

## Interpreting the History of Modern Comparative Law: Beyond Descriptive Linearity The Case of Historical-Comparative Jurisprudence\*

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### 1. Introduction

History of comparative law thinking is still partly unwritten. There are many important pieces on this issue, but a comprehensive account is still lacking.<sup>1</sup> Common to all these, narrower or broader,

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<sup>1</sup> For general accounts of this history see: L.J. Constantinesco, *Traité de droit comparé I. Introduction au droit compare*, Paris, 1972, p. 50 ss.; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, Oxford, 1998, p. 48 ss.. W. Hug, *The History of Comparative Law* in *Harvard Law Review*, vol. 45, 1932, p. 1027 ss. For

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fragments, that they are based on a linear and descriptive approach of the development in legal thinking. That is, they consider development of comparative law thinking as a linear process that starts from the premodern period and lead directly to modernity. This is not too surprising, as legal history deeply embraced the concept of linearity when discussing both the evolution of a legal institution or an idea or school in legal thinking.<sup>2</sup>

However, this paper attempts at introducing a new way of understanding of the formation of modern comparative law thinking. Basically, it borrows certain components of Thomas S. Kuhn's philosophy of science in order to reinterpret the already, more-or-less, settled story of modern comparative law thinking. That is, it makes an attempt to prepare a more feasible way to understand the development of modern comparative law with the help of a historical and sociological concept of science as such. A caveat must be made here, the reception of Kuhn's some concept will have a functional nature in this study, thus the aim of this paper is not to justify or deny the validity or applicability of Kuhn's ideas – being in the centre of a considerable philosophical controversy for decades<sup>3</sup> – but to show how some Kuhnian concepts may help in providing such a vision on the development of modern comparative law that goes beyond the simple claims of description and linearity. Personally speaking the author of this paper is deeply convinced that the history of a given field of scholarly study is much more appealing than a simple, chronologically organized list of authors, theses and dates.

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some national summaries see: M. Ancel, *Cent ans de droit comparé en France*, in *Livre centenaire de Société de législation compare*, Paris, 1969, p. 3 ss.; M. Rheinstein, *Comparative and Conflicts of Law in Germany*, in *The University of Chicago Law Review*, vol. 2, 1934-35, p. 232 ss.; J.W. Cairns, *The Development of Comparative Law in Great Britain*, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2006, p. 131 ss.

<sup>2</sup> As a classic example: Sir F. Pollock and F.W. Maitland, *The History of English Law. Vol 1-2*, Cambridge, 1968. From the contemporary literature: S. Hähnchen, *Rechtsgeschichte. Von der Römischen Antike bis zur Neuzeit*, Heidelberg, 2012.

<sup>3</sup> For a summary: A. Bird, *Thomas Kuhn*, in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), at <http://plato.stanford.edu/archives/fall2013/entries/thomas-kuhn>

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From the perspective of this paper the following Kuhnian terms have certain relevance: pre-paradigm period,<sup>4</sup> scientific community,<sup>5</sup> paradigm,<sup>6</sup> and symbolical generalizations.<sup>7</sup> These all have some added value in the discussion of the story of modern comparative law, and the application of them may even help to overcome some widely shared commonplaces as for instance the lack of proper scholarly premises or the underdeveloped nature of methodological reflection.<sup>8</sup>

In sum, this paper argues that with the help of some Kuhnian terms a better view on the formation of modern comparative law may be reached. The main thesis is that paradigms can be identified<sup>9</sup> in this almost 150 years story and this point will be illustrated by the detailed discussion of the first paradigm of modern comparative law: the historical and comparative jurisprudence. Although this paradigm was

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<sup>4</sup> Cf. T.S. Kuhn, *The Structure of Scientific Revolutions*, Chicago, 1970, p. 10–22 (explaining that the formation of the first paradigm in a given field of study, that is emergence of “normal science” is preceded by a longer period in which various schools and their diverse interpretation compete with each other. This is the so-called “pre-paradigm period”).

<sup>5</sup> Cf. *ibid.* p. 23–51 and p. 177–179. (A central component of Kuhn’s philosophy, as he argues that the commitment to a paradigm’s premises establishes a scientific community, therefore, the ‘normal science’ is simply impossible without the communities of scientists, too).

<sup>6</sup> Cf. *ibid.* p. 181–187. (In the 1969 Postscript, Kuhn refines his concept of paradigm. It is argued, that paradigms are “constellation of group commitments” in various issues being crucial in research work. In essence, these commitments are composed of symbolic generalizations, beliefs in particular models, values and exemplars).

<sup>7</sup> Cf. *ibid.* p. 182–184. (From the aspect of legal scholarship, symbolic generalizations may have a crucial role, as the theses of jurisprudence are mostly expressed in this form. Legal studies tend to use an abstract language, and the sharing of some statements and theses are vital if one wants to subscribe to a certain stream of legal thinking such as natural law understanding or legal sociology, for instance).

<sup>8</sup> For a contemporary summary of this criticism see P. Legrand, *How to Compare Now*, in *Legal Studies*, vol. 16, 1996, p. 232 ss.

<sup>9</sup> Whether the concept of paradigm is to be applied to social or human sciences is still an unsettled question. However, even Kuhn argues that it is not impossible *ab ovo* as puzzle-solving scholarly activities are also part of human sciences. See T.S. Kuhn, *The Natural and the Human Sciences*, in Id., *The Road since Structures. Philosophical Essays, 1970-1993*, Chicago-London, 2000, p. 216 ss.

