

## Results and Task of Legal Ethnology in Europe

**T**HE PROBLEMS OF LEGAL ETHNOLOGY have engaged the attention of European scientific life for more than a hundred years, especially ethnology, history of law and lately sociology. Even this period did not prove sufficient for working out satisfactorily the subject, the proper place, the methodology and applicable results of legal ethnology though many important publications enriched its literature.

A circumstance which renders the clearing up of the problem more difficult is the fact that the operational sphere of legal ethnology has extended to the three aforementioned sciences, each of which has its own well-defined field and methodology. Not one of these sciences laid stress on the development of this new branch of science. The ethnologists did not consider it necessary to differentiate between legal and non-legal phenomena. The jurists were averse to acknowledging that, besides state norms, there existed a second legal sphere which it should be necessary to explore with scientific methods. Sociology also considers it *infra dig* to have any connections with a newly developing historical science.

Naturally this situation should be changed and every possibility is given for the elimination of formal artificial boundaries and for intensive coordination of common themes and methods. No solution will be given in this treatise; the author wishes to summarize the results of European legal ethnology and makes an attempt to define its task, that is we should like to promote the independence and common improvement of legal ethnology amid European social and economic conditions, where the historical existence of the states and the higher level of social evolution lay down other conditions than in the former colonial territories.

The specialists in legal ethnology in Europe are working under completely different conditions to those among primitive peoples and we must emphasize the importance of this fact. The great classical scholars, who had established legal ethnology, either under the name of ethnological law science or under the name of cultural anthropology, had used, for the interpretation of the development of modern law institutions, partly the law customs of primitive peoples, and partly they worked out the materials of the ancient world and of the Eastern high cultures with a comparative method (for example H.S. Maine, A.H. Post, J. Kohler, L.H. Morgan, J.F. MacLennan, J.J. Bachofen). Today an important branch of legal ethnology explores the societies lying outside the spheres of European and Asian high cultures (for example L. Adam, H. Trimborn, J. Gilissen), but rather as a constituent part of the national states, or in connection with them (for example R. Redfield).

What are these diverse conditions and specifications? We can summarize the chief characteristics, as follows:

1. There is no people or territory in Europe, that does not belong to a state sovereignty. In Europe the consequence is that the law of their own state is

predominant for every social class, stratum (social order) and group. Contrariwise in "primitive" (exotic, non-European) societies, even if living in an independent statehood, the state has far diverse functions to the European. These primitive states very rarely give their inhabitants law codexes.

2. In Europe generally the territorial factor is the first determinant; in the case of "primitive" peoples the principle of the personality is the primary factor, that is the same legal rights are due to all consanguineous persons. We can notice some features of this consanguinity in European subgroups (family, the solidarity of kinship, vendetta, etc.).

3. The European legal systems are divided into so-called differentiated branches (private law, law of property, or law of domestic relations, hereditary law). The same diversification is artificial in the case of "primitive" societies. The specialists in "primitive" peoples use it in their publications, but in practice no primitive society differentiates between custom and legal custom, or between the custom of private rights and penal customs. The legally defended interests are also quite different to those of Europe.

4. Europe has a well specified law system for the defence of immaterial rights; in the "primitive" societies it has none at all, or only rarely (for example authorship).

5. In place of the principle of causality, based on natural science, the "primitive" peoples take a magical view of life.

6. In Europe legal disputes are solved by special organs, that is by courts of justice. In organizations outside state life we do not find a similar establishment.

7. In Europe economic circumstances quickly cause changes in the law. In the milieu of "primitive" peoples these changes are relatively very slow.

This enumeration does not give a full picture, nor are all the conditions valid simultaneously, but it denotes that European juridical ethnology has different objectives and methods from similar investigations among "primitive" peoples.

#### LEGAL ETHNOLOGY IN DIFFERENT EUROPEAN COUNTRIES

THE CONDITIONS OF THE EXISTING RESEARCHES are more difficult in Europe than among the peoples living outside state relations. Notwithstanding these difficulties, the summation of the results of one century of scientific research is opportune and useful, though we can deal with only the most important studies.

We begin our conspectus of European legal ethnology with the *French*. Until World War II, French scholars had dealt with legal ethnology under the name of "folklore juridique". But in the present investigations this term has

practically disappeared (as well as all other compounds of the word "folklore"), and the expression "ethnologie juridique" is of most current use in modern French academic language. The intensity of French researches is far more concentrated in the colonial or formerly dependent territories than in France.

On the development of European legal ethnology R. Maunier had a great influence with his famous book, "Introduction au folklore juridique"<sup>1</sup>, published in 1938. Maunier wanted to define the activity of legal ethnology, so he compiled detailed questionnaires and bibliography<sup>2</sup>. According to his interpretation those parts of applied law belong to the sphere of legal ethnology which are oral, local and private ("privé"). According to Maunier there are two basic situations of the law: the law laid down by the legislature and the custom acknowledged by the people. The latter has four applicable possibilities: anonymity, condemnation by administrative organs, toleration and official recognition. Its observation is enforced either by the state or a moral obligation or both. In Maunier's opinion there are four basic sources of customs: the law of the family, the law of property, the contractual law and the penal law<sup>3</sup>. Besides Maunier, the studies of E. Jobbé-Duval<sup>4</sup>, R. Nelli<sup>5</sup> and lastly R. Honin are worthy of attention. The last mentioned has dealt with commercial customs, pointing out that one part of them are "de droit" law customs, that is besides civil law there exists an autonomous living law which has its own sources in the customs.<sup>6</sup>

P. Saintyves<sup>7</sup> had an initiative rôle. In the French Ethnological Atlas some legal themes are also to be found which were widely investigated throughout the country<sup>8</sup>.

We must deal yet with two French sociologists of law, G. Gurvitch<sup>9</sup> and H. Lévy-Bruhl<sup>10</sup>, whose activities had a great influence on the legal ethnology of some Southern European countries. Their studies are respected in France as the foundation stones of legal ethnology. This can be accepted from one important point of view; they have done the same as E. Ehrlich in Germany; both

1. Paris, 1938.

2. *Revue de folklore français et de folklore colonial* (Paris), 8 (1937), pp. 8-9.

3. *Le Folklore Juridique*. In: *Travaux du 1<sup>er</sup> Congrès International de Folklore*. Tours, 1938. pp. 185-190.

4. *Les idées primitives dans la Bretagne contemporaine. Essai de folklore juridique et d'histoire générale du droit*. *Revue historique de droit français et étranger*, (Paris), série 4, 8 (1929), pp. 431-472, 669-711.

5. *Le folklore juridique du Languedoc*. *Folklore* (Carcassonne), n° 69 (1952), pp. 63-77.

6. *Usages commerciaux et loi en droit français*. Paris-Rennes, 1958.

7. *Le folklore juridique*. In: *Chronique du mouvement scientifique*. Paris, 1933.

8. *Atlas folklorique de la France*. Paris, s.d. See p. 61 (on marriage), p. 69 (on common possession), p. 70 (on boundary-mark stones), p. 71 (on hire of servants).

9. *Eléments de sociologie juridique*. Paris, 1940.

10. *Initiation aux recherches de sociologie juridique*. Paris, 1949.

French scholars declared jurisprudence to be essentially a social science, they observed the separating of law and life and gave essential part to folkloristic customs in their researches.

On the Iberian peninsula the *Spanish* people are divided into several ethnical units. In the last decades of the 19th century the unification of private law had created such great problems that from 1883 onwards they had to collect customary laws in preparation for legal codification. In the Ethnological Society of Castillia they organized a separate special group for this task.

The earliest research worker to collect living customary laws was I. Costa, who began in the surroundings of the river Aragon<sup>11</sup> and later expanded his interest to the whole territory of Spain<sup>12</sup>. In Alicante Altamira y Crevea<sup>13</sup>, and in Catalonia J. Karreras i Artau<sup>14</sup> collected the living legal customs. A scientist worked out the rôle of common house ownership in living Spanish customary law<sup>15</sup>. E. Wohlhaupter also investigated the relation between the Spanish people and legal traditions<sup>16</sup>.

In *Portugal*, it is chiefly P. Mereâ's intensive work which is noteworthy, as he made a study not only of legal history, but worked out many questions on legal ethnology<sup>17</sup>.

