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THE CONCEPTUALITY OF LEGAL CULTURE AND ITS ROLE IN THE PROTECTION OF TRADITIONAL LEGAL VALUES

The "new ethics" of the West, in the spirit of technological development and a new, ideologically produced, so-called scientific view of man, has for decades been exploring the possibility of replacing its traditional ideals with a new role for law, one that is flexible and case-based, open and collectively operable, mostly guided by principles, and which also allows room for ad hoc decisions if needed. Law, as a rule, is the command of power and can therefore be changed at will. But what gives law genuine identity amidst daily legal changes is legal culture. Consequently, it is the deepening of legal culture, the embedding of legal policy in legal culture and the constant scholarly rethinking of its foundations—its ideals, basic institutions, procedures and instruments—that provides the most reliable basis for survival amidst the needed daily change.

But what are the basic concepts here?

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In earlier times, "legal culture" as part of culture was simply a way of separating the respectives fields of natural and cultural sciences. Later, it was used as a figurative term to describe the intellectual, linguistic and customary environment of law; it was used to indicate the overall accomplishment of law; it was used to denote its elaboration, its mastery; and it became a simple object when describing legal systems. Later, in sociology, it began to be discussed as a constituent element of the legal order. Attempts have been made to use it as an indicator in surveys, but it has proved unsuitable for use either as an attempt to describe legal orders by quantification or as an attempt to list the technical

elements of the legal order as ideal types. Moreover, the separation of some 'internal' domain from some 'external' domain in law is impossible; it can only be conceived in a simplistic and mostly visual sense.[1]

As the present paper will show in its conclusions, 'legal culture' as an element of a comprehensive world-historical tableau, as an indicator of the various order-thoughts and corresponding types of thinking behind the legal phenomena that have occurred/are occurring in the world, is in turn a theoretically defensible and operational concept. The dilemma over the identity or difference between 'legal culture' and 'legal tradition' is, however, a question within this. Its international discussion confirms the position taken by the present author for several decades: legal tradition is a legal culture within which the past has a specific binding force. Consequently, what will be called 'legal culture' is not a mere context or added surplus to law, but part of the very ontic of law itself.[2]

It follows from this that the characteristics and modes of operation of law are intracultural, dependent on culture. In the final analysis, therefore, the actual meaning and thus the very existence of law is not explained from within, but from the contextualising positioning of the underlying culture: *extra culturam nihil datur*.

Now, as soon as the world of various laws and legal regimes was opened up to me through my reading and study trips abroad, and I became aware not only of their layers in the past, but also of their diversity in the present, I began to search for the real roots of these differences and the conceptual world that I could assume would account for them as its own versions—as variants of it.[3]

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[1] For a detailed overview see Csaba Varga 'Jog, jogi kultúra és jogi hagyomány, avagy az összehasonlító történeti vizsgálódás kulcsfogalmai' [Law, legal culture and legal tradition, or the key concepts of comparative historical research] *Iustum Aequum Salutare* XVII (2021) 1, 191–219 & <https://real.mtak.hu/161529/>, para. 1–5 and on the issue of separation Csaba Varga 'Domaine »externe« et domaine »interne« en droit' *Revue Interdisciplinaire d'Études Juridiques* (1985), No. 14, 25–43 & <https://droit.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-1985-1-page-25?lang=fr&tab=texte-integral>.

[2] Varga 'Jog, jogi kultúra…' (2021), para. 7.

[3] Until the paper by Csaba Varga 'Comparative Law and Multicultural Legal Classes: Challenge or Opportunity?' in *Comparative Law and Multicultural Legal Classes* Challenge or Opportunity? ed. Csaba Varga (Cham: Springer 2020) x + 212 [Ius Comparatum – Global Studies in Comparative Law 46] & <https://zenodo.org/records/13836062>, 3–42.