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overcome in the first ten years of the 20<sup>th</sup> century mostly due to the efforts of the 1900 Parisian Congress,<sup>10</sup> it offers an excellent opportunity to test Kuhn's concepts against facts of the history of legal thinking. Naturally, in this sense, this work is unfinished yet, as the consecutive paradigms and the paradigm-shifts in between must also be studied in the future. But, all in all, this fragment may pave the way toward a novel understanding and may also provoke a stimulating discussion.

*2. General background: the rise of positivism and the idea of evolution*

The continental European legal scholarship, that emerged based on the *ius commune* stemming from the wide reception of Roman law, seemed to be irreversibly disintegrating by the end of the 18th century along national borders. This process was due to the emergence of modern states and their efforts to centralize the formerly multifaceted legal orders.<sup>11</sup> Therefore, from the beginning of the 19th century, one cannot refer to a uniform European legal scholarship any more, but instead its national counterparts focusing on the analysis and development of the national legal orders became the players of the European legal world. The attention of legal scholars almost entirely was directed towards their own legal systems, except for a few isolated attempts,<sup>12</sup> and the outlook to foreign laws lost its significance. However, following the first third of the 19th century, the European scholarly thinking was affected by fundamentally new impacts, which, by the middle of the century, have led to a substantial transformation of the era's perception of scholarship dealing with social issues. This change, obviously, did not leave the previously national legal tradition-focused thinking of lawyers unaffected either.

These impacts are to be divided into two large groups. On the one hand, the general methodological transformation of the period's

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<sup>10</sup> For an overview of the Congress see: *Congrès international de droit comparé. Tenu à Paris du 31 Juillet au 4 août 1900. Procès-verbaux et documents*, Paris, 1905.

<sup>11</sup> Cf. M. Weber, *Staatssoziologie*, Berlin, 1956.

<sup>12</sup> Cf. M. Ancel, *op. cit.*, p. 4; or M. Rheinstein, *op. cit.*, p. 232–233.

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scientific thinking has to be pointed out, on the other, the theory of evolution, which has had a great influence by the second half of the century, need to be mentioned. This general methodological transformation of scientific thinking and the wide penetration of the idea of evolution had such a huge impact on the general thinking and theoretical-intellectual atmosphere of the period that it had not left legal scholarship unaffected either.

By working out the theses of scientific positivism, Auguste Comte has decisively contributed to the formation of modern scientific thinking. Inspired by the buoyant development of natural sciences in this period, Comte argued that social phenomena can be studied with the help of methods of natural sciences. Thus the laws having an objective character that affects social phenomena can be reconstructed, and the laws of the world of physics offer proper examples for such endeavors. So, in Comte's eyes, research focusing on social phenomena should always be based on facts and not *a priori* principles.<sup>13</sup> These insights show that Comte's ideal was the research of social phenomena by a precision that can be compared to that of natural sciences, and the simple fact that he called the analysis and discussion of social phenomena social physics, also reveals a lot about his thinking. In sum, due to the appearance of Comte's positivism focusing on the method of induction, the application of methods rooted in natural sciences gained momentum in scholarship discussing various socio-historical phenomena.

In addition, by the first third of the century the comparative method has spread in a wider circle in natural sciences, among which the first such area was comparative anatomy, as it is argued by Marc Ansel. This spreading did not leave other areas of study unaffected either, mainly given that the inductive method required by positivist philosophy has created a favorable context for the wider application of the comparative method. The earliest attempts to do so appeared first in linguistics, literature and history of religion, so using

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<sup>13</sup> For a details see: A. Comte, *Discours sur l'esprit positif*, Paris, 1844. For an analytical discussion and criticism: F.A. Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason*, Indianapolis, 1979, p. 253–255.

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comparison when analysing socio-historical phenomena became acceptable for more and more scholars.<sup>14</sup>

In the development of the idea of historical evolution, Hegel's philosophical system was of crucial importance. According to Hegel, history is not only a blind evolution, but a process based on certain principles that can be identified by philosophers. With the help of dialectics stemming from the triad of thesis-antithesis-synthesis, one may create a connection between the different steps of history, and it can help in identifying the idea which determines history.<sup>15</sup> That is, there is always an idea that comes to life in history, and the step-by-step manifestation of this process is history itself. This approach paved way to the step-by-step, development-oriented perception of legal development in legal scholarship, hence creating the possibility of reconstructing the general evolutionary lines of legal development.<sup>16</sup>

Hegel's doctrines mostly stimulated the continental academic thinking, while in the Anglo-Saxon world Darwin's theory of evolution had a serious impact. The thought of Darwinian evolution made the application of the historical method accepted generally, by influencing the attitude of those 19<sup>th</sup> century authors, who were dissatisfied with the premises of the utilitarian-rationalist conceptual legal thinking dominant in the 18<sup>th</sup> century.<sup>17</sup> The idea of evolution could perfectly be used in establishing a legal scholarship with more historical character, thus it gave more room to historic uniqueness opposed to the generality of rationalism.

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<sup>14</sup> In 1805, Cuvier's writing *Traité d'anatomie comparée* was published. In 1821, Raynouard's handbook *Grammaire comparée des langues de l'Europe latin* was published, and later writings in the area of comparative literature also became more and more widespread. See for example M. Ancel, *op. cit.*, p. 4.

<sup>15</sup> For more details see: G.W.F. Hegel, *The Philosophy of History*, Kitchener, 2001. For an analytical discussion and criticism: F.A. Hayek, *op. cit.*, p. 385–387.

<sup>16</sup> See E. von Caemmerer and K. Zweigert, *Évolution et état actuel de la méthode du droit comparé en Allemagne*, in *Livre centenaire de Société de législation compare*, Paris, 1969, p. 269–270.