G. Mazzarella was the first, but in many senses, an isolated representative of *Italian* legal ethnology. He laid great stress on the comparative method of legal ethnology, seeking the defining causes and rules which influenced the living legal customs. He differentiated three forms of living legal ethnology: (1) a descriptive, (2) an analytical, (3) a comparative ethnology. His outstanding merit is the investigation of correlative factors. Legal institutions can exist only in well definable social organizations. No legal institution may connect itself with other institutions at will<sup>18</sup>.

11. *Derecho consuetudinario de alto Aragón*. Madrid, 1886.

12. *Derecho consuetudinario y economía popular de España*. Barcelona, 1909.

13. *Derecho consuetudinario y economía popular de la provincia de Alicante*. Madrid, 1905.

14. *Indicacions bibliogràfiques sobre costums jurídics d'Espanya i especialment de Catalunya*. Estudis universitaris catalans, 2. Barcelona, 1908.

15. Duarte-Ruben, Die Hausgemeinschaft im heutigen spanischen Gewohnheitsrecht. *Zeitschrift für vergleichende Rechtswissenschaft* [abbr. : *ZfVR*.] (Stuttgart), 28 (1905) pp. 110-165.

16. Beziehungen von Recht und spanischem Volkstum in Geschichte und Gegenwart. In : H. Koenen und J.P. Steffes (Hsgg.), *Volkstum und Kulturpolitik*. Köln, 1932.

17. *Considerações sobre a necessidade do estudo do direito consuetudinario portugues*. Coïmbra, 1923 ; Die Erforschung der nationalen Rechtsgeschichte in Portugal. *ZfVR*, 46 (1923), pp. 339-354.

18. E. Panetta, L'etnologia giuridica e il suo metodo secondo il Mazzarella. *Lares* (Roma-Firenze), 20 (1954), pp. I-XIX. He published his studies from 1902 till 1909 in series *Studi di Etnologia Giuridica* under his own editorship.

In the research of living law, first F. Maroi's studies can be mentioned. With his program-giving treatise "Costumanze giuridiche popolari"<sup>19</sup>, he gave a sound basis for understanding the problems of legal ethnology. In the following years he made a project for starting a systematic collection of all customs connected with legal ethnology<sup>20</sup>. In 1929-1930 he worked for a special committee of the Department of Justice on the collection of living customary law in agrarian life<sup>21</sup>. In his account he treated at length the problems of the inner organization of Italian peasant families, the types of peasant ownership, based on the recently collected material.

Many special studies originated from the material of the collection of 1930, of which the most important was the treatise of a lawyer named R. Trinchieri. Relating to the matters of principles he showed the important symbolism of contracts at markets in villages, such as, words, gestures, clauses, acts, but declared that he did not consider the collected material a sound basis for the purpose of codification<sup>22</sup>.

Research work on legal ethnology was carried by E.N. Rocca<sup>23</sup>, who, in 1962, at the Ethnological Congress in Modena, proposed that a questionnaire should be circulated in the valley of the river Po<sup>24</sup>. Legal ethnology did not escape the attention of R. Corso; he collected legal customs in many parts of Italy<sup>25</sup> and was especially absorbed in the collection and writing up of juridical proverbs<sup>26</sup>. E. Carusi<sup>27</sup> threw light on the connections with legal history, G. Perusini touched on legal agrarian relations<sup>28</sup>.

19. Roma, 1925. We must note about A. Scialoja, that he proposed, in 1886, the investigation of the legal practices among the common people. (*Antologia giuridica*, 1886, p. 441.)

20. *Per una raccolta di usi giuridici popolari*. Roma, 1926.

21. *Rivista di diritto agrario* (Firenze), 7 (1930), pp. 17-40; Le costumanze giuridiche e la riforma del diritto privato in Italia. In: *Atti del I Congresso Nazionale delle Tradizioni Popolari*. Firenze, 1930. pp. 122-149. In their country-wide collecting work they collaborated with some courts of justice and a number of administrative organizations.

22. Risultato della raccolta degli usi e delle consuetudini giuridiche nei « contratti in fieri » effettuata nel 1930 dalle Procure generali delle Corti d'appello. *Lares* (Roma-Firenze), 20 (1954), pp. 135.

23. *Trenta anni di storia giuridica agraria*. Modena, 1954. *Il mondo agrario tradizionale nella valle padana*. Modena, 1963.

24. *Atti convegno studi sul folklore padano*. Firenze, 1963.

25. Ländliche Gewohnheitsrechte einiger Gebiete Kalabriens. *ZfVR.*, 26 (1903), pp. 430-356; Die Kleiderabgabe bei den Hochzeitsgebräuchen. *ZfVR.*, 37 (1914), pp. 321-339.

26. *Lo studio di proverbi giuridici italiani*. Roma, 1957.

27. Folkloristica giuridica e storia del diritto. *Rivista di storia del diritto italiano* (Roma), 2 (1929), pp. 129-159.

28. *Consuetudini giuridico-agrarie della provincia di Udine*. Firenze, 1944; *Vita di popolo nel Friuli. Patti agrari e consuetudini tradizionali*. Firenze, 1961.

In Italy there are excellent collections of legal agrarian essays and bibliographies<sup>29</sup>. The legal profession evinces great interest in these collections and the specialists in customary law use their material in their treatises<sup>30</sup>.

The *Germans* have an extensive and manifold literature in legal ethnology, based chiefly on historical data and research in the archives. It is hard to say when and by whom these researches were initiated. The so-called German school of historical law, chiefly F.K. Savigny and G.F. Puchta, attributed great importance to customary law, and its issue, the people's ancient right. In their opinion the law of the people is a living reality in the legal customs, in the different manifestations of the cultural life of the people: in proverbs, in songs, in parables, in folk-tales, in countless ritual forms. They are in close touch with family law, the law of property, hereditary law, contract law and the penal law of the people. In their opinion the material of the law must be explained by the integral historical past of the nation. It means, the law is always a part history, from which may be deduced the fact that with the evolution of life, it changes with the alteration of customs, which are the direct expressions of the legal awareness of the people.

Savigny expressed it as follows: "gemeinsames Bewusstsein als gemeinsame Überzeugung des Volkes". He affirmed that a law which does not take into account the life of popular legal customs has not much value<sup>31</sup>.

The research workers in German legal ethnology adhered firmly to the ideas and theories of the historical-law school, and this attitude remained the dominant characteristic in their later treatises, too. The influence of this school was felt to a greater or smaller effect all over Europe.

How was German legal ethnology developed on this basis?

It is not accidental that legal ethnology was derived from the history of law and through the decades the historians of law have been its promoters. J. Grimm<sup>32</sup> was the first to take note of the "antiquitates iuris", under which name they accumulated everything from the relics of former ages and indeed the Germans collected enormous material from such sources of the law. J. Kohler<sup>33</sup> directed his interest to comparative investigations, and by his method

29. *Archivio Scialoja per le consuetudini giuridiche agrarie*. Firenze, 1931-1942; *Bibliografia di diritto agrario*. Milano, 1959, 1962.

30. M.-Bareris Ricca, *Consuetudine e diritto*. Torino, 1955; C.E. Balossini, *L'accertamento del diritto consuetudinario compito del giurista e del sociologo*. Milano, 1963.

31. *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*. Heidelberg, 1814. (Cf. G. Cocchiara, *Storia del folklore in Europa*. Seconda edizione. Torino, 1954. p. 242.)

32. *Deutsche Rechtsalterthümer*. Göttingen, 1828.

33. Der Mädchenmarkt auf dem Gainaberg. *ZfVR.*, 9 (1886), pp. 398-400; Studien über die künstliche Verwandtschaft. *ZfVR.*, 7 (1884), pp. 415-440; Zur ethnologischen Jurisprudenz. *ZfVR.*, 9 (1886), pp. 407-429; Lebens- und Rechtsbräuche der Bulgaren. *ZfVR.*, 39 (1916), pp. 433-460.

of comparing the legal materials of the different European peoples, both separately and in connection with each other, he became the protagonist of ethnological law studies. He expounded his theories for nearly 40 years in the *Zeitschrift für vergleichende Rechtswissenschaft*, which he founded in 1878; the supplement of which was devoted to legal ethnology. Kohler considered legal ethnology as a part of comparative jurisprudence.

