting with the principles of EU LEADER program. For instance, instead of boosting

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A JOG, MINT KÖZÖSSÉGI KAPCSOLATOKON ALAPULÓ JELENSÉG MEGKÖZELÍTÉSÉNEK VÁZLATA

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Összefoglalás

A jog nem csak egyszerű formális szöveg, nem is határozható meg önmagából, a jog valójában az emberek közösségében keletkező olyan rögzített tudati mintázat, amely folyamatosan változtatatható. A jog nem szabály, hanem a mi-tudat működése. A társadalomban megjelenő mi-tudat eleve adott szerkezeti eleme a jog, amelyik a kommunikáción keresztül egyre komplexebb és formalizáltabb módokban jelenhet meg. A jogszabályok összessége nem a jog, hanem a mi-tudat jogi vonatkozásainak verbális megnyilvánítási kísérlete.

A hálózati gondolkodás feladata, hogy feltárja azokat a kulcsszereplőket a társadalomban, akik segítségével kialakulnak azok a mintázatok, amelyek jogrendként kimondásra kerülnek és joggyakorlatként megvalósulnak.

A jog érvényessége csak absztrakció. A valóságban az érvényesség a közösségbe integráltan keletkezik. A jog tehát szükséges eszköz az együttélés szabályozásához, amelynek alapjai az ember-lét közösségi vonatkozásaiban találhatóak. (Mi-tudat). Egyre inkább világossá válik, hogy a „fejlett" és „fejletlen" jogrendek között a különbség nem az alapvető működési mintázatokban van, hanem azokban a formalizált-verbalizált szerkezetekben, amelyek megjelenítik ezt a jogot.

Bizonyossággal állítható, hogy a közösségi kapcsolatok történeti mintázatai határozzák meg azokat a szereplőket, akik együttesen a hatalom megtestesítői lesznek. A hatalom pedig nem csak a jog-alkalmazás, hanem a jog-alkotás szintjeit is érinti, ilyen értelemben mindegyik vonatkozásában figyelembe kell ezt a szempontot venni. Azaz, nem csak a jog alkalmazását, hanem a jog alkotását is meg kell vizsgálni a jogszociológia eszköztárán keresztül is.

A szabályozottság igénye jelenik meg a mi-tudatban, ez az igény verbalizálódik ill. instrumentalizálódik később különböző normatív rendek (jog, erkölcs, vallás) ill. az ezekhez kapcsolódó intézményrendszer formájában. A verbalizált ill.

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the local market, resources granted for rural development were spent on building extremely expensive playgrounds. The development of proper sample-providing system would have ensured the more effective use of resources. Instead of that, supervision was very strict and formal, consequently discrepancies of the content were not identified.

instrumentalizált szintek azonban csak a jog felszíni formái, az eredete az ember közösségi létében, ill. az ehhez tartozó kapcsolati mintákban (hálózat) van.

A félautonóm társadalmi mezők azok, amelyek a hálózaton belül alkalmasak arra, hogy normákat alkossanak, vagy éppen az alkotott normák alkalmazását megakadályozzák. A társadalmi hálózatok kutatása viszont lehetővé teszi, hogy a FATM szerkezete is modellezhető legyen. Sőt a FATM szerkezetének leírása hozzájárulhat a teljes hálózat struktúrájának megértéséhez. A FATM által létrehozott mintázat olyan önszabályozó rendszer, amely a legoptimálisabb életfeltételeket célozza.

Természetesen az egyes mintázatok céljai nem egyeznek meg mindenben a más mintázatokban kialakított érdekekkel/értékekkel/célokkal. Ezért lehetséges, hogy az egyes mintázatok gátló funkciót is képesek mutatni. Ha a jog nem igazodik a társadalom mozgásához, akkor az kilökődik a társadalomból. Az erőltetett törvényhozás lehet olyan gyors is, hogy a közigazgatás sem képes már követni. A bölcs jogalkotó a társadalom formálásával együtt alakítja a jogot. Gyakran előfordul, hogy a végrehajtás, vagy éppen egy külső elem, a gazdaság átveszi a vezérlést és a mi-tudatban kialakult jog-mintázattól eltérő jogot alkottat a demokratikus úton megválasztott képviselőkkel.

Elképzelhető, hogy a nyugati, vagy éppen európai jogalkotás már nagyon messze jár attól, ami az egyének mi-tudatában megnyilvánul. Ez a diszkrepancia pedig komoly katasztrófákhoz vezethet olyan kiélezett helyzetben, mint amilyenben az ember negatív mindenhatósága (önpusztításra való totális képessége) megjelenik.

Kulcsszavak: félautonóm társadalmi mező, mi-tudat, hálózat, kapcsolat, jog, közösség, individuum.