<sup>17</sup> See Sir F. Pollock, *History of Comparative Jurisprudence*, in *Journal of the Society of Comparative Jurisprudence*, vol. 5, 1903, p. 79 ss. and Id., *English Opportunities in Historic and Comparative Jurisprudence*, in Sir F. Pollock, *Oxford Lectures and Other Discourses*, London-New York, 1890, p. 42 ss.

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All in all, it can be argued, that the spread of the idea of scientific positivism and the theory of evolution have largely contributed to the birth of the first paradigm of modern comparative law in Kuhnian terms. Scientific positivism and the theory of evolution, which are intertwined in many aspects,<sup>18</sup> endorsed such methodological principles and philosophical aims that had a vital relevance for the rising historical and comparative jurisprudence. Basically, by merging the idea of evolution with the need for comparison, the structural frame providing the bases for a paradigm was created.

It also needs to be highlighted that the solidification and inner coherence of the theoretical frames alone would not have been sufficient for the development of the first paradigm of comparative law, if it had not been connected to the first wave of institutionalization. It comes logically from Kuhn's concept of paradigm that we cannot infer the existence of paradigms without institutional networks. Only the academic institutions are capable of providing such a material and intellectual structure which can support the regular practice of scholarship. If the institutional framework is missing, then scientists are not capable of sharing their results with each other and the wider audience, so the "normal science", as coined by Kuhn, cannot take shape.

Mark Ancel argues that the year 1869 was crucial in the process of institutionalization of modern comparative law, most probably because of a historical coincidence. This was the year when Henry Sumner Maine founded his *Historical and Comparative Jurisprudence* department in Oxford; when the *Société de législation comparée*, which later had a serious effect on the development of comparative law, was established in Paris; and when the journal *Revue de droit international et de législation comparée* was started in Belgium.<sup>19</sup> In 1872, the previously mentioned French society has launched its own journal (*Bulletin Trimestriel de la Société de Législation Comparée*), which was followed by the German *Zeitschrift für vergleichende*

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<sup>18</sup> Hayek specifically raises awareness and thoroughly analyses the fact that the seemingly distant theories of Comte and Hegel are very much connected in their presumptions. See in detail F.A. Hayek, *op. cit.*, p. 367 ss.

<sup>19</sup> M. Ancel, *op. cit.*, p. 6.

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*Rechtswissenschaft* also dealing with legal problems in a comparative perspective in 1878.<sup>20</sup> The first professional society of the German language region was founded in 1894, called *Gesellschaft für vergleichende Rechts- und Staatswissenschaft*. In 1894, more scholarly societies were formed both in Germany and England, the *Internationale Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre*<sup>21</sup> and the *Society of Comparative Legislation*.<sup>22</sup> These societies and the network of their journals, combined with the university faculties have already provided a sufficient background for scholarly research built upon the regular communication of authors interested, thus it led to the formation of a scientific community devoted to a comparative study of law.<sup>23</sup>

In the following, this paradigm will be discussed by presenting its two main streams: the English and the German schools of historical and evolutionary comparative law thinking. The differentiation between these two schools is justified owing to the linguistic and cultural similarities, however, it should also bear in mind that a vast number of common presumptions connects them, too.

### *3. Historical and Comparative Jurisprudence – the emergence of the paradigm in England*

#### *3.1 The fusion of the historical and comparative methods in Maine's Ancient Law*

It is no exaggeration to argue that Sir Henry Sumner Maine's work is among the turning points of the 19th century English

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<sup>20</sup> I Zajtai, *Réflexions sur l'évolution de droit compare*, in H. Bernstein - U Drobnig - H Kötz (eds.), *Festschrift für Konrad Zweigert*, Tübingen, 1981, p. 596.

<sup>21</sup> See M. Rheinstein, *op. cit.*, p. 234, footnote 8. For details see H. Wehberg, *Internationale Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre*, in *Introduction à l'étude du droit comparé. Recueil d'Études en l'honneur d'Édouard Lambert*, Paris, 1938, p. 664 ss.

<sup>22</sup> See Z. Péteri, *A jogösszehasonlítás kezdetei az angol jogtudományban*, in *Állam- és Jogtudomány*, vol. 18, 1975, p. 409, footnote 57.

<sup>23</sup> About institutionalisation see in detail L.J. Constantinesco, *op. cit.*, p. 103–107.

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jurisprudence. Maine deliberately broke up with the previously dominant analytical approach – coined by Austin and Bentham and based on a rationalist epistemology – and turned against the approach of 18th century authors who have neglected historicism manifestly.<sup>24</sup> In his *opus magnum*, *Ancient Law*, published in 1861 and soon became popular all over the continent, Maine attempted to discover the general laws of legal development through examining the history of the various institutions of law. One may consider his efforts was pathbreaking, as he tried to understand analyze the phenomenon of law within the conditions of the given historical era, including the social, economic and ideological context. Thereby Maine stepped away from the utilitarian-analytical thinking putting legal principles in the center of study and applying the tools of logic for legal phenomena without any interest in their context.<sup>25</sup>

Maine's view on legal scholarship, a novelty in his era, was formed as a result of several impacts. First of all, the impact of natural science methods should be mentioned, as these methods advocated that the discovery of objective, empirically-founded laws of nature is certainly possible. Maine, in accordance with the period's incline towards positivism, firmly believed that one can find such laws both in human nature and society as well,<sup>26</sup> and, as a consequence, legal history also has its own evolutionary laws. Thus, he wanted to make legal scholarship a real science in terms of the era, so he put the inductive method in spotlight instead of the previously dominant deductive and speculative approaches. For him, geology was the influencing model, which in the question of geomorphology praised the idea of continuous and almost undetectable change, as opposed to those former concepts which regarded sudden and vast catastrophes

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<sup>24</sup> About Maine's career in detail see G. Hamza, *Sir Henry Maine et le droit comparé*, in *Acta Antiqua*, vol. 45, 2005, p. 193 ss.; Z. Péteri, *A jogösszehasonlítás kezdetei az angol jogtudományban*, cit., p. 399.