Later, German scientists looked upon "Rechtliche Volkskunde" as adjacent territory between legal history and ethnology, but they emphasized that this new concept and science was the product of the history of law<sup>34</sup>. It became even more evident in so-called "legal archeology"<sup>35</sup>, which among other things, dealt with the legal symbols, the instruments of penal law and torture, customs and such objects of art which portrayed the manifestations of legal things and activities. It was not till 1925 that living customs were admitted to be as important as the material and archival sources, though a systematic collection of living customary laws was not effected.

Among the more important scholars of legal ethnology we must mention the names of E. von Künssberg<sup>36</sup>, C. von Schwerin<sup>37</sup>, H. Meyer<sup>38</sup>, K. Fröhlich<sup>39</sup>, E. Wohlhaupter<sup>40</sup>, K.S. Bader<sup>41</sup>, and from among the generation after the Second World War, F. Merzbacher<sup>42</sup>, K.S. Kramer<sup>43</sup>, A. Gabler<sup>44</sup>, and G. Lutz<sup>45</sup>.

34. K.S. Kramer, Problematik der Rechtlichen Volkskunde. *Bayerisches Jahrbuch für Volkskunde* (München), 13 (1962), pp. 50-66.

35. K. von Amira, *Rechtsarchäologie*. Strassburg, 1913.

36. *Rechtliche Volkskunde*. Halle, 1936; Rechtsgeschichte und Volkskunde. *Jahrbuch für historische Volkskunde* (Berlin), 1 (1925), pp. 67-125; Vergleichende Rechtsarchäologie. In: *Kunst und Recht. Festgabe für Hans Fehr*. Karlsruhe, 1948.

37. *Rechtsarchäologie*. Berlin, 1943; Volkskunde und Recht. In: *Die Volkskunde und ihre Beziehungen zu Recht, Medizin, Vorgeschichte*. Berlin, 1928; Volksrechtskunde und rechtliche Volkskunde. *Studi di storia e diritto in onore di Enrico Besta*. Milano, 1939. Vol. 2, pp. 518-535.

38. *Recht und Volkstum*. Weimar, 1933.

39. Begriff und Aufgabenkreis der rechtlichen Volkskunde. *Giessener Beiträge zur deutschen Philologie* (Giessen), 60 (1938), pp. 49-59.

40. Beiträgen zur rechtlichen Volkskunde Schleswig-Holsteins. *Nordelbingen* (Flensburg u. Kiel), 16 (1940), pp. 74-160; 18 (1942), pp. 51-88; Neue Beiträge zur rechtlichen Volkskunde Schleswig-Holsteins. *Kieler Blätter* (Kiel), 1943, pp. 67-92.

41. Gesunkenes Rechtsgut. In: *Kunst und Recht. Festgabe für Hans Fehr*. Karlsruhe, 1948; *Grenzrecht und Grenzzeichen*. Freiburg, 1940.

42. Rechtswissenschaft und Volkskunde. In: *Jahres- und Tagungsbericht der Görres-Gesellschaft 1960*. Köln, 1961. pp. 13-24.

43. *Haus und Flur im bäuerlichen Recht. Ein Beitrag zur rechtlichen Volkskunde*. München, 1950; Brauchtum und Recht. In: A. Erler und E. Kaufmann (Hgg.), *Handwörterbuch zur deutschen Rechtsgeschichte*. Vol. 2. Berlin, 1965. pp. 506-511.

44. Rechtsbräuche und Rechtsgewohnheiten im Hesselberggebiet. *Bayerisches Jahrbuch für Volkskunde* (München), 10 (1959), pp. 120-123.

45. Sitte, Recht und Brauch. Zur Eselshochzeit von Hütten in der Eifel. *Zeitschrift für Volkskunde* (Stuttgart), 56 (1960), pp. 74-88.

The works of Künssberg had an influence on the legal ethnologists of the neighbouring peoples (Poles, Czechs, Hungarians, etc.). Fröhlich drew up plans for an Atlas to illustrate the territorial extension of the results of legal ethnology.

In *Switzerland* and in *Austria* the development of legal ethnology was influenced by the German example. In Switzerland H. Fehr<sup>46</sup> was its most important representative who had worked together with Künssberg for seven years. The researches of F. Speiser<sup>47</sup>, and H. Bächtold<sup>48</sup> were inspired by a purely ethnological interest, while those of H.F. Pfenninger<sup>49</sup> and E. Höhn<sup>50</sup> were motivated by the aims of the jurist or legal historian. In 1951 the Swiss Ethnological Society held a meeting at Brugg which was devoted to the field of legal ethnology<sup>51</sup>.

In *Austria* H. Baltl published some excellent studies under the name of "Rechtsarchäologie"<sup>52</sup>. His theoretical foundations are also worthy of mention<sup>53</sup>.

In *Hungary* at the end of the 19th century judiciary organs took the initiative for commencing research on law customs in connection with the proposition of the Civil Law Code, when a claim arose for creating a special hereditary law for agrarian people. With the help of questionnaires these repeated researches gave a comprehensive view of the preparation for the legislation. In 1922 K. Tagányi published a request for the collection of living law customs and, as an example, he communicated comparative material for domestic and hereditary law<sup>54</sup>. A. Szendrey applied himself to the research of both administrative<sup>55</sup> and penal customs<sup>56</sup>.

In 1939, at the initiative of G. Bónis and L. Papp, a systematical work for collecting legal customs and law traditions was started again. More questionnaires were made, the intention of which was to ensure the common delimitations of

46. Volk und Recht, Volkskunde und Rechtsgeschichte. *Schweizer Volkskunde* (Basel), 41 (1951), pp. 2-6; Das Recht im Bündnermärchen. *Zeitschrift für schweizerisches Recht* (Basel), 84 (1935), pp. 219; Altes Strafrecht im Glauben des Volkes. *Deutsches Jahrbuch für Volkskunde* (Berlin), 1 (1955), pp. 147-156.

47. Sitte, Brauch und Recht. *Schweizerisches Archiv für Volkskunde* (Basel), 43 (1946), pp. 73-90.

48. *Die Verlobung im Volks- und Rechtsbrauch*. Basel, 1913.

49. *Übung und Ortsgebrauch im Schweizerischen Zivilgesetzbuch*. Zürich, 1911.

50. *Gewohnheitsrecht im Verwaltungsrecht*. Bern, 1960.

51. *Schweizer Volkskunde* (Basel), 41 (1951), p. 44.

52. Rechtsarchäologie in Österreich. *Die österreichische Furche* (Wien), 5 (1949), p. 8; *Rechtsarchäologie des Landes Steiermark*. Graz-Köln, 1957.

53. Rechtliche Volkskunde und Rechtsarchäologie als wissenschaftliche Begriffe und Aufgaben. *Schweizerisches Archiv für Volkskunde* (Basel), 48 (1952), pp. 65-82.

54. *Lebende Rechtsgewohnheiten und ihre Sammlung in Ungarn*. Budapest, 1922.

55. A közigazgatás népi szervei [Self-administrating organizations of the common people]. *Népiünk és Nyelvünk* (Szeged), 1 (1929), pp. 23-38, 92-101.

56. Népi büntetőszokások [Penal customs of the common people]. *Ethnographia* (Budapest), 47 (1936), pp. 65-72.



the themes. It had to take into consideration the fact that, at the request of the Ministry of Justice, and under the direction of M. Hofer, collections were being carried on simultaneously in nearly one hundred places. They were headed under the name of "Research of the legal life of the people". In substance they followed ethnological methods with more or less sociological valuation. All this was mentioned in a detailed scientific-historical summary<sup>57</sup>.

One of the Hungarian scholars L. Papp<sup>58</sup> and the author<sup>59</sup> each completed the full legal monography of a village. G. Bónis treated of the one-child system as a central problem around which revolved many customs and their sociological valuation<sup>60</sup>. E. Fél<sup>61</sup> wrote an ethnological synthesis on the law customs of the joint family organization in the village of Martos. Z. Tóth<sup>62</sup> elaborated the hereditary customs of a closed ethnical unity.