At first, I tried to unravel the mystery of the difference between continental and Anglo-Saxon law in a purely theoretical legal context, as a difference in legal methods;[4] then it turned out that it was not only in law, but mainly, and above all, about thinking about law itself;[5] a concept of the idea and ideal of the social order which ultimately dominates the whole vision of the world—its philosophy, its treatment of concepts, even its logic, its relation to human experience, and thus the formulation (or, properly speaking, the formulatability) of any generalities (such as the laws of physics), as well as, as it happens among others, the choice of style of garden design—of the different cultures of the peoples concerned.[6] This, in turn, once we look beyond the two great heirs of Roman law, the realms of Civil Law and Common Law, which once had a Bolognese reception, and then look at the vast arrays of legal arrangements that once appeared and/or are now emerging anywhere in the world, will be increasingly clearly articulated only as a way of conceiving of the order, or *ordo*, that is to be served and secured.[7]

In addition to views on society and the order that is desirable and can be secured within it, whole worldviews are brought together on a common platform of inquiry. The most common feature they have in common is their mutual difference, which precludes any comparability or even any assessment of them in opposition to each other; for in everything they represent, their original—that is, most closely autochthonous—being is present. For, as parts of world civilisations in different places and times, they have been shaped by their own conditions and their own hard-won experiences into their own ideas of order. And any interaction or learning process which sometimes nevertheless may be detectable in them is of

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[4] For a first attempt to define the essence of difference, see Csaba Varga ‘A »Jogforrás és jogalkotás« problematikájához’ [Remarks to the problems raised by the monograph »Sources of law and law-making«] *Jogtudományi Közlöny* XXIV (1970) 9, 502–509 & <http://mek.oszk.hu/14500/14525/>, 215–222.

[5] This is the difference and ultimately the unity of *thinking in law* and *thinking on law*, which became clear to me in the 1980s, when I started my two-year evening seminars at the ELTE Bibó College for my then law students, who have since become the leadership of the FIDESz as a governing force. Cf. Csaba Varga *The Paradigms of Legal Thinking* [1996/1999] enlarged 2nd ed. (Budapest: Szent István Társulat 2012) 418 [Philosophiae Iuris] & <https://zenodo.org/record/6473631#.YmBQejW8qUk>.

[6] Ibid.

[7] *Comparative Legal Cultures* ed. Csaba Varga [The International Library of Essays in Law & Legal Theory: Legal Cultures 1] (Aldershot etc.: Dartmouth & New York: The New York University Press 1992) xxiv + 614.

subordinate importance to their own indigeneity, autochtonity,[8] i.e. their origin. But this implies, on the one hand, that the measure of their success is exclusively their own criteria—regardless of how internally, structurally and institutionally they are differentiated, how deeply they are built up, how they are separated from other disciplining mechanisms and how they function autonomously. In other words, even the most ancient and primitive of their possible variants often provide a surprisingly complex internal structure and feedback system. On the other hand, it follows from this that, more often than not, in each of them we can find an approach, a coherent vision or simply a technical solution that is original to such an extent that the genius inherent in its conception and construction can be generalised by the observer as being characteristic of the whole structure.[9]

In my own investigations, I have called these large entities legal cultures. Not those which I study at close quarters solely out of some special interest, nor those which I compare as neighbours with our own,[10] but the individual carriers of the whole set of them which our universal human development has so far established as the fundamental patterns of law. In the characterisation of these as 'legal cultures'[11] we thus find an exemplary or generalised description of features

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[8] With Glenn's conceptualization of autochthony [from the Greek *auto-* + *chthőn* of earth], professional interest shifted to the originality inherent in any cultural component, whereas a few decades earlier Watson's legal history research focused on the opposite, on the almost unexceptional generalization of human imitation and with it the borrowing of legal patterns, i.e. on an "always the same, always different" explanation of legal development. Cf. H. Patrick Glenn *Legal Traditions of the World* Sustainable Diversity in Law (Oxford & New York: Oxford University Press 2000) xxiv + 371 as well as Alan Watson *Legal Transplants* An Approach to Comparative Law (Edinburgh: Scottish Academic Press 1974) xiv + 106 and critical reflections on the latter by Csaba Varga in his *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [] (Budapest: ELTE "Összehasonlító jogi kultúrák" 1994) xix + 503 [Jogfilozófiák] & http://mek.oszk.hu/14500/14525/>, 193–208.

[9] Cf. note 3.