<sup>25</sup> For the comprehensive critique of the utilitarian-analytical thinking see J Bryce, *The Methods of Legal Science*, in J. Bryce, *Studies in History and Jurisprudence*, vol. II, Oxford, 1901, p. 178 ss.

<sup>26</sup> Sir P. Vinogradoff, *The Teaching of Sir Henry Sumner Maine*, in *The Collective Papers of Paul Vinogradoff I*, New York, 1995, p. 182 ss.

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as the reasons of geological changes.<sup>27</sup> It is apparent that this idea was the main source of Maine's views on the organic legal development, and he built up his theory based on this analogy about the levels of the development of law.

Besides Maine's natural sciences-influenced thinking based on external laws, he also drew ideas from the theses of the German historical school of jurisprudence. This understanding, which promoted the historical and collective psychological character of law due to its conservatism and romanticism, has clearly influenced Maine's work, especially in relation to the application of the historical method.<sup>28</sup> Both Maine and the historical school of jurisprudence have shared the view that there are some distinct nations (superior or progressive ones) whose legal development has its own unique path. Moreover, Maine also agreed with the scholars of the historical school that Roman law is the most important starting point of any legal research.<sup>29</sup> However, Maine has outstepped this framework, as represented by Savigny, as he expanded his research to the English, Greek and Hindi law (besides Roman law).<sup>30</sup> Further, he did not consider the national characteristics defining the legal development to be definite and unchangeable.<sup>31</sup> To sum up, Maine incorporated the insights of the historical school to his theory but without its strictly national, that is to say German, angle. This may be one of the reasons behind the popularity of his theses abroad.

Another important element of Maine's scholarly attitude was his constant 'fight' against abstract and a priori theses. He did agree neither with contractual theories endorsing the idea of natural state, nor with a priori constructions of natural law, because he thought that they all are founded on false assumptions. Among other things, they did not take into consideration the organic nature of social development and the picture of the so-called primitive human can also be considered fundamentally wrong. Besides these skeptical views, Maine also heavily criticized the attitude of Bentham and Austin: first

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<sup>27</sup> P. Stein, *Legal evolution*, Cambridge, 1988, p. 88.

<sup>28</sup> P. Vinogradoff, *The Teaching of Sir Henry Sumner Maine*, cit., p. 180.

<sup>29</sup> P. Stein, *op. cit.*, p. 90.

<sup>30</sup> *Ibid.*, p. 92.

<sup>31</sup> P. Vinogradoff, *The Teaching of Sir Henry Sumner Maine*, cit., p. 180.

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of all, he doubted the feasibility of utilitarianism, secondly he considered Austin's concept of law, focusing on the central role of sovereign, to lack any connection to history.<sup>32</sup>

These all shaped Maine's understanding of his historical and comparative method, by which he aimed to present the questions of legal development in a fundamentally new context, in his book, *Ancient Law*. The starting point of his theory was the differentiation between stationary and progressive societies.<sup>33</sup> He apparently needed this differentiation in order to avoid the mistakes stemming from the universalisation of the uniqueness of Western European social- and legal development, which was especially striking compared to the societies living in the colonies of the era, such as India and China. Thus, Maine did not want to declare the laws of development determining Western legal development to be generally valid, as it was easily imaginable that a society outside Europe, due to the underdeveloped nature of social relations, was unable to fulfill the Western path. Based on the previous differentiation, and through analyzing the history of some legal institutions – fiction, equity and legislation – which harmonize legal development with social development, Maine came to the conclusion that developing societies necessary move through the disintegration of traditional ties aims towards the development of individual relations determining the modern era. According to Maine, this process can be grasped, in legal terms, in the evolution from status to contract.<sup>34</sup>

With the help of this theory 'legal of evolution' a historical classification of legal systems also takes form. Based on the previous presumptions, an evolutionist way of legal development is to be reconstructed: cohabitation without provisions with a legal character<sup>35</sup> is followed by a state of society which is regulated by prompt individual decisions based on divine inspiration (so called *themistes*),<sup>36</sup>

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<sup>32</sup> *Ibid.*, p. 176–178.

<sup>33</sup> Sir H.S. Maine, *Ancient Law. Its Connection with the Early History of Society and its Relation to Modern Ideas*, London, 1908, p. 21.

<sup>34</sup> *Ibid.*, p. 151.

<sup>35</sup> *Ibid.*, p. 110.

<sup>36</sup> *Ibid.*, p. 3–6.

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then customary law evolves built on oligarchic bases,<sup>37</sup> finally these customs are enacted in law, the reas of ancient codes.<sup>38</sup> This line of development was called the spontaneous development of law by Maine, which occurs in all human communities. However, the differentiation between developing and stagnating societies gets a real meaning at this point, as further development from fiction, equity and legislation to contract is only a privilege for advancing or developing societies. It is evident that the previously described path of development provides an opportunity to place the legal systems of different periods and societies onto the different levels of legal development, thus it incorporates the possibility of the historical and development-based classification of legal systems, too.

Ancient law has brought a reverberating success to its author, and a part of the theses elaborated in the book, such as the strict formalism of ancient law, the connection between law and religion in the practice of ancient societies, or the role of procedural law in the earliest legal systems,<sup>39</sup> soon became the core concepts of legal history and spread quickly. Obviously this success and widespread reception can be owed to the fact that Maine's views could easily be fit into the public thinking, which already dealt intensively with the notion of scientism and the idea of biological evolution.<sup>40</sup>

To sum up, Maine's work had opened new prospects in English jurisprudence, and created a school in the meantime. In the following decades, this school, with Oxford as its center, has continued the elaboration of some problems and the further development of the research method, inspired by the 'master'.

