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Grażyna Skąpska

Law and Society in a Natural Laboratory: the Case of Poland in the Broader Context of East-Central Europe

The new situation in which socio-legal studies currently find themselves in East-Central Europe is marked by the necessity to deal not only with the economic, political, cultural, and moral effects of the collapse of communism, but also with the planned enlargement of the European Union.¹

It is a situation in which history once more offers a real-life laboratory, where one can again test scientific concepts, research tools, and methods and devise new ones to better grasp the newly emerging reality. My paper will be devoted mostly to the development of socio-legal studies in Poland in the context of new challenges and hopes, against a broader background of similar challenges and hopes faced by these studies in other East-Central European countries.

Although focused on the present, this paper's main argument is the importance of the historical and cultural factors and intellectual traditions, on the one hand, and the tensions and contradictions within a "scientific field" for the development of socio-legal studies after the collapse of communism, on the other. Martin Krygier argues that culture counts and "...our cultural context is not only inhabited, but it inhabits, shapes and moulds those brought up in it. ... One's thoughts, values, symbols, are enveloped and to a large extent constituted by the given." (Krygier, 1999: 88) And quoting another author, Krygier emphasizes "...novelties continually occur, but they do so 'within an already existing idiom of activity'" (Krygier, after Oakshott, *ibidem*: 89).

In light of this argument, independently of the great change, intellectual traditions influence socio-legal studies in two ways: either as a source of concepts and role models, or adversarially – as a negative frame of reference, a warning for future development.

With regard to the tensions and contradictions characteristic of the "scientific field" as a source of scientific development, I will try to subordinate a description of the development of Polish sociology of law to the classical problems of the sociology of science, or, more generally, the sociology of knowledge.²

Following this, I will characterize the socio-legal community, its distinguishing features, as well as dominant paradigms but also tensions and contradictions that structure and influence the undertaken research. Further, I will venture to describe the changes occurring on the level of conceptualization of the studied object.

Finally, I will try to outline the content of current empirical research and of the more theoretical debates after the collapse of communism, in the wake of European Union enlargement eastwards.

Socio-legal studies in the environment of legal pluralism

Eastern, but above all East-Central Europe has a complex and multifarious legal heritage of Roman law, Byzantine law, Muslim law, and local customary law that determined the development of legal institutions and cultures, was mirrored in legal mentalities, law perceptions, and modes of reasoning, and was an important factor in the application of law. East-Central Europe is a place of long public legal history of a struggle for control over political power and protection of public rights and for the self-determination rights of nations (Paczolay, 1999). The latter were stressed as early as the fifteenth century (by a Polish international lawyer, Paweł Włodkowiec, professor at the Jagiellonian University). However, it is also a place – at least in some parts – where personal freedom was not granted to peasants until as late as the middle of nineteenth century.

Central to Polish history is the special period of the partition of Poland, which resulted in the implementation of three different legal cultures on its territory. One of these was the Prussian *Rechtsstaat* culture, the culture of a strong but law-bounded state and of uncorrupted civil service;

another was the Austro-Hungarian multicultural society under one legal regime, with broad political and intellectual freedoms and liberties and skilled and uncorrupted administration. In the part of Poland annexed by Austria-Hungary, Eugen Ehrlich developed the foundations of the sociology of law. The third specific legal culture was imposed by Russia, where law was basically understood as a kind of disguise for the sheer power of the absolutist monarch, who was in no way controlled or subordinated to any higher authority, accompanied by a highly corrupted civil service. Some very prominent Russians contrasted this with the right and noble feelings for justice of the Russian folk, particularly of peasants.³ The legacy of these three legal cultures still poses an interesting and open question about the conceptualization of law and its social functions, promoted by Polish sociologists of law.⁴

Thus, East-Central Europe is a mosaic of overlapping religious, cultural, and political influences, especially the long-lasting effects of the overlapping political orders of the German, the Turkish Ottoman, and the Russian Empires, of the Habsburg monarchy, and, after the Nazi occupation, of the Soviet system. Here not only can the clash of civilizations be traced; the accommodation of various cultural influences is also visible. Apart from that, in some parts of East-Central Europe, especially in the Austro-Hungarian monarchy, it is argued, interest in law and support for the rule of law was limited to social elites and found neither comprehension nor support among peasants – the overwhelming majority of the population.⁵ Therefore, one can plausibly argue that, historically in East-Central Europe, the study of cultures and of social stratification was an important part of legal studies. Nor have these studies lost their importance in the meantime, under conditions created by democratization after the collapse of the dictatorial system and by the harmonization of laws as a result of the prospective European Union enlargement. The thesis of the complexity of the system of law, and in fact of many overlapping systems of law, is formulated with regard to the current situation (Oerkeny and Scheppele, 1999). This thesis, based on empirical research, was applied to Hungary, but it can be easily generalized to Poland, as indicated by studies on the restitution of nationalized property, and possibly also to other East-Central European societies (Skąpska, 2000).