From 1942 till 1944 under the leadership of G. Bónis team collective work was instituted in about 35 villages of the district of Kalotaszeg<sup>63</sup> (now in Rumania) and at Bálványosvárálja<sup>64</sup>, (now also in Rumania). J. Morvay<sup>65</sup> has thrown a new light on the problems of the joint families. I. Katona dealt with the legal customs of pick-and-shovel men, with their organization of labour and

57. László Papp, *A magyar népi jogélet kutatása* [The investigation of the everyday legal customs of the Hungarian common people]. Budapest, 1948; György Bónis, *Magyar jogi néphagyományok* [Customary legal traditions of the Hungarian common people]. *Magyar Szemle* (Budapest), 36 (1939); E. Tárkány-Szücs, *A népi jogéletkutatás problémái a Nagy-Alföldön* [The problems of the investigation of customary law in the Great Hungarian Plain]. *Alföldi Tudományos Gyűjtemény* (Szeged), 2 (1948), pp. 303-311; K. Kulcsár, *A jogszociológia problémái* [The problems of the sociology of law]. Budapest, 1960. pp. 109-125.

58. *Kiskunhalas népi jogélete* [The living customary law of the common people in Kiskunhalas]. Budapest, 1941.

59. *Mártély népi jogélete* [Living customary law of the common people in Mártély]. Kolozsvár, 1944.

60. Egyke és jogszokás a Garamvölgyén [One-child system and customary law of the common people in the valley of the river Garam]. *Társadalomtudomány* (Budapest), 21 (1941); *Népi szemlélet és jogalkotás* [The people's opinion and legislation]. *Puszták Népe* (Budapest), 3 (1948), pp. 15-23.

61. A nagycsalád és jogszokásai a komárommegyei Martoson [The joint family and its customary law in Martos]. *Társadalomtudomány* (Budapest), 23 (1943), pp. 408-437; 24 (1944), pp. 1-35.

62. *A barkók öröklési jogszokásai* [The hereditary customary laws of the Barko (ethnic group in the vicinity of Eger)]. Eger, 1947.

63. E. Tárkány-Szücs, *Jogszokás-gyűjtés Kalotaszegen* [The collection of customary laws in Kalotaszeg]. *Kolozsvári Szemle* (Kolozsvár), 12 (1943), pp. 64-70; Erdély öröklési jogszokásai [The hereditary customary law of Transylvania]. *Hitel* (Kolozsvár), 9 (1944), pp. 378-400; *Jogi elemek a kalotaszegi népmesékben* [Juridical elements and relations in the folktales of Kalotaszeg]. *Kolozsvári Szemle* (Kolozsvár), 13 (1944), pp. 137-145.

64. E. Tárkány-Szücs, *A juhtartás népi jogszabályai Bálványosvárálján* [Statutory provisions of the common people in the affairs concerning sheep-breeding in Bálványosvárálja]. *Erdélyi Múzeum* (Kolozsvár), 49 (1944). These investigations were headed by J. Venczel, under the sponsorship of the so-called Transylvanian village exploring teams.

65. *Asszonyok a nagycsaládban* [The rôle of women in the joint family]. Budapest, 1956.

the dividing of the wages which were paid to them in one common lump<sup>66</sup>. K. Kulcsár protested against the mis-use of the results of legal ethnology for legal-political purposes<sup>67</sup>.

When turning our attention to the Balkan peninsula, we see that the Albanians are rather subjects for than workers in legal ethnology. In this country there still exists in abundance wide-spread traditions, and survivals of old tribal laws live in the memory of the older generation even today. In 1895 at the request of the Hungarian L. Thallóczy<sup>68</sup>, a priest compiled a list of the living customary laws of the Dukadjin and Mi-Skodrak tribes as told to him by the old people. This compilation together with other collections produced a very rich literature on tribal customs<sup>69</sup>. In 1939 M. Hasluck collected a great variety of material on the mountain of Gheg<sup>70</sup>. Some questions on the Albanian customary law system were worked up separately in similar monographies, for example by D.E. Cozzi, who had written on the legal status of females, on marital customs<sup>71</sup> and on vendetta<sup>72</sup>.

Under the heading of Southern-Slavs we deal with three different ethnical unities: the Serbo-Croatians, the Slovenes and the Bulgarians.

The Serbs took the first steps towards having their customary law recognized. In 1866 the Scientific Academy of Beograd gave orders that collections should be made, and in 1874 B. Bogišić the eminent statesman published them in a very considerable collection<sup>73</sup>. They were used for the preparations of the Civil Law Code of Montenegro in 1888<sup>74</sup>. Important summaries are to be found on this

66. Types of Workgroups and Temporary Associations of Seasonal Labour in the Age of Capitalism. *Acta Ethnographica* (Budapest), 11 (1962), pp. 31-84.

67. A népi jog és a nemzeti jog [The customary law of the people and the common law of the State]. *Az Allam- és Jogtudományi Intézet Értésítője* (Budapest), 1961, pp. 153-193.

68. *Illyrisch-Albanische Forschungen*. München-Leipzig, 1916. Bd. 1, pp. 409-462.

69. F. Nopcsa, Die Herkunft des nordalbanischen Gewohnheitsrechtes, des Kanun Lek Dukadžinit. *ZfVR.*, 66 (1925), pp. 371-376; J.V. Ivanova, Obyčnnoe pravo severnoj Albanii kak etnografičeskij istočnik [The customary law of Northern Albania as an ethnographical source]. *Sovetskaja Etnografija* (Moskva-Leningrad), 1961, n° 3, pp. 53-65; S. Isljami, Šemejnaja obščina albancev v period ee raspada [Community of family among the Albans in the age of their dissolution]. *Sovetskaja Etnografija*, 1952, n° 3, pp. 119-132; Qu. Kastrati, Some Sources of the Unwritten Law in Albania. *Man* (London), 55 (1955), pp. 124-127.

70. *The Unwritten Law in Albania*. Cambridge, 1954.

71. La donna albanese con speciale riguardo al diretto consuetudinario delle Montagne di Scutari. *Anthropos* (St. Gabriel-Mödling b. Wien), 7 (1912), pp. 309-335, 617-626.

72. La vendetta del sanguenelle Montagne dell'Alta Albania. *Anthropos*, 5 (1910), pp. 654-687.

73. *Zbornik sadašnjih pravnih običaja u Južnih Slovena*. Zagreb, 1874; F.S. Krauss *Sitte und Brauch der Südslaven*. Wien, 1885.

74. *ZfVR.*, 31 (1908), pp. 122.

theme in the books of T. Saturnik<sup>75</sup> and J. Belović<sup>76</sup>. Among the *Croats* J. Strohal had developed intense activity in the collecting of living law customs, in fact the *Ethnological Journal of Croatia* published in 1909 a questionnaire touching on customary law<sup>77</sup>. On the family legal traditions of the Croat-speaking inhabitants of Alsómuraköz (zadruga, engagement, dowry, etc.), the work of J. Csányi<sup>78</sup> is exemplary. In the case of the *Slovenians* the draft of S. Vilfan sums up Slovenian legal ethnology; the study of B. Orel treats of everyday life and employments<sup>79</sup>. So does the minor study by M. Kostrenčić<sup>80</sup>, and M.S. Filipović's treatise on Bosnia follows the same trend<sup>81</sup>.

The example of Bogišić had a productive influence on the *Bulgarians*. The living legal customs awakened the interest of E. Bobčev, chiefly those connected with family law, hereditary law<sup>82</sup> and the zadruga<sup>83</sup>. The later writers L. Barbar<sup>84</sup> and J. Kohler<sup>85</sup> give a full portrayal of the living Bulgarian folk legal customs. The connections between the customs and the law were analysed by I.V. Comov<sup>86</sup>.

Let us now turn to the Western-Slavs, to whom the Poles, the Czechs and the Slovaks belong. Each of them represents many ethnical unities.

In 1889 among the *Poles* Baron Grabowsky elaborated a voluminous questionnaire for the collection of legal customs both of the village and town people<sup>87</sup>. Concerning its results we have no information. In his younger years the law historian K. Koranyi evinced an interest in legal ethnology in his studies. He deals with law history using legal customs as demonstrative material, in fact,

75. *Jihoslovanské právo soukromé ve světle právních obyčejů* [The South-Slav private law as reflected in customary laws]. Praha 1926.