*3.2. The development of historical and comparative jurisprudence*

Sir Frederick Pollock, who took charge of Maine's department in 1883 and led it for 20 years, was a pioneer in improving Maine's

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<sup>37</sup> *Ibid.*, p. 8–12.

<sup>38</sup> *Ibid.*, p. 12–18.

<sup>39</sup> For the listing of Maine's theses known as 'scientific commonplaces' see P. Stein, *op. cit.*, p. 98.

<sup>40</sup> *Ibid.*, p. 99–100.

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findings. Besides his wide-ranging work on common law,<sup>41</sup> Pollock prepared the notes of Maine's major writings, moreover, he also studied extensively the methodological problems and historical antecedents of comparative law in detail.<sup>42</sup>

Historical and comparative jurisprudence relies on the same historical method which has previously been applied in natural- and social sciences, in Pollock's eyes. To put it in a wider context, according to him, the historical method comes from Darwin's theory of evolution, which Pollock understands as the historical, more precisely, historical-evolutionary interpretation of natural facts. Therefore, it can logically be argued that the use of the historical method, in reality, means the application of the theory of evolution, through which the development of human societies can be explained satisfactorily.<sup>43</sup>

The most significant forerunners of applying the historical method in social sciences were Vico, Montesquieu, Burke and Savigny, but it was the "master", Maine, who improved and refined the use of this method in the area of jurisprudence. The historical method itself for Pollock became the newest and most important tool of natural- and social sciences. The advantage of this method is its inductive nature, or its facts-focused nature, which protects the researcher from the exaggerated, sometimes even surreal "flow" of the rational-deductive thinking. However, its deficiencies also come from the inductive nature, as the method is not able to provide answers to the final, abstract problems of philosophy. Due to these immanent barriers, the historical method can highlight where the competence of science ends and where the role of philosophy begins, and it can also show the point, where competent philosophical questions can be

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<sup>41</sup> Among others, Pollock dealt with the question of contracts and *torts*, the development of *common law* and participated in writing Maitland's comprehensive piece, *History of English Law*. See W.S. Holdsworth, *The Historians of Anglo-American Law*, New York, 1928, p. 94–98.

<sup>42</sup> See F. Pollock, *History of Comparative Jurisprudence*, cit.; F. Pollock, *English Opportunities*, cit.; or Sir F. Pollock, *Droit comparé: prolégomènes de son histoire*, in *Congrès international de droit comparé. Tenu à Paris du 31 Juillet au 4 août 1900. Procès-verbaux et documents*, Paris, 1905, p. 258 ss.

<sup>43</sup> F. Pollock, *English Opportunities*, cit., p. 41.

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asked.<sup>44</sup> Thus, the historical method, based on the idea of evolution, can accurately define the borders separating science and philosophy, consequently, it defines the place of historical and comparative jurisprudence in the world of scholarship.

Furthermore, the results of Pollock's methodological research revealed that a strict separation of the historical and comparative methods was simply impossible, so legal scholarship has to be historical and comparative at the same time. Pollock based this conclusion on a quote from Maine and his opening remarks at the *Village Communities*.<sup>45</sup> Through emphasizing the inseparable nature of the historical and comparative methods, Pollock in reality has declared the most basic and most believed basic principle of the first paradigm of modern comparative law. The universality of his statement is further proven by the fact that through referring to the work of Joseph Kohler,<sup>46</sup> Pollock states that from his perspective, it does not even matter whether one call this field of study historical and comparative jurisprudence or universal legal history (*Universale Rechtsgeschichte* or *Vergleichende Rechtswissenschaft*).<sup>47</sup>

Regarding specific research tasks and opportunities, Pollock thought that comparative jurisprudence had a huge potential for study: for instance, the historical analysis of English legal institutions and their comparison with Roman law, or examining certain Indian rights. Besides theoretical aims, researching Indian law had practical interests as well, as getting to know the Indian law is in the vital interest of the public administration of the British Empire. In his arguments Pollock explained that he did not believe that India could be governed only through the rule of weapons, but in order to build

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<sup>44</sup> Pollock's word on this: "It is a key to unlock ancient riddles, a solvent of apparent contradictions, and potent spell to exercise those phantoms of superstition, sheeted now in the garb of religion, now humanity, now (such is their audacity) of the free spirit of science itself, that do yet squeak and gibber in our streets. It is like the magic sword in Mr. George Meredith's delightful tale, whose power was to sever thoughts"; *ibid.*, p. 42.

<sup>45</sup> F. Pollock, *History of Comparative Jurisprudence*, cit. p. 75. For a detailed analysis Z. Péteri, *A jogösszehasonlítás kezdetei az angol jogtudományban*, cit., p. 404.

<sup>46</sup> Several versions exist when it comes to spelling Joseph Kohler's name. This study uses the version of the German National Library.

<sup>47</sup> F. Pollock, *History of Comparative Jurisprudence*, cit. p. 76.

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up the well-functioning public administration, knowing Indian rights was a must.<sup>48</sup>

The questions of methodology were also studied by Pollock's close friend, James Bryce, usually dealing with political and public law issues, and who also shared the assumption about the unity of the historical and comparative methods. In his polemic piece about the methods of jurisprudence, which was also quite critical with Bentham and Austin, Bryce argued that the comparative method as understood by Pollock was no more than another "face" of the historical method. With the help of the comparative method, the most important and general characteristics can be filtered from the legal historical facts collected through the historical method, so well-founded theoretical conclusions can be drawn this way.<sup>49</sup> Jurisprudence can be imagined neither without the historical nor without the comparative methods, which complement and mutually help each other.