It is not astonishing that, in the historical context outlined above, famously original society-oriented legal theories were formulated in the late nineteenth and early twentieth century. The cultural and legal context produced scholars who won an established place as pioneers of socio-legal studies. Their theories stressed the complex structure of legal phenomenon, its social and socio-psychological embeddedness, and the links between law and other social normative systems, above all morality and culture, as represented in customs. Among these pioneers of socio-legal studies was Eugen Ehrlich, who was active in a province of the Austro-Hungarian monarchy that became part of Romania after World War One. We are indebted to this scholar for ideas on law's reality within a context of broader and more deeply binding norms of human associations, based on shared understanding or negotiated compromises, as well as for his statements about the uncertain and problematic relationship between norms of decision applied by state agencies and the patterns of thought and behavior actually existing in society. Another such pioneer was Leon Petrażycki, professor of law in Russia and, after the revolution of 1917, sociology professor at Warsaw University in Poland, who was concerned with law as a psychological phenomenon consisting of associated feelings of rights and duties. Leon Petrażycki also developed a civil society-oriented psychological theory of law and morality that stressed the mutual enhancement of civic morality and the development of legal institutions. Authors who, like Eugen Ehrlich, were also legal practitioners and judges concerned with the local accountability of their verdicts underlined the importance of empirical studies on “living law” or “unofficial law” and stressed the plurality of interlocking orders – or plurality of laws – within a given society, as opposed to legal studies focused primarily on legal texts. Such concerns were either functionalistic and pragmatic – one had to reach a binding decision and implement it in a culturally differentiated social milieu in order to maintain the relative coherence of the multicultural monarchy – or more theoretical. In

both cases, the society-oriented concepts of law presented a strong foundation of empirical studies of “living law”, law’s legitimacy, law’s efficiency, and the effectiveness of legal policy.

Socio-legal scholars as public intellectuals

Two characteristic features distinguish scholars interested in socio-legal studies in Poland. These features seem also to be common, to varying degrees, in other East-Central European countries. First, we observe the social and political commitment, the participation in public debates, and the fulfillment of civic responsibilities by many prominent scholars of the sociology of law; and second, the socio-structural characteristics of socio-legal scholars.

Sociologists of law, like other professional groups with a predominantly, but not uniquely humanistic education and/or a free profession, belonged to a very specific Eastern European structural phenomenon, the *intelligentsia*. To belong to the *intelligentsia* in Poland and elsewhere in this region meant to contribute to the struggle for national independence – and at least for some representatives of this social group, also to struggle for a place within Western culture. As the distinctive social class, the *intelligentsia* was seen as having a special mission to watch over the souls and spirits of the nations in the name of freedom and justice. Being a part of the overall Polish *intelligentsia*, sociologists of law had a very special status. First, they were and predominantly still are lawyers or combine legal and sociological education (Kojder, 1990). Their special interest in the social aspects of the functioning of law and the sociological concept of law some of them proposed distinguishes them from their professional peers, but also makes them defend their views, which are unorthodox from a legal standpoint. They had and have to struggle to give the sociology of law a place in the academic curriculum, and to look for support for their concepts. This they often find in public debates.

The specific situation of the *intelligentsia* generally changed after World War Two, and it is changing again now. First, after the Second World War, the social character of the *intelligentsia* changed. Lawyers are a special case here. As a result of their almost complete extermination during the Second World War, their further extermination or at least persecution by the new, communist authorities, and the strict instrumentalism according to which the law was conceptualized as a tool to transform the whole social system into socialism and people into “socialist citizens”, lawyers had to be specially and rapidly educated. Some of them finished only special courses, not attending university at all. The state needed lawyers educated in the principles of Marxist-Leninist ideology and conforming to the demands of the new economic and political order based on a state-owned, planned economy and one-party rule. Moreover, in the Stalinist era, i.e., roughly between 1945-1956, it was difficult to even mention the sociology of law, since it ceased to exist as an academic discipline and was banned from university curricula, together with other disciplines dangerous to Marxist orthodoxy (Kurczewski, 1991).

However, as I will describe more thoroughly in the following sections of this paper, after the “thaw” of 1956, scholars of the sociology of law could pursue their activities and contribute to the stabilization and prestige of the sociology of law in the law community, as well as in the broader sociological community, thanks to the underground educational activity of some scholars even during Stalinism and thanks to the personal engagement and activity of their students.

The second characteristic feature of the socio-legal community in Poland is its public commitment and public engagement. In the first, inter-war period, in the recent period of the first democratic governments and presidency, and in the wake of European Union enlargement, its most prominent members were not only engaged in public debates about the development of a democratic and liberal society, but have also held high positions in Parliament or the government or were active in promoting democratic development and democratic education. This is not to say that the entire socio-legal community in Poland was unanimously anticommunist, pro-democratic, engaged, and independent-minded. Many examples of political and intellectual opportunism and political servility could be cited to the contrary (Podgórecki, 1992). However, precisely from the point of view of the development of the discipline, its unorthodox concept of law, and the content

of the research carried on, the engagement of some intellectuals has great importance as a source of some still valid arguments.

The direct roots and models for the contemporary development of Polish sociology of law are found in the inter-war period. Thanks to the activities of Leon Petrażycki, the first Chair of Sociology was established at Warsaw University (Kojder and Kwaśniewski, 1985; Kojder, 1990). The challenge for lawyers in the inter-war period was enormous: they were responsible for the development of the basic legal framework of the new state, and they could contribute to the further democratic development of their country. In such a vein, Petrażycki was co-author of the final draft of the Act of Academic Schools. It sanctioned a high degree of self-administration at universities in Poland at the beginning of the 1920s. Leon Petrażycki demonstrated his social commitment by the publication in 1920 of his pamphlet “How to Rescue Polish Intelligentsia and Science” as well as by his involvement in promoting the rights of women in public and political activities (Skapska, 1987).

From the end of the Second World War until 1956, even to teach such subjects as the sociology, theory, or philosophy of law required great courage. These subjects were forbidden, erased from the syllabi, and, in their place, a simplified version of Marxism-Leninism was taught. But even during that darkest Stalinist period, the sociology, theory, and philosophy of law were taught unofficially. At the Jagiellonian University in Kraków, Jerzy Lande, a disciple of Leon Petrażycki, taught the sociology of law at a private, officially forbidden seminar held at home. Needless to say, mere participation, not to mention the organization of that seminar, could be severely punished as an act of political disobedience.