76. *Die Sitten der Südslawen*. Dresden, 1927.

77. K. Tagányi, *op. cit.*, p. 10.

78. *Alsómuraközi családai jogi néphagyományok* [The customary law traditions of Alsómuraköz (Northern Croatia)]. Perlak, 1943.

79. *Narodopisje Slovencev*. Ljubljana, 1952. Vol. 2, pp. 217-262, 263-350.

80. *Običajno Pravo* [Customary law]. Zagreb, 1948.

81. Društvene i ovičajno-pravne ustanove u Rami [Notes on social institutions and customary law in Rama (Bosnia)]. *Glasnik Zemaljskog Muzeja u Sarajevu. Istorija i etnografija* (Sarajevo), Nova serija 9 (1954), pp. 169-180.

82. *Sbornik na B'lgarskijte juridičesaki običaji*. Vol. 1. Plovdiv, 1897; Vol. 2. Sofija, 1902.

83. *B'lgarskata čeljadna zadruga. Istorikopravni studii*. Sofija, 1907.

84. *Gewohnheitsrechtliches aus Bulgarien. ZfVR.*, 35 (1912), 37 (1914), 39 (1916), 40 (1917).

85. *Lebens- und Rechtsbräuche der Bulgaren. ZfVR.*, 41 (1918), pp. 433-460.

86. *Obyčej i zákon v Bulharsku. Sbornik věd právních a státních* [Customary law and state law in Bulgaria]. Praha, 1926.

87. L. Halban, *Znaczenie zwyczajów prawnych i ich badanie* [The importance of customary law and its research]. *Lud* (Kraków-Lublin), 39 (1948-1951), pp. 148-180.

even in his independent shorter studies<sup>88</sup> he made use of living legal customs. In 1952, L. Halban's attention was turned to legal customs but founded on scientific-history and chiefly on the philosophy of law<sup>89</sup>.

Among the *Czechs*, according to R. Horna, nobody dealt systematically with the problems of legal ethnology, and therefore in 1952 he took upon himself the prime task of giving a program<sup>90</sup>. Among the *Slovak* people Rath had worked out in 1907 a 27 page-long questionnaire for the purpose of collecting legal customs<sup>91</sup>, but without any result. S. Luby elaborated many questions on customary laws<sup>92</sup> and S. Svecová did the same in respect to the systematization of Slovak family forms<sup>93</sup>.

Among the Eastern Slavs the *Russians* had in earlier times (that is in the 18th century) made it possible for the conquered peoples to use their own laws. These special laws were treated as a supplementary law to the Russian state law and their compilation became necessary. This was completed on the scene, in the presence of the nobles and leaders. Some collections were extended to a number of peoples living in the European parts of Russia (for example the so-called Speransky-collection of the year 1822). We can find the scientific historical summary of the question in K. Tagányi's work<sup>94</sup>. M. Kovalevsky<sup>95</sup> completed the working out of a fragmentary part of living law customs.

In the U.S.S.R. since 1950 they treated of the legal phenomena of social life using the so-called examination of change. It was important for the Soviet State to take into consideration social structures and popular legal culture as in their territory there existed several nationalities of varying cultural levels and with different religious beliefs. A great part of these people still lived in feudal conditions. For example, the original source of the customary law of some peoples of the Caucasus was the scheria, the law of Islam, accepting polygamy, the agnate connection of the family, the almost outlawed state of women. Penal law had a strongly private law character (family revenge, etc.). For some time there were daily conflicts between the law and customary law<sup>96</sup>. Many of the peasants adhered firmly to the old traditions.

88. *Lud* (Lwów), 26 (1927), pp. 7-18, 96-97, 113-114; 27 (1928), pp. 1-25.

89. L. Halban, *op. cit.*

90. Folklore juridique. *Lud*, 39 (1948-1951), pp. 133-147.

91. *Slovenské Pohľady*. Turócszentmárton, 1907. p. 225.

92. *Obyčajové právo a súdna prax* [The rôle of the juridical custom in legal practice] Bratislava, 1939.

93. Klasifikácia rodinných foriem v Slovenskom materiáli [The classifications of the diverse family types based on Slovak ethnological material]. *Český lid* (Praha), 21 (1966), pp. 85-89.

94. K. Tagányi, *op. cit.*, pp. 3-9.

95. *Modern Customs and Ancient Laws of Russia*. London, 1891; *Zakon i obyčaji na Kavkazie*. Moskva, 1890.

96. H. Günther, Zusammenstösse zwischen Gesetz und Gewohnheitsrecht im nördlichen Kaukasus. *ZfVR*. 54 (1931), pp. 317-359.

At first the collections and treatises on social transformations were schematical sketches, but later they treated the problems more dialectically, enlarging the scope of their researches to include more profound examinations of legal problems : thus many useful publications appeared. In 1953 G.M. Sverdlov's directory had a stimulating effect on the researches of the ethnologists. He drew their attention to the state-law side of the problems examined, that is to notice how the laws were merging into everyday life <sup>97</sup>.

A collection of legal-historical relics found in customs is in progress, its examples being the studies of E. Kagarow <sup>98</sup>, M.O. Kosven <sup>99</sup>, A. Ladyzenskij <sup>100</sup>, R. Kharadze <sup>101</sup> and A.C. Omarov <sup>102</sup>.

The Rumanians having many ethnological unities, possess a very rich customary law. The first Rumanian study in the field of legal ethnology was written by G. Draganescu, who has elaborated the marriage legal customs <sup>103</sup>. G. Fotino is supposed to have discovered many Rumanian folk peculiarities chiefly among the hereditary legal customs relating to real estate <sup>104</sup>. Much valuable material has been obtained from D.D. Mototolescu's history of law <sup>105</sup>; from S. Radivici's work <sup>106</sup> on the common ownership (razes and mosnen) of Rumanian peasants extant at the turn of the century; and from I. Radu's treatise on the living customs of family rights <sup>107</sup>.

From the theoretical standpoint T. Herseni's study on the rôle played by custom in relation to the individual and to society is very important <sup>108</sup>. X.C. Costa-Foru and H.H. Stahl <sup>109</sup> in their treatise on family common property in the village of Nerej (Oltenia) show how the organized forms of the old life

97. *Sovetskaja Etnografija*, 1953, n° 2, pp. 202-211.

98. Reste primitiver Rechtsgewohnheiten in den ostslawischen Volksgebräuchen. *ZfVR.*, 53 (1930), pp. 209-218.

99. Semejnaja obščina. Opyt istoričeskoj kharakteristiki. [The joint family. Attempt at a historical characteristic.] *Sovetskaja Etnografija*, 1948, n° 3, pp. 3-32; *Matriarkhat*. Moskva, 1948.

100. Das Familiengewohnheitsrecht der Tscherkessen. *ZfVR.*, 51 (1928), pp. 178-208.

101. *Gruzinskaja semejnaja obščina* [The Georgian joint family]. Tbilisi, 1960.

102. *Pamjatniki obyčnaja prava Dagestana XVI-XVII vv.* [Monuments of the Daghestanian customary law of the 16th and 17th centuries]. Moskva, 1964.

103. Rumänische Hochzeitsgebräuche. *ZfVR.*, 31 (1908), pp. 68-105.

104. *Contribution à l'étude des origines de l'ancien droit coutumier roumain*. Paris, 1925. pp. 61-84, 134, 205, 238, 271; What is the Old Rumanian Law? *Rumanian Quarterly* (Bucureşti), 1939, pp. 31, 38-40.

105. Der Grenzzeit mit der Erdscholle auf der Kopfe im alten rumänischen Recht. *ZfVR.*, 60 (1937), pp. 269-305.

106. *Mosnenii și razesii*. Bucureşti, 1909.

107. *Raport asupra manifestărilor juridice din sânul familiei*. Timișoara, 1938.

108. Individ și societate în satul Fundul Moldovei. *Arhiva pentru știința și reformă socială* (Bucureşti), 10 (1932), pp. 135-158.