Sir Paul Vinogradoff, who emigrated from Russia, is to be considered the last representative of English historical and comparative jurisprudence. His work largely contributed to further developing the theoretical assumptions of the Oxford school, due to the fact that he incorporated the results of the period's German social sciences, mainly Max Weber's points. His main work, which was planned to be his legacy of six volumes but remained unfinished due to his death, became the most compelling attempt to provide a summary and organized explanation for historical and comparative jurisprudence, that is, for this paradigm.

Vinogradoff succeeded Pollock as head of the Historical and Comparative Jurisprudence Department in 1904, and in his inaugural lecture, besides praising Maine's work, he presented the theses of comparative jurisprudence. This was especially important because it made available an organized summary of those research principles, which have already silently and many times intuitively driven the works of his predecessors. He distinguished four fundamental principles: (i) studying law cannot only happen in order to transfer professional knowledge, but law can also be a subject of scientific

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<sup>48</sup> See in detail F. Pollock, *English Opportunities*, cit. p. 43 ss.

<sup>49</sup> J. Bryce, *The Methods of Legal Science*, cit., p. 154–155.

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examination, (ii) two distinct methods can be applied in legal research: the deductive and inductive methods, (iii) in inductive research, law appears as a historical phenomenon (iv) if research aims at discovering general laws, then the historical method should also be comparative.<sup>50</sup> With the help of these four propositions, Vinogradoff organized the structural principles of the first paradigm of comparative jurisprudence into a logical system, thus largely contributing to the clarification of a previously fragmented and intuitive methodology.

Another important methodological observation from Vinogradoff was the distinction between the analytical and synthetic study of law. This clarification is important because the antithesis of the analytical method was usually seen in the historical method. Vinogradoff considered this as a logical mistake and argued that the antithesis of the analytical method was not the historical but the synthetic method.<sup>51</sup> In addition, the purpose of the synthetic method, as opposed to the analytical method solely focusing on law and legal provisions, was to examine the historical, social, economic and other factors influencing the development of law, and understanding law as a historical phenomenon in general. History can get a crucial role in this process, but other sources, such as statistical data – if available – can also be added to the research.

One of the most important benefits of the synthetic method is that it protects the researcher, enchanted by a “conceptual heaven”, from drifting too much apart from social reality; moreover it prevents them from disregarding some factors, in the name of conceptual clarity and logic, without whom the functioning of law is incomprehensible.<sup>52</sup> However, it should be emphasized that Vinogradoff, as opposed to the often angular, categorical, or sometimes even ironic opinions of his predecessors, did not discard the analytical method, but instead he recognized its relevance in conceptual legal thinking. He argued that the different national legal provisions call the attention to the necessity of analytical method.

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<sup>50</sup> P. Vinogradoff, *The Teaching of Sir Henry Sumner Maine*, cit. p. 188–189.

<sup>51</sup> Sir P. Vinogradoff, *Methods of Jurisprudence*, in Id., *Custom and Right*, New Jersey, 2000, p. 4.

<sup>52</sup> *Ibid.*, p. 7–8.

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Furthermore, the comparative research of different national solutions opens the way to the synthetic research method, which searches for the causes of the difference between legal institutions in their context.<sup>53</sup> Thus, analytical research is an inherent step of legal study, but it can never get exclusive if one aims to find a general and comprehensive explanation.

In his main work,<sup>54</sup> Vinogradoff aimed to find the theoretical explanation to European legal development, starting from the work of his predecessors. In this late writing, he tried to provide a comprehensive, encyclopedic summary of historical and comparative jurisprudence, as a complementary to his predecessors' and fellow researchers' work. The base of his views on legal development was formed by the differentiation of the historical types of legal development. In determining the historical types of law, Vinogradoff was inspired by the results of the early German economic-sociology, for example, in many writings he has mentioned the impacts of the theories of Max Weber and Karl Bücher.<sup>55</sup> These historical types of the development of law were understood by Vinogradoff, similarly to the previously mentioned scholars, as ideal types, so he did not aim to consider them as exclusive patterns.

As for legal development based on historical types, Vinogradoff analyzed in detail the roots and theoretical problems of this approach. He reached back to Aristotle and Montesquieu in relation to the research based on ideal types, but he also argued that their attempts at classification had lost their validity by then, because they have always started from the state when explaining law. However, law was not connected to the state in all historical periods, as this was already proven by Maine. This is why a new and valid attempt to create historical ideal types, in line with the requirements of the synthetic method, should be based on social arrangements. Vinogradoff agreed that law was closely tied to values, and he considered this feature as an important factor in creating the types, but he rejected both the "idealistic monism" of Hegel and the "economic monism" of Marx.

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<sup>53</sup> *Ibid.*, p. 10–11.

<sup>54</sup> Sir P. Vinogradoff, *Outlines of Historical Jurisprudence I-II*, London, 1920-22.

<sup>55</sup> *Ibid.*, p. 156.

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These approaches did not fit in the synthetic method, as they were exclusive by putting only one factor of development in the center of their argumentation. Further mistakes of Hegelian and Marxist theories are that in some cases they confuse fact with idea and effect with cause, as it is pointed out by Vinogradoff.<sup>56</sup>

Vinogradoff considered his method ideological, as he argued that the task of historical jurisprudence was monitoring the path of the everchanging legal ideas with the help of the facts of legal history. He used the expression “ideological” primarily to emphasize the distance between his understanding of legal development and the chronological method. This task is facilitated by the fact that in human evolution some ideal developmental lines can be discovered.<sup>57</sup>

He differentiated between six historical types of law: (i) the law of totemistic societies, (ii) tribal law, (iii) the law of city-states, (iv) medieval law, (v) the law of individualism and (vi) the law of collectivism. It has to be emphasized, at the very beginning, that this classification has no universal character as it is only relevant to the European development of law. On the other hand, this grouping does not require a chronological order, already referred to in relation to the ideological method, as some components of these settings may appear in different periods as well.<sup>58</sup>

It is apparent that Vinogradoff, similarly to Kohler, does not derive his arguments from the most radical version of evolutionism, according to which all human societies necessarily have to go through the same developmental stages, but he believes in a more “relativist” version of the idea. This more “relativist” understanding accepts the existence of unique phenomena and developmental lines in some ways different than others, in the process of general legal development determined by universal laws.