The period of the political “thaw” after 1956 was characterized in Poland by the development and academic stabilization of the sociology of law.

Thanks to Adam Podgórecki, a prominent student of Jerzy Lande’s “private seminar”, the first Chair for the Sociology of Law was set up at the Institute of Sociology of Warsaw University. In 1972, Podgórecki established the Institute of Social Prophylactics and Resocialization, also at Warsaw University. Owing to his organizational activities and his initiative, the Section of the Sociology of Law was organized within the Polish Sociological Association, thus also creating the conditions for the non-academic institutionalization of the socio-legal community. Professor Podgórecki describes the struggles with governmental authorities and communist party functionaries that accompanied his intellectual activity and organizational efforts in his book, “Polish society” (Podgórecki, 1992).

Another leading Polish sociologist of law and student of Jerzy Lande’s private seminar, Maria Borucka-Arctowa, was strongly and successfully engaged in making the sociology of law an obligatory subject of syllabi in legal departments at Polish universities within the framework of a legal education reform.

Recent history has also been marked by the engagement of some of the discipline’s prominent representatives in the underground activities of the democratic opposition. It was also marked by educational engagement in the so-called “flying university” (a series of fairly regularly held underground lectures, conducted in private homes, mostly in Warsaw, that dealt with topics not taught officially) and the “workers university” (also consisting of lectures and seminars, hosted mostly on premises of the Catholic Church, mostly, as far as is known, in Kraków and Wrocław). This period was also characterized by enormous activity by Polish intellectuals, among them sociologists of law, in publishing in the framework of the so-called “second circulation” – a network of underground printing presses and distributors that grew to be more voluminous than anything else known in Eastern Europe. This period in the intellectual development of Polish sociology of law can also be described as the “functioning of an academic discipline in the shadows of legality”, since the same persons were teaching officially at the state universities and unofficially at the “flying” or “workers universities”; publishing officially, semi-officially (i.e., in books or journals that were printed in editions of only 100 copies, which could be distributed only

to a very limited extent), and unofficially; and performing official and unofficial functions (the latter as advisors to the democratic opposition).

The culminating moments of this heroic period in Poland were the Gdańsk Agreement in 1980 and the Round Table Agreement in 1989.

In the countries whose economies are liberalizing and whose political systems are democratizing after the collapse of totalitarianism, the public engagement of intellectuals, sociologists of law among them, was initially greatly applauded. However, after 1989, in these same societies interest in socio-legal studies dwindled. Initially, the former original ideas seemed no longer compatible with the new realities. No pluralism of legal orders was taken seriously when the rule of law was declared in the constitution and, with the prospect of future membership in the EU, domestic law had to be subordinated to *acquis communautaire* anyway. Many scholars once engaged in socio-legal studies undertook more practical tasks. But socio-legal studies are currently undertaken anew; they focus on the development of post-communist law, on the compatibility of legal institutions with the legacy of the former system and with the new challenges, and on the importance of extra-legal norms for the functioning of official law. These studies indicate once more the public concerns of socio-legal scholars and illustrate the fact that, although the traditional role of the *intelligentsia* is no longer in demand, an empty space has appeared and waits to be filled by the learned opinions of publicly engaged intellectuals in order to conduct an informed and critical examination of post-communist law and of the processes of legal integration under EU law.

The “unexpected” career of functionalism during communism

Eugen Ehrlich – himself a judge – tried to integrate indigenous law into the concept of law, and Leon Petrażycki stressed unofficial law. The dominant paradigms of early socio-legal studies were cultural functionalism and psychologism. One has to make binding decisions in a culturally differentiated legal environment where the central authorities are far away. Differentiated legal and cultural legacies have to be integrated in one coherent legal system of the newly created states, and official law has to find sources of legitimacy.

The later socio-legal studies in Poland were certainly not one-dimensional. On the contrary, they were, and still are conflicting, and their sources are many. They can be analyzed in the light of a theory stressing the importance of a scientific, critical debate and of theoretical, critical self-reflectivity. They can be also debated in the light of a theory that investigates the emergence of a dominant scientific discourse within a field of a discipline, of a dominant paradigm, and of the marginalization of other concepts and theories.

The first approach underlines the importance of an exchange of arguments that brings about the enrichment of theory and research. From this perspective, the first phase in the development of the sociology of law in Poland seems to be characteristically effective, influential, and setting a model for current research. Works and debates initiated by Leon Petrażycki and his students often conflicted with the dominant legal doctrine. Eventually they contributed to the development of legal, and not only socio-legal, studies, resulting in the development of a multidimensional concept of law in its ontological and methodological version, in the development of the concept of conscious legal policy, and in the stress on the motivational and educational functions of law. Both versions of the multidimensional concept that law is a complex phenomenon composed – most importantly for Leon Petrażycki – of legal norms that are primarily psychological phenomena and of official legal texts, and its methodological version that called for the complex methodological approach to the analysis of law, the consideration of law’s social functioning, its psychological aspects, and its doctrinal analysis, proved to be not only useful, but also able to be broadened and developed. Similarly, the concept of a rational legal policy and of educational and motivational functions of law contributed greatly to the development of the theory of law as a social phenomenon. Thanks to Petrażycki’s theoretically elaborated idea of conscious legal policy based on the concept of the civilizational role of law in the education of citizens and in the development of social cooperation, Polish scholars also currently find a sound theoretical basis for their research

on the interconnections between the development of law and civil society (Petrażycki, 1985; see also Petrażycki, 1959).