109. Caracterul devălmaș al familiei nerejene. *Ibidem*, pp. 447-462.

are dissolved by the new and modern state-issued conditions (for example the influence of the Code Civil). H.H. Stahl acquaints us with the rules of customary law relating to the landed estate beyond the village<sup>110</sup>.

In old *Lettonia*, V. Sinalski, in a book of several hundred pages, dealt with the problems of legal ethnology based chiefly on history<sup>111</sup>.

In *Turkey* there is only one short study that has any bearing on our subject and that is K. Yund's treatise on traditional family rights in İçel<sup>112</sup>.

In *Greece*, G.L. Maurer was the first historian of law<sup>113</sup> in the beginning of the 19th century, who with the help of a questionnaire collected the customs of laws. From the material collected, it may be deduced that the living law customs can be traced back to Bizantine, Hellenic and Old Greek sources.

From among the Teutonic peoples of Scandinavia we shall deal first with the *Swedes*. To our best knowledge, no separate space has been devoted to legal ethnology in their vast ethnological literature. A. Eskeröd in one of his articles dealing with social problems, begins his study by mentioning that in the field of Swedish folk culture the structure and dynamics of social organization have not yet been touched upon<sup>114</sup>. We can deduce from the comprehensive ethnological studies that extensive basic works relating to legal ethnology have already been commenced<sup>115</sup>. S. Erixon and S. Ljung collaborated in writing a treatise on the selfgovernment of peasant villages, which, though only a detail of legal ethnology, convinces us of the afore-mentioned fact<sup>116</sup>. C.H. Tillhagen studied some customary legal problems of the Gypsies living in Sweden<sup>117</sup>.

In *Norway* K. Ostberg produced the most excellent study on European legal ethnology, the "Norsk Bonderet"<sup>118</sup>. It is a colossal collection and elaboration of Norwegian peasant rights. In a work of several volumes he treats of peasant rights in their entirety (bonderet), from the contracts of servants to proprietary marks. He mentions also the customs appertaining to the neighbourhood, to lumbering and an especially valuable ancient Old-Norwegian custom concerning

110. Bornes, limites et signes de propriété champêtres. Notes de folklore juridique roumain. *Travaux du 1<sup>er</sup> Congrès International de Folklore*. Tours, 1938. pp. 201-205.

111. *Folklore juridique*. Riga, 1931.

112. Geleneklere göre İçel'de aile hukuku [Traditional familiarly law in İçel]. *Türk Düşüncesi*, (Istanbul), 1 (1954), pp. 281-283.

113. E. von Künssberg, *Rechtliche Volkskunde*. Halle, 1936, pp. 3-4.

114. *Schwedische Volkskunde*. Festschrift für S. Svensson. Stockholm, 1961. p. 153.

115. See the studies by A. Eskeröd, (pp. 153-179), O. Hasslöf, (pp. 244-272) and N.A. Bringéus (pp. 424-429) in : *Schwedische Volkskunde*.

116. Svenska byordningar [Swedish village arrangements]. *Folk-liv* (Stockholm), 17-18 (1953-1954), pp. 81-124.

117. The Concept of Justice among the Swedish Gypsies. *Journal of the Gypsy Lore Society* (Edinburgh), 37 (1958), pp. 82-96.

118. 11 vol. Oslo, 1914-1936.

communal whale-fishing<sup>119</sup>. Ostberg's theoretical and comparative reflections are of less value<sup>120</sup>. In the first third of our century he had great influence on the formation of European legal ethnology. We have yet to mention E. Solem's book on the customary law of the Lapps<sup>121</sup> and a short article by G. Anohin<sup>122</sup>.

The extensive ethnological interest of the *Finns* discourses on legal problems without its coming under the name of legal ethnology, nor is any endeavour made to use any legal systematic methods in their studies. Their scholars deal first of all with the Finno-Ugric age and the legal traditions of later-period primitive societies. E.A. Virtanen has written on the law of hunting<sup>123</sup> and fishing<sup>124</sup>, on the occupation marks<sup>125</sup>, on the private and common ownership of the primitive Finnish communities<sup>126</sup>. U. Harva<sup>127</sup> dealt with the systems of kinship and U.T. Sirelius with the legal questions concerning hunting<sup>128</sup>.

In *Denmark* two studies attract our attention. P. Meyer occupied himself with rural autonomy, local communal customs, and freegrazing-systems<sup>129</sup>. A.F. Schmidt published important material on the customs of local administration<sup>130</sup>.

In *Belgium* P. Heupgen<sup>131</sup>, in *Luxemburg* J. Hess<sup>132</sup> and J. Engling<sup>133</sup>, and in *Holland* the studies of G.A. Wilken<sup>134</sup> have some bearing on legal ethnology.

119. *Op. cit.*, vol. 9. Oslo, 1934. pp. 77-103.

120. *Op. cit.*, vol. 3. Hamar, 1922. pp. 1-17.

121. *Lappiske rettsstudier*. Oslo and Cambridge, 1933.

122. Izučenie perežitkov obščinnogo prava v Norvegii [The study of survivals of communal law in Norway]. *Sovetskaja Etnografija*, 1961, n° 1, pp. 198-200.

123. Über das Jagdrecht der Karelrier. *Studia Fennica* (Helsinki), 4 (1940); *Suomalaista tapaoikeutta* [Finnish customary law]. Helsinki, 1949.

124. *Itäkarjalaisten kalastusoikeudesta ja -yhtiöistä* [On fishing rights and fishing companies in Eastern Karelia]. Helsinki, 1950.

125. Okkupaatiomerkeistä [Upon occupation-marks]. *Suomen Museo* (Helsinki), 58 (1951), pp. 49-55.

126. Über Privat- und Gesellschaftswirtschaft in der primitiven Gemeinschaft. *Sitzungsberichte der Finnischen Akademie der Wissenschaften* (Helsinki), 1960, pp. 115-131.

127. The Finno-Ugric System of Relationship. *Transactions of the Westermarck Society* (Göteborg), 1 (1947), pp. 47-52.

128. Über das Jagdrecht bei einigen finnisch-ugrischen Völkern. *Mémoires de la Société Finno-ougrienne* (Helsinki), 35 (1914), pp. 4-9.

129. *Danske Bylag* [Danish villages]. København, 1949.

130. *Studier over vider og vedtægter* [Studies on village organizations]. Brabrand, 1951.

131. Menus faits. Folklore judiciaire. *Le Folklore brabançon* (Bruxelles), 16 (1936-1937), pp. 93-94, 282-285.

132. *Luxemburger Volksleben in Vergangenheit und Gegenwart*. Grevenmacher, 1939. ("Rechtsüberreste", pp. 68-75.)

133. In: *op. cit.*: "Alte Volkssitten und Gebräuche im Luxemburger Land", pp. 132-146.

134. *De vrucht van de beoefening der ethnologie voor de vergelijkende rechtswetenschap*. Leiden, 1885.

In *England* as in Sweden, the research work on the legal customs and conflicts, which arise in an organized society, do not come under the heading of "legal ethnology", but of "legal anthropology". This branch of science treats of the structure of law systems and examines the manner in which society reacts to legal regulations<sup>135</sup>. Legal anthropology differs from the characteristics of European research in so far as it looks upon the undeveloped communities as integral parts of the national state and does not perceive the influence of historical traditions on the inner pulsation of society; still less does it attach any importance to it<sup>136</sup>.

In this country the importance of the customary law is traditional and besides customary law there is no such "folk customary law", as in Europe where it is the chief source of legal ethnology. The consequence is, that what we treat of under the name of legal ethnology, is in England an organic part of the history of law, and for example under the name of "juridical folklore" ancient historical systems of punishment may be included<sup>137</sup>. Researches among the documents of the law-courts give no greater results<sup>138</sup>.

An exception being perhaps, the English rural communities<sup>139</sup>, or the grazing communities of Irish villages<sup>140</sup>, of whose customary rights we have a rich collection. P. Vinogradoff made very fundamental statements relating to the connection between custom and right, especially on the manner of acquiring these rights. For this he took his examples from the life of medieval and modern peasantry<sup>141</sup>.