Vinogradoff's work is essential from many angles. His methodological efforts largely contributed to the systematization and clarification of the methodology of historical and comparative jurisprudence. This means that he basically managed to systematize

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<sup>56</sup> See in detail Sir P. Vinogradoff, *Historical Types of International Law*, in *The Collected Papers of Paul Vinogradoff II*, New York, 1995, p. 248 ss.

<sup>57</sup> *Ibid.*, p. 245.

<sup>58</sup> *Ibid.*

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the theses of the paradigm in an explicit way. Another important aspect of his legacy is that in his main work, which was supposed to be a six-volume book series, he attempted, through the synthetization of the results of his predecessors, to prepare a systematic discussion of a universal historical and comparative jurisprudence. However, his death did not make possible the completion of this ambitious venture. It can be noted however, that his work, which was very sophisticated both theoretically and historically, due to the spreading of new ideas on legal comparison as elaborated by French authors, such as Lambert or Saleilles,<sup>59</sup> remained more-or-less unknown in the Western literature of comparative law. This is why Vinogradoff is remembered today mainly as a legal historian by the academia.

#### 4. From *Ethnologische Jurisprudenz* to *Vergleichende Rechtswissenschaft* – the birth of the paradigm in Germany

##### 4.1. *The beginning: ethnological perspectives in the legal scholarship*

In the 19th century, the German legal thinking, in harmony with the general European scholarly atmosphere, was dominantly devoted to the dogmatic-positivist understanding of law. German lawyers have accepted the boundaries of their national legal system as given, and focused on its “internal” problems.<sup>60</sup> Their efforts have reached their peak in the pre-war decades, at the same time when the BGB was enacted and came into effect. However, besides all this, some authors still needed a “broader perspective”,<sup>61</sup> and this need, propelled by the rise of empirical and evolutionist methods in general scholarly

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<sup>59</sup> Cf. E. Lambert, *Conception générale et définition de la science du droit comparé, sa méthode, son histoire; le droit comparé et l'enseignement du droit*, in *Congrès international de droit comparé. Tenu à Paris du 31 Juillet au 4 août 1900. Procès-verbaux et documents*, Paris, 1905, p. 26 ss. or R. Saleilles, *Conception et objet de la science du droit compare*, in *Congrès international de droit comparé. Tenu à Paris du 31 Juillet au 4 août 1900. Procès-verbaux et documents*, Paris, 1905, p. 167 ss.

<sup>60</sup> See in detail M. Rheinstein, *op. cit.*, p. 232–238.

<sup>61</sup> *Ibid.*, p. 233.

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thinking, has led to the start of comparative legal studies and the formation of an academic community in the last three decades of the century.

These initiatives, which stretched beyond the dogmatic-positivist horizon of this period, started with a volume published in the beginning of the 60s. In 1861, Bachofen's book about matriarchal legal systems was published, which, contrary to the dominant dogmatic trends, did not concentrate only on Roman law as did the influential "Romanists" of the historical school of law, but also integrated the study of "other" legal systems, too.<sup>62</sup>

The first comprehensive discussion of the research goals and methodology of the new approach was submitted by Albert Hermann Post, lawyer and judge from Bremen.<sup>63</sup> The titles of Post's first writings<sup>64</sup> show the aim of their author to renew the methodology and scholarly nature of jurisprudence, starting from the new impetus provided by the fast development of natural sciences. This need for renewal was propelled by Post's methodological dissatisfaction with the legal thinking of his era: he considered the theses of both the natural law school and the historical school of law simply unsupportable. From his perspective, a major shortcoming of the school of natural law was that scholars of this approach, in general, did not pay enough attention to studying the legal life of the different people of the world, so they did not have a strong intent to discover

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<sup>62</sup> J.J. Bachofen, *Das Mutterrecht: eine Untersuchung über die Gynaiokratie der alten Welt nach ihrer religiösen und rechtlichen Natur*, Stuttgart, 1861. Gábor Hamza considers this writing the starting point of the school based on Kohler and Bernhöft cf G. Hamza, *op. cit.*, p. 201–203.

<sup>63</sup> R. Schott, *Main Trends in German Ethnological Jurisprudence and Legal Ethnology*, in *Journal of Legal Pluralism*, vol. 14, 1982, p. 38 ss. It is interesting to note here that the first attempt to do empirical research on the legal life of tribes living on German colonies is also connected to Post. In 1893, Post developed a comprehensive questionnaire, which provided help in examining the legal systems of the tribal civilisations of the German colonies in Africa. See in detail A. Lyall, *Early German Legal Anthropology: Albert Hermann Post and his Questionnaire*, in *Journal of African Law*, vol. 52, 2008, p. 114 ss.

<sup>64</sup> *Das Naturgesetz des Rechts. Einleitung in eine Philosophie des Rechts auf Grundlage der modernen empirischen Wissenschaft* (1867); *Einleitung in eine Naturwissenschaft des Rechts* (1872).