The dark period after the Second World War was characterized by a dramatic closing of possibilities of any scholarly debate and by harsh persecution of potential participants in such debate. Some of the characteristic questions became the subject of limited and controlled public debate after 1956, but especially after 1962, when Adam Podgórecki published his *Sociology of Law*, and after Maria Borucka-Arctowa published her *On the Social Operation of Law* in 1967. Scientific, informed debate suffered another blow after 1968 when, fleeing the politically initiated “top-down” anti-Semitic hysteria, many prominent intellectuals, including sociologists of law and lawyers interested in sociological studies on law, left Poland and went to work in Great Britain, the USA, and elsewhere.

In the 1960s and 1970s, the new concepts and empirical research on legal phenomena were often elaborated against the narrow and primitive concept of legal positivism, proposed mostly by politicians and imported together with the foundations of Marxism-Leninism. Within such a political context, one may point to several domains of open and often dramatic tensions permeating the development of socio-legal debate in Poland, which also have consequences for contemporary debates and studies.

Two clearly contesting positions were elaborated toward law as an object of research. The first conformed to the official ideology and to the simplistic, primitive, and often hypocritical version of legal positivism promoted by the communist party functionaries. It identified law with an order issued by political authority, backed by state force, formulated as legal text, and conforming to the basic principles of Marxism-Leninism. The content of the latter principles was their current interpretation by the top communist party apparatus. The theoretical foundation of this legal positivism was Marxism; Marxist theory was envisioned as a part and formative factor of social reality. Thus, in this period, the simplified version of legal positivism was accompanied by a very anti-positivistic approach to social and political reality.

Of course, the mechanisms of interconnections between political theory and political reality, especially between such a practically oriented theory and political actions, pose one of the most interesting theoretical problems. These problems can be approached either by searching for the above-mentioned “idiom of activity”, or by looking for holistic, systemic explanations, or both.

According to Niklas Luhmann, the holistic “semantics” offered by Marxist theory presents a special case here. Marxism presented itself “...as a unity of science and ideology, a particular kind of science. In line with this, it expresses its own theory as a condition of legitimization.” (Luhmann, 1990: 18) In more simple language, Marxism contributed to the shaping of reality in the former communist countries by providing the language and the concepts in which the political systems of those countries described and differentiated themselves from their “capitalist” and “imperialist” environments, in this way legitimizing their own existence. Marxism also provided important ideas influencing the frames of minds of these country’s ruling elites and eventually also of their citizens.

Thus, the self-referential theory provided law with its semantic steering mechanism – an Orwellian “newspeak” – thanks to such concepts as “socialist legality”, “socialist product quality”, and “socialist legal consciousness”, which were compatible with the conceptualizations of systemic rules known as “Diamat” (dialectical materialism) or “Histmat” (historical materialism). Marxism provided language and concepts with which the new political system could differentiate itself from capitalism without needing empirical evidence of its truths.

Once applied, the symbolic laws absolved functionaries and citizens even further from responsibility for individual actions and their results. It sufficed to apply semantic rituals, to proclaim new laws on “socialist product quality”, to change names and words, and not bother with the details of legal acts that would enable the enforcement of the laws on socialist quality or equal treatment. It was enough to introduce the rituals of elections and have a symbolic reality compatible with theoretical requirements and thus protect the coherence of the system. This idea of

a “system” provided the intellectual and moral context for the social operation of law as a “subsystem” within the socialist society system. In accordance with Marx’s thesis about the economic “base” and the intellectual “superstructure”, but in a much more subtle and profound way, the idea of an overarching, all-determining “system” supplemented the discourse about law with arguments about law’s role in the development of the social system. The law was reduced not only to a means of oppression one social class uses to its own advantage, as the first naive Marxists believed. It was not even perceived as a “grand-scale instrument” of social change anymore, but came to be conceptualized as a coherent system of techniques, including discursive techniques, completely desocialized and depersonalized, inevitable, totally subordinated to the laws of socialist system development, and therefore beyond any moral judgment.

On the other hand, when the actual social processes clearly diverged from theory, it was no longer possible to hide the uncomfortable facts contradicting ideological/theoretical assumptions about the overwhelming presence and development of the socialist system. Then the law acquired the purely symbolic quality of a superstructure legitimized by a visionary theory, as part of an unquestionable system-related discourse, to which conventional categories of truth did not apply. Here we had such examples of “systemic hypocrisy” as laws stipulating the equal treatment of private farmers and national agricultural enterprises or stipulating the protection of small business entrepreneurs. Further hypocrisies lay in symbolic laws regarding education for sobriety in a country where the statistical data on the consumption of strong alcohol were alarming and nothing was undertaken to combat this; in the symbolic law on the socialistic quality of products under conditions of universal scarcity, where anything produced was immediately sold; and in symbolic anti-pollution laws in the most polluted regions in Europe.

Niklas Luhmann’s neo-functional system theory would say that a politically interpreted dominant theory, rather than social reality, informed the conformist and even servile legal studies of this period. Here, the concept of legal positivism promoted by the proponents of such studies means law as existing in legal texts, on the one hand, and its legitimization in a specific theoretical reality, i.e., in a reality created within politically interpreted Marxist theory, on the other.

This official, doctrinal position was challenged by the very idea of empirical research on the social functioning of law. It was contested by the followers of Leon Petrażycki’s theory of law, first and foremost by Adam Podgórecki. According to Petrażycki’s psychological theory of law, the law is a realistic phenomenon, composed of a practical judgment, i.e., a judgment assigning a pattern of conduct to imperative/attributional emotions. Propositions inherent in such a concept of law and linked with the concept of unofficial, intuitive law were reflected in Podgórecki’s research on the prestige of law, on law and morality, and in studies on legal subcultures, social pathology, and social control (Podgórecki, 1966b; 1969; Podgórecki, 1971; Podgórecki, 1975).