#### EVALUATION OF RESULTS

FROM THE VARIED MATERIAL LISTED we gain a wide survey of the situation of legal ethnology in Europe and this, more or less, determines its task. We can see that in nearly all European countries and among all peoples, initiatives were taken and with success. But it is equally perceptible, from the above outlined literary material, that the themes and their treatment are extremely varied. If

135. See P. J. Bohannon's study "Anthropology and the Law" In : *Horizons of Anthropology*. London, 1965. pp. 205-211.

136. R. Redfield, *Peasant Society and Culture*. Chicago, 1956. p. 10.

137. I. W. Spargo, *Juridical Folklore in England*. Durham, 1944.

138. C. F. Tebbutt, Folklore from Court Records. *Folk-Lore* (London), 67 (1956), pp. 228-230.

139. Example : G. L. Gomme, *The Village Community with Special Reference to the Origin and Form of Its Survivals in Britain*. London, 1890.

140. *Ulster Folklife* (Belfast), 2 (1956) ; C. Arensberg and S. T. Kimball, *Family and Community in Ireland*. Cambridge, 1940.

141. *Custom and Right*. Oslo, 1925.



we take into consideration the fact that we have dealt only with those works which contributed directly to the process of developing legal ethnology, on a European level, we may conclude the foundation was widely spread.

The works mentioned in the scientific-historical survey disclose the fact, that among the peoples of Europe, even in our times, there exist legal customs derived from different stages of social history. E.A. Virtanen has discovered among the Finno-Ugric peoples of today, surviving traces of primitive man's pursuits, such as the gathering of food-stuffs, in the occupation-marks and the legal rights relating to them. In the region of Vrancea, the Rumanians have a form of legal magic, called "sânger". This consists of a bloody stake being placed in each of the four corners of the field. In H.H. Stahl's opinion this is to protect it from strangers. K. Ostberg describes Old-Norwegian fishing, the distribution of the various parts of the caught whale's carcass and the customs derived from this which had their origins thousands of years ago. Let us look at Albania, where survivals of customs based on the internal functions of the ancient clan-organizations, still exist in the family life of today. Seeing these customs, we can scarcely consider ourselves as independent of the pre-feudal age. In the case of the migrant gypsies and some transhumance shepherds in the Balkans, it is as if the wheel of time had stopped several centuries ago.

Remains of early and late feudalism are still to be found in the material of European legal ethnology. These are chiefly connected with the soil, its use, its concept, its heritage, and the family. It would be rather difficult to associate the joint family, house-community (*zadruga*) with any single given historical age, but the seed of its diverse forms, as might be studied from the end of the 19th century till our days, was sown by feudalism. Various elements of feudalism are embodied in the internal organization of the village, the countless economic, cultural and social institutions (for example law-courts, common pasture for animals, common defence against fire etc.), which were brought into being for the purpose of carrying out common tasks. These were examined chiefly by German and Swiss scholars. From the age of Capitalism, commercial customs (market-practices, "usage", etc.) came into the field of legal ethnology. In this respect we cannot as yet form any idea of the relation of Socialism to legal ethnology, but it would appear that the internal collaboration of the state organs has a tendency to follow stereotyped practices (as customs), while trade follows the usual commercial customs.

We can appreciate our material not only from the standpoint of social-historical development, but from the different branches of law as well. The customs disclosed can be classified chiefly under private law, that is it touches on personal law, proprietary law, contract-law (comprising commercial law), inheritance law, family law and marriage-property law. The customary material in the field of administrative law and penal law is not so rich.

The enormous diversity of legal customs and legal traditions, discounting ethnical and religious factors, is the direct consequence of the unequal economic and social evolution in Europe and within the various nations and peoples, as well. Thus, we draw the conclusion that no people exists who does not possess legal customs. This circumstance ensures research a wide field of variety in the future, even in those countries whose legal culture stands on a relatively high level. There are still many possibilities for research work on legal ethnology in Europe, whatever type of ruling system governs.

The material based on the national results of research certainly facilitates the comparison of parallel work done by the neighbouring countries who have identical or similar economic and social institutions. Further, it makes possible the appraisal of the attitude of some concrete legal forms (legal customs, motives or models of behaviour) on the basis of codified laws and how they are put into practice by the people. It often happens that what is a law in one country is merely a legal custom in another. On the other hand, the revealed material based on common and united concepts and on developed methods may have a certain advantageous reaction on national researches.

In the literary material we find several solutions for the name of this research, according to what other science it was brought into contact with. In France, today, both ethnological and sociological investigators most frequently use the expression "ethnologie juridique" instead of the obsolete "folklore juridique". The Italians use several names: "folclore giuridico", "folcloristica giuridica", "etnologia giuridica" (chiefly used by jurists). In accordance with the historical interest of the Germans some call it "rechtsgeschichtliche Volkskunde" or "Rechtsarchäologie", some use A.H. Post's expression "ethnographische Jurisprudenz", others J. Kohler's term "ethnologische Rechtsforschung". But the term "rechtliche Volkskunde" is becoming more and more current in ethnologists' terminology. The Dutch use "juridieke folclore", Lettish researchers "juridiska folklorā", the Poles "etnografia prawna", the Czechs "právní ethnografie" and "právní lidověda". In Hungary they generally use "jogi néprajz" (legal ethnology), "jogi népszokáskutatás" (research of legal folk customs), "népi jogkutatás" (folk legal research), "népi jogéletkutatás" (research of legal life of the people). In Sweden and in England we find the term, "legal anthropology".

One part of the European researchers deals with legal ethnology, and all activities which come under that name, as a branch of ethnology; others look upon it as an auxiliary science to the history of law; and again there are researchers who consider it part of comparative jurisprudence or of sociology.

Concerning the results, we must mention that steps have already been taken towards a common cultivation of legal ethnology. Among them, we can consider as such the decision of the *Academie Internationale de Droit Comparé* (in 1932 at the Hague Congress) to take upon themselves the task of studying not only the written and unwritten legal customs of primitive peoples, but also

the folk legal customs and legal folklore of all Europe. The Czechoslovakian R. Horna, with this aim in view, proposed in 1952, a congress of Polish, Czech, and Slovak jurists<sup>142</sup>. In 1964, at the 7th "International Congress of Anthropological and Ethnological Sciences" in Moscow, customary law appeared as the central theme for the common study of the source of legislation.

#### *LEGAL ETHNOLOGY AND ITS TASKS*

IN CONNECTION WITH THE CONCEPT OF LEGAL ETHNOLOGY we shall find many obscure and much-debated problems. The themes of these topics can, in general, be divided into three greater parts: legal customs, legal traditions and their (real) material. Most discussions are about legal customs. Many persons doubt whether legal customs come into being at all, and if so, how do they stand in relation to the law, and why does one branch of ethnology deal with it, etc. Later we shall give detailed answers to these questions, but first we consider it necessary to elucidate the concept of legal ethnology in point of other aspects.

For delimiting it from other sciences, the term "legal ethnology" gives us a certain starting-point, inasmuch as it conjures up for us a picture of the people, the law and the various forms of human behaviour, that is of the real object of research. Considering its diverse relations we must avoid rigid ideation.

According to our literary material, the greatest part of the researchers were interested chiefly in the agrarian strata, including the gathering economics (for example the Gypsies). The power or the helplessness of the customs, the endeavour to stabilize the relations is most significant among the peasantry. From urban life legal ethnology picked up something from the customs of the traders (chiefly market-dealers, etc.). In addition to the living conditions of peasants and traders, our future task is to extend our researches to the workers (for example the industrial proletariat, the pick-and-shovel men, miners, etc.). We must first investigate the legal customs and only afterwards enquire who avails himself of them. We can say briefly: legal ethnology embraces all those who marry, inherit, make wills, transact business, or those who work in agricultural co-operatives, etc., and do but keep the state legal regulations in so far as is compulsory, in other respects living according to the customs of their smaller communities (micro-societies).

In the term "legal ethnology" with its reference to law, we find a certain conceptual constraint, as even the philosophy of law was unable in 2 000 years to define unanimously the exact meaning of law. As every country, people and scientist gave a different interpretation to the concept "law", it cannot serve us as a starting-point. We can proceed only if we look upon law as a social product and approach it not from the theoretical but the practical aspect of human conduct.