[10] In this context, the term 'mentalité juridique' is used by Pierre Legrand 'À propos d'une réflexion sur la comparaison juridique' *Revue internationale de droit comparé* 45 (1993) 4, 879–888 & <https://www.persee.fr/doc/ridc_0035-3337_1993_num_45_4_4773> and Pierre Legrand 'European Legal Systems are not Converging' *International and Comparative Law Quarterly* 45 (1996) 1, 52–81 at 60 et seq. & <https://pierre-legrand.com/european-legal-systems.pdf>. According to its definition—Pierre Legrand *Fragments on Law-as-Culture* (Deventer: W. E. J. Tjeenk Willink 1999) x + 162 on 27—, this is „the framework of intangibles within which an interpretive community operates, which has normative force for this community [...] and which, over the longue durée, determines the identity of a community as community."

[11] This is also acknowledged by Jaakko Husa 'Legal Culture vs. Legal Tradition – Different Epistemologies?' *Maastricht European Private Law Institute Working Paper* 2012/18 <https://ssrn.com/abstract=2179890> 30 at 22: it is not legal culture per se that is described, but "rather *cultures*".

which are comparable and even ideal.[12] This is why I was able to state three decades ago that "Comparative legal cultures are examined by a field of scholarship, which is situated at the line bordering comparative law and historical jurisprudence."[13] However, these are not only products, passive products or imprints, but also productive forces that create social reality. They are ontological beings in their existence, which at the same time serve as epistemological filters and frameworks in all cognition of them.[14]

And what was it all for? For a universal theory of law to be able to outline the hitherto known potential of law—its order-concept, its way of thinking—and to go beyond the narrow, formal, mostly rule-centered presentation of law of legal comparatism as it works now, to show why it is worthwhile to talk about the rule-based construction of law in some legal systems, while in others it may be irrelevant, moreover, absent, if not expressly alien.

It is more than two decades since the French specialist from Oxford and Cambridge—according to whom legal culture is nothing more than „a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts"[15]—put it that the problematisation of the Italian-English author he cites essentially "contributes to a debate which Varga, in particular, is developing and whose work is being published by the same publisher […], though is not referred to directly in the work under review."[16]

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[12] According to an early formulation—John Henry Merryman – David S. Clark *Comparative Law: Western European and Latin American Legal Systems* Cases and Materials (Indianapolis: Bobbs-Merrill 1978) xliv + 1978 [Contemporary Legal Education] on 29—, these are "historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system".

[13] Csaba Varga 'Introduction' to *Comparative Legal Cultures* ed. Varga (1992), xv–xxiv at xix, quoted by <https://en.wikipedia.org/wiki/Legal_culture>.

[14] „In short—as Lawrence Rosen *Law and Culture* An Invitation (Princeton, New Jersey: Princeton University Press 2004) xiv + 214 on 4 explains—, we create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real." This in turn creates—continues Geert Hofstede *Cultures and Organizations* Software of the Mind (New York: McGraw-Hill 1991) xii + 279 on 5—„the collective programming of the mind which distinguishes the members of one group or category of people from another".

[15] John Bell 'English Law and French Law: Not so Different?' *Current Legal Problems* 8 (1995), 63–101 at 70.

[16] John Bell's review on David Nelken *Comparing Legal Cultures* in *International & Comparative Law Quarterly* 47 (1998) 1, 248, referring to *Comparative Legal Cultures* ed. Varga (1992) and *European Legal Cultures* ed.

Because, in contrast to the latter's targeted sociological indicator conception—a Finnish comparatist further reflects on the question. „However—he argues—, not all the uses of 'legal culture' or definitions of it are stemming from sociological legal world-view purely. There are also more demanding and more subtle ways to understand the concept. Varga has also connected uses of up-to-date comparative concepts, as 'legal culture' and 'legal tradition', with transcending the limits of legal positivism so that law's internal description of itself is replaced by an external description of law. To simplify a great deal, epistemic point of view from which law is conceived has shifted from inside to outside. Here we find different socio-historical, sociological, and cultural anthropological frameworks. For Varga the shift in comparative law seems to be, rightly so, a shift from positivistic epistemology into wider socio-historical framework. He defines 'legal culture' in a manner that seems to contain elements from multiple fields that study law, not just juristic studies, but sociology, philosophy, history, and philosophy."[17]

As this author quotes me in the same article, "the law's formal objectification (enactments, decided cases, etc.) can be meaningfully interpreted only within its informal contexture. This environment is called legal culture; it is embedded in general societal culture. Legal cultures include ethos, values, conceptual and referential frame related to law, judicial skills and habits, as well as ideology and deontology of the legal profession, among others. It is this component that gives law a life, makes it dependent from local histories and domestic culture, defines its orientation, shapes its receptiveness and responsiveness, and, in case of eventual reform, backs or withstands to it."[18]

Volkmar Gessner – Armin Hoeland – Csaba Varga (Aldershot etc.: Dartmouth 1996) xviii + 567 [Tempus Textbook Series on European Law and European Legal Cultures I].