Empirical studies of law were based on the concept of law as a multidimensional phenomenon in the methodological sense, proposing a methodologically complex approach to law. They were studies on the social functioning of law, attitudes toward law, legal consciousness and social change, and social functions of law (Podgórecki, 1969; Podgórecki, 1971; Borucka-Arctowa, 1964; Borucka-Arctowa, 1974; Borucka-Arctowa, 1981; Skąpska, 1981).

However, such imminently positivistic components of law (according to definitions from John Austin to Max Weber) as its political and social legitimacy, Max Weber’s theory of law as a component of economic development, or Émile Durkheim’s concept of “strong institutions” were not broadly debated either in Poland nor, to my knowledge, elsewhere in East-Central Europe until the 1980s and 1990s. Another subject characteristically not a topic of discussion and research, a subject that would be fully compatible with legal positivism, was the history and traditions of legal institutions in the context of modernization processes. One exception was a broad study on divorce and changing opinions toward it, conducted by a specialist in private law, Jan Górecki (1967). These subjects were of practical interest to authorities, though. In the 1960s and especially in the 1970s, the political authorities in Poland and elsewhere in Eastern and Central Europe, especially

in Hungary, Romania, Bulgaria, and the former Soviet Union, became interested in legal efficiency and legal consciousness, and they launched large studies on these subjects.

Controversies and conflicts related to the scope and self-definition of the sociology of law as a discipline followed the main controversy on the concept of law as an object of studies. The clearly outlined positions consisted in the proposition made by Adam Podgórecki of a broad concept of the sociology of law as a theoretical discipline, aimed at constructing a sociological theory of law, which was conceptualized as a primarily social phenomenon – as a social construct – supported by empirical studies. Such conceptualization of the sociology of law stayed in close connection with proposals to study law in a context of broader normative phenomena within a society. The opposing view was also formulated, defining the sociology of law as a predominantly empirical discipline subordinated to the study of legal doctrine and using sociological methods and techniques of empirical research in order to supplement lawyers' knowledge of the consequences of particular regulations.

The postulate of conscious legal policy opened the way to further theoretical studies and empirical research. It resulted in the concept of socio-technics, as a method of enlightened reform, with consideration of psychological, cultural, and macro-systemic factors. Socio-technics was defined as “a number of general directives telling how, taking into account the existing social valuations, to carry out the changes in consciousness in order to attain the socially-intended aims” (Podgórecki, 1966a: 27).

The author of this concept also dealt with the problem of the main social values that were the basis of the social effectiveness of law, thus formulating the hypothesis of the three modifiers of the law operation. The first independent variable was the content that the type of socio-economic system gives to legal regulation; the second was the type of subculture existing within a given socio-economic system; and the third was the type of personality of the recipient of a given rule (Podgórecki, 1966c: 7).

An example of uneasy relations between the development of socio-legal studies in Poland, the public and ethical engagement of their authors, and the political system within which those studies were carried out was provided by the methodology of socio-legal research and its theoretical foundation within sociological studies of law. Quite strikingly, functionalism provided such a theoretical basis and gave studies on law a new theoretical and methodological paradigm, after their initial rejection as a “bourgeois theory”. Afterward, however, it became very fashionable to combine functionalism with Marxism, after adapting the positivistic and functionalist concept of law as an instrument of social change to functionalistic and systemic premises, with the stress on the educational function and effectiveness of law. Adoption of this paradigm roused political authorities' great interest in research on legal consciousness.

The positive reception of functionalism after its initial rejection may well be interpreted in the light of a political thesis that was especially popular in the propaganda of the 1970s: the thesis of the “political-moral unity” of the “developed socialist society”. The ontological status of such a thesis was very unclear: often it was presented as actual reality in accord with Niklas Luhmann's propositions, but because party functionaries also had some doubts, there was a need to support or to construct such a unity. Hence stress was put on the abovementioned studies of legal and moral consciousness and on the educational function of law. Interest was directed to broad research on attitudes toward law, knowledge and opinions about law, and social deviance. But many sociologists of law in East-Central Europe, including Poland, used this interest to carry out unorthodox and critical research, producing some very interesting material.

The tensions that characterize the academic debate may also be analyzed as those that structure the “scientific field”, because of the process of dominance/marginalization within an academic community. Such an analysis reveals new features of the production of theoretical concepts and of the interpretation of research data: official and unofficial pressures and power structures that contribute to the formation of the mainstream discourse and the main paradigms within a discipline. Here we can indicate the dominant theoretical and conceptual approaches,

dominant discourses, and processes of marginalization of those concepts that do not conform to the dominant approach.

The obvious example of the structuring of the socio-legal research field in conformity with power relations determined by ideology is provided by the ideological domination described above. The supervision and control of research topics and political censorship within an academic community belonged to everyday scientific practice in the 1960s and 1970s, even though Poland, along with Hungary, was counted as one of the happier and freer barracks in the socialist camp. This was complemented by a degree of opportunism and even intellectual, political, and moral cowardice on the part of scientists, which was so interestingly described by Adam Podgórecki (Podgórecki, 1992). Even where this debate seemed free, some topics, like the legitimacy of law, were simply not discussed. The efforts to debate them were rebuked in Poland by an authoritative statement that “Polish theory of law has already said everything there is to say on the *validity* of law”.

The field of socio-legal research is also structured by more subtle personal influences on the formation of paradigms and discourses and by personal loyalties that influence the development of a discipline and which still await proper investigation.

Considering the still hypothetical importance of such invisible factors in the mainstream socio-legal debate and their contribution to the development of mainstream theoretical approaches, it is interesting to note that some highly promising concepts were hardly incorporated in socio-legal debate in Poland and nowadays have been forgotten, for the most part.