142. R. Horna, *op. cit.*, p. 147.

The source of human conduct is the consciousness: what is just and what is unjust, what we may do and what we may not: this, we say, is reprehended by man's consciousness of right, which decides whether to act or abstain. Now we will not touch on the very complicated dialectical question of decision and performance, for example expediency (as innovation) and powerlessness (as compliance), etc., which motivate the intention, we might say, man is influenced by his consciousness of right.

But what are the more important factors that influence the individual's consciousness of right and at the same time the existing so-called moral integration of the micro-communities ?

They may be the following:

1. Inherited tradition (passed down by one generation to another);
2. the practices which are followed by other persons (for example the influence of higher classes, or of neighbours, or neighbouring communities);
3. religious beliefs (for example sects, scheria, etc.);
4. the law of the state and its coercive force;
5. individual experiences (which make social legal customs individual).

In a word, the consciousness of right is bound by historic, social, religious and state elements, and individual experience motivates all these. The influence of these factors may be occasional, tendential and exclusively from the point of view of individual conduct. If the influence of any one factor, from having once been conviction, now becomes a tendency or becomes exclusive<sup>143</sup>, and repeatedly results in similar conduct on part of the major part of the community, in definite situations, if this influence is accepted socially, we then speak of custom, provided it is not identical with the state law. Basically one custom is similar to another: it is followed instinctively or consciously by the people, for if it were not, the inner mechanism of society, the infrastructural forces would enforce it<sup>144</sup>.

From the mass of various customs, we can separate legal customs with the help of fiction. We say there are human relations which are generally reflected in the law, or relations, which have rules imposed upon them by the law. We may presume, that at the same time and in larger territories, they are relatively

143. Legal ethnology — derived from branches both of ethnology and sociology — evaluates only the rules of behaviour, which had become general, but not its deviations.

144. Modern legal sociology also "steps beyond" the traditional concept of law. For example, H. Lévy-Bruhl referred to the fact that the research of rights must go beyond the rules of law, legal regulations and the legal written material in general. (*Initiation aux recherches de sociologie juridique*. Paris, 1949.) G. Gurvitch, considers the most diverse mass of rules of behaviour as a law symbolic activities, suppositions, customs, and whose value may be discovered in the spontaneous normative facts. (*Sociology of Law*. London, 1947 p. 48.)

permanent and immutable, or at the most, change very slowly. To this group belong the relations of proprietorship, of distribution, of persons, and common procedures, etc. For example, for the distribution of the common property the civil law established rules, but the aforementioned examples of the Old-Norwegian distribution of whale fishing, or the distribution of benefits derived from communal sheep breeding in Transylvania, for the most part escape the attention of the legislation. In these cases larger or smaller groups constitute for themselves a "law", structurally identical with that of the state to which they subject themselves.

We have an example of a legal institution being established by state law, and custom applying it to different relations; among the Croats, the female brought a dowry to her husband's house, and this was based on state law, but (according to J. Csányi) custom compelled the man to do the same in the case of his going to live on the farm of his wife's parents. Whether the latter is to be considered a law or a legal custom is a moot question.

Our subsequent problem is, what is the state's attitude to legal customs? We must touch on this question as many scientists do not consider as an integral part of legal ethnology the legal customs which are acknowledged by the state, only those are so-considered which are independent of the state or degrade it, or have a derogatory effect on it. We accept the former opinion, because the legal customs acknowledged by the state, have their source in the community which established them.

From all this we have the means for delimiting the topics of legal ethnology from other sciences and defining its tasks. Jurisprudence deals with the establishment and employment of the state laws (including administrative organs and law-court practices); the examination of the concrete rôle they play in society is the occupation of legal sociology<sup>145</sup>, and the task of legal history is the research of their relation to history. The task of legal ethnology is the examination of human behaviour (derived from all other sources) which is accepted and applied customarily by any socially defined community, even if with the aid of fiction it enters the field of law. Legal ethnology must deal also with the extant creations of man's consciousness of right, but which are not put into practice any more and live only in the products of folklore (tales, songs, legends, and fables) and appear in legal customs which are still remembered by the people of today. We will not occupy ourselves with these, the objective (real) mementos of legal customs and legal traditions as they indubitably belong to the field of legal ethnology.

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145. J. P. Poisson, *Le concret en sociologie juridique. Revue de l'Institut de Sociologie (Bruxelles)*, 39 (1958), pp. 505-511.

*SOME METHODOLOGICAL ASPECTS*

FOR THE PURPOSE OF EXAMINING THE THEMES BELONGING to the field of legal ethnology, experience has formed an adequate method, which takes into consideration the circumstance that customs are parts of some legal institution and the parts must be investigated in conjunction with the whole. Besides these customs stand in the closest relation to socio-economical realities, and legal traditions have inherited the criteria and relics from former legal systems. We must develop the existing methods further and make them suitable for the realization of common results. Attention must be paid to some points of view.

Customs and traditions must not be separated from the mode of living, as may be seen from the aforementioned. Examinations must be carried out showing that they have a bearing upon one another. Every phenomenon, which can be appreciated from a legal point of view, has forms, meaning, use and function, as well as development, change and migration. Today legal ethnology can be studied successfully only by using complex methods for revealing connections and certain phenomena. In the following we wish to give a rough outline.

The exact time and place must be ascertained concerning the forms of the phenomena of legal ethnology, such as, the connection with the culture (meaning) of a given community (group); the relation to state law (use); lastly the connection with the socio-economic basic structure of the community (function). This basic operation is our most important task and must be dealt with according to the generally accepted and known methods proper to legal ethnology. Only those phenomena may be taken into account which occur repeatedly in the collective mentality and actions of the majority of the community. In contrast with this, legal traditions as well as folk tales and folksongs may consider the perpetuation of single occurrences as indispensable. The reason we declare our science to belong to ethnology is because the most important basic work is done with the aims and methods pertinent to the science of ethnology, deviating only in so far as we look at it from the legal point of view.

Concerning technical questions, we wish to mention only questionnaires and atlases whose rôle in the preparation for common European research must be made clear without delay.

The questionnaires were of great help to national collections, but as experience has shown, they proved useful only for a general collection of experiences in the internal affairs of some community. For the purpose of obtaining a thorough and varied knowledge concerning certain communities or still more, of certain legal institutions (for example dowry), special questionnaires should be devised. Placing the problems on a European level, the initial aims should be the compilation of a thematic catalogue; and the publication of questionnaires relevant to the most important topics would be of great help.

All over Europe collections are being instituted towards the charting of ethnographical maps and in nearly every country some questions of interest to us have appeared in the questionnaires. It would have been better if everywhere identical questions had been agreed upon. The atlases have illustrated well the wide diffusion of customs, but for us they are useful chiefly because they show the points (villages) where it would be worth while later to commence deeper examinations.

There is another important question that must be mentioned if we wish to co-operate or find a base for comparison. That is a uniform terminology. But we must go not too far and create immoderately narrow conceptions, as such attempts would prevent us from understanding properly the many various ethical characteristics (peculiarities) existing in Europe. Further, it would deprive us of the possibility of discoursing in a common language with those branches of science whose data we use or to whom we could give data. A common periodical for that purpose would be of great use.

The next phase of our work after having collected our data is its elaboration. The examined legal phenomena are integral parts of a nation's culture, the results of historical evolution. That is the reason why we must expose the historical sources, in which work we are helped both by national legal history and by universal legal history. The latter furnishes us with a base for understanding the adoption and migration of the phenomena, concerning which S. Svensson has given us countless useful observations on these problems as seen from the ethnological point of view. To find one's bearings among legal traditions without the aid of the ready data of the history of law is impossible. For the examination of the social aims of customs, we may employ the results and even the methods of sociology. The regular comparison of national and international results is also a phase of elaboration. We can find some very fine examples of this in the aforementioned work by K. Tagányi.

A gigantic task awaits the exponents of legal ethnology, whether we look at national results or the perspective of international collaboration in Europe. These prospects cannot be viewed simultaneously. Our only aim here was to give a survey of the existing and immediate tasks. Should we find co-workers in Europe willing to collaborate in this estimable endeavour, we feel we have not laboured in vain.