[17] Husa 'Legal Culture…' (2012), 7.

[18] Csaba Varga *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 [Philosophiae Iuris] on 85 & <http://mek.oszk.hu/14700/14760/>, quoted by Husa, 7, note 28.

This is why in this "broad definition"—he continues—"'legal culture' conceived in this manner is not rigid, it is rooted in social habits, it describes how law is felt, it is not only descriptive because it contains the element of potential (in objectified elements of law i.e. enactments, decided cases etc.), it is formed in social co-operation, it is conceptualisation of law in broad sense, it tells about the legal mentality of a society or a group."[19]

So, on the whole—as he quotes me again[20]—„the comparative study of legal cultures has from the very start been interested in the genesis and formation of the law's various phenomena and operations, that is, in how law evolved within various civilisations, producing various cultural responses in human efforts at problem solving, with varying moral and religious foundations and value preferences in successive ages in a way rebuilding again and again. Or, this is also an interest in the history of ideas, manifesting itself in the general frame of the history of civilisations, dedicated to societal problem-solving capacity even when we are making formal and homogenised instruments and institutions", because—as the author continues further by quoting me[21]—this is "the context of the cultural response we offer in law to the various challenges, characteristic of the given human community and civilisation", actualizing in one way or another the specificity of law.

Or, more precisely, as an American comparatist explains a decade and a half later, „Csaba Varga's starting point, in turn, is the heterogeneity of laws. For him, legal systems are intrinsically diverse. Consequently, any classification into any specific group—it being civil, common, or mixed—is artificial in nature and only serves to facilitate the comparative task."[22] "Still—continues her argument

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[19] Husa, 22 and 23.
[20] Csaba Varga 'Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline' *Acta Juridica Hungarica* 48 (2007) 2, 95–113 at 104 & <http://real-j.mtak.hu/762/1/ACTAJURIDICA_48.pdf>, quoted by Husa, 12, note 51.
[21] Varga 'Comparative Legal Cultures?' (2001), 99, quoted by Husa, 14, note 64.
[22] Anita Frohlich 'Mixed Legal Systems in a Cultural-Traditional Context' <https://comparelex.org/author/anitabfrohlich/page/14/>.

in another paper[23]—, Csaba Varga employs the term legal culture in order to establish a new interdisciplinary area of research (he calls it *comparative legal cultures*) that intends to study legal systems not only from a legal stand point, but also from a sociological, philosophical, historical and anthropological perspective. According to Varga »the term 'legal cultures' […] stands for an operative and creative contribution, through social activity rooted in underlying social culture, to express how people experience legal phenomenon […], how and into what they form it through their co-operation, how in what way they conceptualise it, an in what spritit, frame and purpose they make it the subject of theoretical representation and information.«"

As I have argued all through, *legal culture* is thus ultimately nothing more than the spirit or order of things that creates and maintains *law* as (a) "a global phenomenon embracing society as a whole", which is (b) "able to settle conflicts of interests that emerge in social practice as fundamental" while (c) "prevailing as the supreme controlling factor in society".[24]

This finally reveals the indefinability of the disciplinary nature of comparative legal cultures and one of the main virtue of its discipline: the potential of perceiving in different cultures, in principle, different component(s) of each culture, the organising core of each of their variants, and the genius of the whole, the ingenuity that distinguishes them from all others. For, as a Brazilian author quotes me, "the starting point is no longer either the law of a nation or its sectoral history, but the cultural medium in continuous formation, in which references, as the fixed and fixing points of human thinking and action—beliefs

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[23] Anita Frohlich 'What is Legal Culture?' (July 10, 2014) <https://comparelex.org/author/anitabfrohlich/page/14/>, quoting Csaba Varga 'Legal Traditions? In Search for Families and Cultures of Law' *Acta Juridica Hungarica* 46 (2005) 3–4, 177–197 at 182 & <http://real.mtak.hu/45682/1/ajur.46.2005.3-4.2.pdf>. By the way, the same explanation is quoted by Husa, 7 as well.