The post-communist societies are confronted with the disappearance of the old system-thinking and with the emergence of multiple options, though these are fragile, unstable, and untried. The response to these options depends greatly on informed, enlightened debate and the capability to critically explore their consequences. They struggle with the political heritage and ideology of law as an uncontrolled, dictatorial political power’s instrument deliberately used to transform whole societies and all social systems: economic, political, and cultural (Skąpska, 1994). They also look for new paradigms. Nowadays, such paradigms are promised by sociological theories on late modernity or post-modernity, theories oriented more toward social agency and discourse and that explore more subtle power relations, are influenced by cultural anthropology, or are informed by post-structuralist concepts of legal phenomenon that are less rigid, less hierarchical, and open to optional interpretations. Important for these studies are new ideas of the legal system as being characterized by contingency and growing complexity, with the overlapping of many partial and non-hierarchical systems. “The King’s Many Bodies” proposition (Teubner, 1997: 763) reflects power decentralization and the overlapping of many heterarchical legal systems – national, local, international, and European – in forms of professional self-regulation, technical standardization, emerging international labor and corporate law, or the new Law Merchant. Apart from that, in the whole region of East-Central Europe, sociologists of law are faced with new challenges that result from the stress on strict and efficient legal expertise, the dominant economic approaches to law, and the political commitment to goals that do not seem to be critically debated. Among them are the transformation of post-communist law in a specific process of imitation and mixing and the implementation of *acquis communautaire* in hasty proceedings that often indeed recall the construction of a new Prince Potemkin’s villages (6).⁶

In search of new concepts and methods: socio-legal studies after the collapse of communism

The symbolic year 1989 posed a serious challenge to socio-legal studies in Poland and elsewhere in East-Central Europe. It happened independently, but also maybe because of the great hopes for the rule of law and the revival of interest in the concept of the rule of law that East-Central European “peaceful revolutions” brought about worldwide. This era is commonly understood in terms of democracy or the market economy, but it has equally important legal dimensions. It was

preceded by growing criticism of the dominant political ideology and the dominant functionalistic paradigms, but it succeeded in the astonishing initial revival of legal positivism and the simultaneous vanishing interest in studies of the social operation of law. Suffice it to say that the sociology of law, once obligatory, is currently an elective subject. The revival of legal positivism was accompanied by the seemingly deep and persisting belief in the written law as an instrument of social change, i.e., in the “new legalism” (Sajo, 1994), or “new instrumentalism” (Skąpska, 1992; Turska, 1992; Cywiński, 2000). Such a “new” and naive legalism was often accompanied by the equally naive belief in the efficient implementation of legal institutions (developed in Western democracies) in societies experiencing overwhelming social change and dealing with the institutional and mental burden of the very recent totalitarian past. In the “institutional optimism” that is a part of naive legalism, Central Europe represents a “tabula rasa” to be filled by institutions and concepts brought in from outside in order to achieve the planned goals of a working democracy, an efficient market economy, a robust civil society, and the rule of law. Such institutional optimism was based on a crucial proposition, in whose light societies in this region are treated as “new savages” waiting for souvenirs and enlightenment (Sajo, 1997: 44 -49).

It is not astonishing that socio-legal scholars once again contest the dominant views and concepts of law. The arguments of governments, lawyers who work as experts for the government, parliamentary commissions, officials responsible for the implementation of *acquis communautaire*, and the more critical sociologists of law determine the current tensions and contradictions characteristic of legal studies after 1989. Criticism is predominantly of the discrepancy between the statutes and their application and of the still-existing symbolic and ritualized attitudes of lawmakers and politicians who still think merely changing statutes or putting the democratic legal state in the new constitutions means a shift in reality. The criticism questions their optimism, which results from their tacitly assumed sociological theories of social change and their still “systemic” views on law as something imposing itself on society without due consideration of mentalities, cultures, and interests. In contrast to this optimistic and simplified institutionalism, the more sophisticated, contemporary propositions are based on the assumption that there is no simple, linear directionality nor any ultimate goal in change. On the contrary, social change is often characterized by discontinuity and often involves crisis; nor is it inevitable or irreversible. Accordingly, some maintain that the history of post-communist societies – even if they adopt legal institutions promoting liberal constitutionalism, the protection of civil society, and the market economy – does not necessarily have a direction, much less a liberal one. All sorts of reversals and backlashes are possible, especially if the proponents of institutional reforms do not consider the societies’ hopes and expectations (Alexander and Skąpska, 1994; Skąpska, 1996, in the broader context of Szacki, 1994). It is also argued that the naive belief in the law as an instrument of social change introduced “from above” or “from outside” into an empty space of post-communist societies is premature, and that what is going on takes place not “on the ruins of communism” but “with the ruins of communism”. In this view, the remnants of the former system make the important contributions to the emerging new political and economic orders (Stark, 1992).

Let us glance at the new approaches and new methodology applied in research on “unofficial law” in *statu nascendi* and the processes of its formation in real life situations. This was the character, for instance, of the research on the formation of strictly observed and binding norms regulating actions of people queuing for rare commodities – the most frequent daily life situation of Poles in the 1980s (Kurczewski, 1985). Important are also studies of conflict resolution, with the stress on extra-legal norms influencing the definition of a conflict and its redefinition as a legal dispute; extra-legal arguments used in the conciliatory proceedings (Kurczewski, 1982; Borucka-Arctowa, 1988); and studies on legal and political socialization (Borucka-Arctowa and Kourilsky 1991). The methodology of these studies was based on in-depth interviews, analyses of documents, and participatory observation.

Within this broad context are some particularly pertinent questions. The first is about the very concept of law and the rule of law at the time of democratization; the second concerns the ability

of law and legal institutions to deal with transformation, on the one hand, and with the legacies of the past, on the other. In this regard, the socio-legal debate in East-Central Europe, including in Poland, contributes to the general, worldwide debate on “legal institutions in crisis”. The starting point here is the aforementioned critique of “new legalism” or “new instrumentalism”. Dysfunctional consequences of such approaches to law were empirically explored and critically debated, even before the change, in a book published in Poland in 1988 (Turska and Łojko, 1988). Currently, the narrow, technocratic conceptualizations of law are juxtaposed with concepts that are relevant for the societies. There are ideas on law once nurtured by members of the democratic opposition, images of law characteristic of societies that experience a great transformation not only of political and legal systems, but of their life-worlds (Kurczewski, 1993; Priban, 1998). These took the form of the propositions of the Czech philosopher Jan Patočka that culture and tradition matter for law and put distinctive limitations on public activity, especially if this culture and tradition appeals to human rights as “a higher law” (Havel et al., 1985). Such proposals to involve culture and tradition in legal reasoning make us think more about the past, investigate past laws and values connected with them, and conduct research on the past verdicts of our supreme courts or constitutional tribunals as important limits on the visions of social change. The stress is put on the axiological component not only of the concept of the rule of law, but of the very concept of law as an important part of social culture (Kojder, 2000).

In these debates, the characteristic East-Central European ideas on law that were nurtured by the first socio-legal scholars return. They link legal studies with the studies on societal moral fabric: conceptualizations of rights, human dignity, and justice. However, as is also observed, another important feature of modern societies is the impact on lawmaking of lobbying groups, NGOs, and spontaneous social movements of civil society. These new developments seem to be both inevitable and benign, but the question arises how, after the collapse of communism, the social contract will be possible in the face of the pluralism of values and lifestyles and the increasing differentiation of collective interests. In light of this, the issue arises of legal certainty and legal security as the attributes of the principle of the rule of law, together with the issue of stable and reliable foundations for legislation, adjudication, and legitimacy of the democratic state ruled by law. In contemporary democracies, such stable foundations of the legal and political system are sought in the concept of inalienable human rights and in the principle of human dignity that is enshrined in many constitutions, notably in those proclaimed after the collapse of totalitarian or authoritarian regimes. This increasingly important approach to law takes inalienable human rights as the higher standards for evaluating the functioning of the democratic and the legal system, a final test measuring the quality of the democratic and legal order. The relationship between democracy and law in modern complex and pluralistic societies is analyzed and evaluated in terms of universal standards set off by human rights interpreted and applied in the changing social and differentiated cultural conditions of the modern world, quite in accord with the pre-1989 traditions (Kurczewski, 1993).

Furthermore, as maintained by socio-legal opponents of the dominant technocratic view of law, the increasingly technical character of legal reasoning and of the legal system, the growing complexity of democratic institutional arrangements characteristic of contemporary complex societies, and the increasing importance of the executive branch of government are challenged by the new developments and the emerging new ideas about democracy and law. First, one observes the growing importance of judicial review, above all of constitutional review, as controlling not only the application of the law in individual cases, but also the conformity of governmental decisions and parliamentary legislation with the constitution. Hence the proposal to study the interdependence of, and not only the separate processes of lawmaking or law application. Second, in accordance with the concepts and theories of Jürgen Habermas, which are very popular in East-Central Europe, stress is put on contemporary demands to interpret law in terms close to local experiences and the equal application of universal legal standards. Within this model, proceduralization also means growing stress on the role of constitutional courts and judicial review

in general in relation to the political legislative process (Sajo, 1997, *idem*, 1999). Hence, the proposal to investigate the formation of democratic will in the form of a “grassroots constitutionalism” (Skąpska, 1999), to critically review constitutional law and constitutional adjudication from the perspective of its compatibility with the conditions of post-communist societies under transformation, and to study the formation of constitutional equity.

Hence the need for studies of institutions, first and foremost of the new, post-communist constitutions, to explore the conditions of the adaptation of liberal constitutional principles in the given cultural and social context. Kim Lane-Scheppele proposes new approach to constitutionalism, the constitutional ethnography based on sociological hermeneutic methods for sociologically informed research on post-communist constitutionalism.

The model of procedural democracy and of the proceduralization of law leaves some questions open. It also indicates the fragility of legal and political systems in modern democratic societies. In post-communist democracies, this fragility of the legal and state systems consists in the low level of law enforcement, usually analyzed as a consequence of a “weak state”. So we need to study the application and enforcement of the law and the importance of extra-legal, i.e., organizational norms that contribute to the efficiency of the application of the law and the impact of the mentalities of its main agents – lawyers, judges, prosecutors, and civil servants – on this application. These issues are addressed in studies of the application of law in courts and governmental agencies and of the corruption of their officials.

Such studies oppose the dominant view of law as a “system” that imposes itself on passive functionaries. Systemic passivity is replaced by the assumption of pragmatic attitudes of legal professionals, public servants, and citizens and by the critical evaluations of individual and collective interests, values, and passions. These theoretical postulates consist in replacing the ritualistic activities of a “system’s” puppets by real people who promote their own interests. Let us think of legal professionals as people who have personalities and characteristic features of courage or cowardice or opportunism, are well or not so well trained, more or less intelligent, more or less wise, and responsible for their decisions, judgments, and verdicts according to the principles of law. Such a theoretical and methodological turn, reflecting the more general pragmatic turn in sociological theory, prompts one to investigate the formation and application of law as reflecting the cultural, social, and individual properties of law’s agents.