[24] Varga *The Paradigms of Legal Thinking* (2012), 311–312. For the first such formulation of this triple criterion of law and thus its universal definition, see Csaba Varga 'Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures' in *Law in East and West* On the Occasion of the 30th Anniversary of the Institute of Comparative Law, Waseda University, ed. Institute of Comparative Law, Waseda University (Tokyo: Waseda University Press 1988), 265–285 & in <http://real.mtak.hu/164100/>, 437–457.

and values, preferences and aims, traditions and skills, methods and procedures—may have developed in a given (and not another) way, that is, the medium in which a certain (and not another) notion of order and the associated (and not another) store of instruments (with a proper conceptual scheme and the role it may attribute to abstract logic) could evolve. If, in an inverse move, we start thinking from the endpoint, this explains why the comparative study of legal cultures neither supposes any kind of codified list, nor any set of questions, nor taxonomy, nor previously established methodology, regarding (or following) which the discipline of comparative legal cultures and its focus on the whole variety of cultures and ages should provide a response. Just to the contrary. According to its inherent approach, out of itself and through its in-built learning processes, each culture generates proper (general and sectoral) formations, frameworks and schemes, often ones and in manners characteristic exclusively of it—approaches and problem-sensitivities, organisational principles and notional distinctions, institutionalisations and procedural paths, methods and skills—, which are suitable, in their systemic totality, to define the specific character of an order which is going to be described by us a posteriori as a legal one, particular to the given culture."[25]

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We must therefore be aware that law is more than a set of rules. Rules are only feasible or predominant carriers of the law—in some cultures, while in others it is carried by others. But what is to be carried at all? Well, that which the order-idea developed in the culture in question considers suitable for fulfilling the

[25] Csaba Varga *Comparative Legal Cultures* On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism (Budapest: Szent István Társulat 2012) 253 [Philosophiae Iuris] & <http://real.mtak.hu/163799/> on 34, quoted by Fernanda Mambrini Rudolfo *O modelo garantista na interpretação e na aplicação dos direitos fundamentais* Um estudo comparado do posicionamento processual penal do Supremo Tribunal Federal Brasileiro em 2015 e 2016 [PhD thesis] (Florianópolis: Universidade Federal de Santa Catarina 2017) 431 & <https://repositorio.ufsc.br/handle/123456789/189495> on 322.

function of law as defined above.[26] The preservation of our culture therefore implies the preservation not only of our legal culture as such, but of our law as a whole.

The siren voices of legal change see the basic conditionality of the perpetuation of change as a precondition for its engagement with today's postmodernity. This kind of approach, in which it is no longer a value, a goal, an aspiration that has remained unchanged whilst being served by our given instrument, which instrument does not simply change in order to fulfil its function unchanged despite the ever-changing circumstances, but which, in the process of change and its all-consuming drift, becomes itself random, slowly eroding the very thing it was used to serve as an instrument for, cannot longer be forward-looking and in this sense progressive, since it has itself become a mere destructive force. As opposed to it, the main characteristic of culture is not randomness or passivity, but a self-identity that can only answer why it has come into being. The expression of this identity is tradition, which carries it in its value and, while being open to change, ensures that this change is carried out by preserving its unchanged entity, its overall values.[27]

[26] Чаба Варга [Csaba Varga] 'ГЛОБАЛЬНОЕ БУДУЩЕЕ, СИСТЕМНЫЕ ВЫЗОВЫ (Изменения в профилях права?)' in *Глобальный мир* Системные сдвиги, вызовы и контуры будущего: XVII Международные Лихачевские научные чтения, 18–20 мая 2017 г., ред. А. С. Запесоцкий (Санкт-Петербург: Санкт-Петербургский гуманитарный университет профсоюзов 2017) 592 at 47–50 & <http://www.lihachev.ru/pic/site/files/lihcht/2017/dokladi/VargaC_plen_rus_izd.pdf>.

[27] See Csaba Varga *Jogváltozás* [Legal change] (Budapest: Akadémiai Kiadó – Társadalomtudományi Kutatóközpont 2022) 212.