The challenge specific to post-totalitarian socio-legal studies is also connected with the procedures of the lustration and decommunization of lawyers, within the more general framework of issues of “facing the totalitarian past”. In this way, very sensitive and sometimes strongly contested research on decommunization, lustration, and “dealing with the past” once more contributes to a growing awareness of the importance of applying the law and of basic legal principles in this sensitive sphere in which politics and law overlap (Łoś and Zybortowicz, 1999).

Next to the political transformation, the crucial change for these societies was brought about by the introduction of capitalism and the free market. One speaks here about a civilizing effect of law on social and individual activity, of taming anti-social passions, of promoting cooperation, and of protecting and promoting interests. In short, the change consists first in the recognition of the protective function of law, second, in the recognition of the necessity of legal regulations for mutual interactions, and third, in the recognition of the enabling, and not only restraining role of law in society and of the fact that sophisticated legal instruments are important for sophisticated entrepreneurial, financial, or political activities. Our empirical research already provides us with examples of the changing attitudes toward law characteristic of businessmen – a category of citizens for whom the importance of law but not necessarily obedience to it is growing (Turska, 1999; Skąpska, 2002). This change consists in the more pragmatic, down-to-earth, but also more demanding attitudes toward legal regulations. The law, especially private law, comes to be treated as kind of a toolbox from which one selects an instrument to use as needed, to one’s own advantage. This change results in growing criticism of symbolic law and legal hypocrisy, perceived as violations of the abovementioned protective and enabling functions of law.

The most recent phase of development of socio-legal studies in Poland is also characterized by growing awareness of deficiencies of the traditional approach, which was based on the criticism of legal positivism and “official law”. This problem is presented in a research program titled “What Law Do Poles Need?” The question was raised whether the broad concept of law can still be paradigmatic for socio-legal research conducted in present-day Poland, or whether one should look for inspiration to the theory of Max Weber, connecting the development of a formal, rational law with the development of the market economy.

The question is all the more important, the more the development of informal networks, contrary to existing “official law”, and connections based on the *do ut des* principle are revealed by studies of the mechanisms of corruption (Kwasniewski and Kojder, 1979; Kwasniewski and Kojder, 1982; Kwasniewski, 1984; Kojder, 1995b), by studies on the impact of collective, vested interests on the functioning of the economy, especially the “second economy” (Łoś, 1989), and norms and rules as social capital important for the effective operation of law (Skapska, 2002).

Concluding remarks

The transitional period in the development of socio-legal studies in Poland is certainly not finished yet. Conveners of these studies try to analyze the transformation of the political order, of the economy, and of the new constitution-formation processes and to define a place for law in the specific reconstitution of society after the collapse of communism. In this paper, I have tried to show how they respond to new challenges and how the traditional paradigms influence research, but also how they change. This report on Polish sociology of law, against the backdrop of the development of socio-legal studies elsewhere in East-Central Europe, is certainly not complete. Many other important studies have been conducted that were not discussed here, for instance the feminist studies of law, the comparative studies of legal and political socialization conducted in Poland, Hungary, Bulgaria, France, Spain, the United States, and Russia, comparative studies of the formation of totalitarian law and its importance for the processes of transformation, and studies of values in law (Palecki, ed., 1998). Considering the scope and range of these studies, one hopes that the great opportunity offered once more by the “natural historical laboratory” will enable the elaboration of new concepts and new theories of the social operation of law.

Socio-legal studies already contribute to the new conceptualization of law. In light of their results, we can speak of the legal system as a system of legal institutions, norms, and rules that are open-ended, polisemic, subject to interpretation, incoherent, and certainly imperfect. Under conditions of law’s growing complexity and contingency, as well as of growing social and political complexity, the actors face an even greater challenge – functionaries of law are no longer confronted with authoritative certainties, but with such principles as the margin of free interpretation, subsidiarity, the necessity of negotiating the meanings of legal concepts in the pluralistic reality of post-totalitarian societies, and the harmonization of laws from the bottom up rather than top down, in both the national and the international context. One possible interpretation is based on unquestioned relativism, another, more demanding one is commitment to the fundamental universal principles of law and justice, valid also in the changing conditions of late modernity and more specifically of post-communist reality: the principles that wrongs should be righted and crimes punished.

Therefore, the compatibility of the complex, contingent, and dynamic legal system with the complex, contingent, and dynamic society is deeply connected with the initial traditions and research methods developed by sociologists of law. Thanks to such traditions, socio-legal scholars are prepared for the search for new paradigms.

¹ See Kojder and Kwasniewski (1985), Skapska (1987), Kojder (1990), Kojder (1978).

² See Kuhn (1962), Bourdieu (1975).

- ³ Extremely informative and insightful in this respect is the (indirect) controversy between two men, representing quintessentially different ideas of law: Leo Tolstoy, not only a prominent writer, but also a strong proponent of ideas praising the pure and uncorrupted Russian peasants, for whom the law symbolized the cynical justification of sheer and corrupted power, and Leon Petrażycki, a former student of law at German universities, proponent of the concept of law as being closely related to the education and formation of citizens (for a description of this controversy, see Kojder, 1993).
- ⁴ Apart of the strong solidarity bonds between participants in that forbidden private seminar, one learns about criticism leveled at Jerzy Lande by some of his students, when Lande was called to make public “self-criticism” in the presence of his colleagues and students at a meeting held on the Jagiellonian University (a public self-accusation combined with a promise of reformation) because of his wrong scientific opinions and teaching.
- ⁵ See Pogany “A New Constitutional Dis(order) for Eastern Europe” in: idem (eds.), 1995: 217 ff.
- ⁶ See the special issue of *East European Constitutional Review* under the characteristic title “The Ordeal of EU Enlargement” EECR, Vol. 9, No. 4, Fall 2000.

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