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the reality of law. Moreover, he also pointed out that the hypothesis of a general legal sense born with us was absurd. Moreover, he also criticized the historical school of law because this scholarly movement only dealt with the law of some people, thus they did not strive for a more general research, and, therefore, it only focused on written sources but neglected other types of them.<sup>65</sup> Due to these manifest deficiencies, a completely new jurisprudence had to be established, whose preparation according to Post could largely be facilitated by the idea of empiricism and evolutionism, furthermore, the application of the comparative method has also play a role.

In the creation of the methodology of this new jurisprudence, Post was largely inspired by three disciplines rapidly developing in the era: ethnology, biology and sociology. The universality and method of ethnology had a great effect on him because these two points could help overcome those imperfections of the natural and historical schools of law which were previously identified. The idea of evolution in biology – which preached the orderliness of development, was considered broadly accepted since Lamarck – could perfectly be integrated into a new, comprehensive account of legal development. Sociology, which had successfully applied the method of empirical research in examining societies, had undoubtedly provided the most important pattern for methodological renewal in jurisprudence.<sup>66</sup>

So, Post's perception of scholarship was explicitly shaped by the scientific development of his era, and its most important goal was to lay down the foundations of a new empirically-based theoretical jurisprudence. This new way of thinking would accept the thought of evolution as a starting point, and would examine as many legal systems around the world as possible. An interesting aspect of his evolutionism is that even though Darwin's doctrine has largely influenced his attitude on legal development, Post never accepted the validity of fight for survival as the central thought of social-

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<sup>65</sup> R.M. Kiesow, *Science naturelle et droit dans la deuxième moitié du XIXe siècle en Allemagne*, in P. Amselek (ed.), *Théorie du droit et science*, Paris, 1994, p. 193–194.

<sup>66</sup> *Ibid.*, p. 200–203.

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Darwinism, while he supported the necessity of the unidirectional nature of evolutionary development.<sup>67</sup>

Besides Darwin's biological concept and the previously mentioned disciplines, Post's views on legal development were also influenced by the evolutionary theory of Adolf Bastian, an important ethnographer of his era. According to Bastian, due to the homogeneity of human nature, development takes place in the same way and goes through the same steps everywhere in the world (*Elementargedanke*), however, some differences can be detected, which may be due to geographic, climatic or economic characteristics (*Völkergedanke*).<sup>68</sup> It comes logically from this approach that primitive people show those early developmental levels, which have already been passed by the more civilized Western people. This insight is of great importance from the perspective of legal development, because the research of natural peoples makes it possible to get to know episodes of Western legal history, which could only be speculated about due to the lack of sources otherwise, argued Post.<sup>69</sup> Thus, research always has to focus on the similarities of legal development dominated by evolution, and differences simply have to be disregarded according to him.<sup>70</sup>

Post also examined the relation between legal philosophy and ethnology. In his view, ethnological research may point out that the phenomenon of law is inspired by a collective, and not individual, legal consciousness. The philosophical reason behind emphasizing collective legal consciousness might have been the fact that in relation to the general questions of consciousness Post has outright rejected Schopenhauer's idealism, which separated world and consciousness and opposed them to each other. According to Post, the facts of the world surrounding us have a big impact on our consciousness,<sup>71</sup> which cannot be disregarded in analysing legal consciousness either. He argued that our perceptions about law are shaped by social

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<sup>67</sup> *Ibid.*, p. 208–209.

<sup>68</sup> P. Koschaker, *L'histoire de droit et le droit comparé surtout en Allemagne*, in *Introduction à l'étude du droit comparé. Recueil d'Études en l'honneur d'Édouard Lambert*, Paris, 1938, p. 276–277.

<sup>69</sup> A.H. Post, *Ethnological Jurisprudence*, in *The Monist*, vol. 2, 1891, p. 34.

<sup>70</sup> L.J. Constantinesco, *op. cit.*, p. 121.

<sup>71</sup> R.M. Kiesow, *op. cit.*, p. 195.

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conditions, so if these conditions change, our legal consciousness is also transformed: some of the previous elements disappear and get replaced by new ones. Consequently, all legal philosophies, which build only on the given period's legal consciousness, are unable to answer general – a strict sense – questions about law, so their scope is always limited.<sup>72</sup> By recognizing this and together with the results of the empirical research of all the laws of the world, the ethnology must have a decisive role in laying the foundations of a new, general legal philosophy.<sup>73</sup> Thus, in Post's eyes, the results of ethnology may form the basis of a new, general legal philosophy. However, Post did not intend to develop this new legal philosophy in detail, this will be done by the key figure of this paradigm, Joseph Kohler, a decade later.

In 1878, Franz Bernhöft and Georg Cohn have founded the already mentioned *Zeitschrift für vergleichende Rechtswissenschaft*, which had become the central forum of the German scholars sharing, at least partially, the previously detailed theoretical assumptions. The authors connected to the *Zeitschrift* have formed the German scientific community which approached legal problems in a new and original way, in a legal atmosphere which has mainly focused on dogmatics and textual interpretation.

In his editorial, Bernhöft presented the main goals of comparative law (*vergleichende Rechtswissenschaft*) in his interpretation. He argued that this field of study, which was earlier called ethnological jurisprudence by Post, has to examine the evolvment of the institutions of peoples and the adequate development of the general laws of evolution.<sup>74</sup> In accordance with Post's already presented thoughts, Bernhöft stated that comparative law had to break up with its Roman- or German-centered nature when identifying and discussing the general laws of legal development.<sup>75</sup>

Comparative law should significantly broaden the horizon of jurisprudence, whose only barrier is the fact that it has to refrain from studying the law of peoples living under a certain legal and moral

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<sup>72</sup> A.H. Post, *op. cit.*, p. 37.

<sup>73</sup> *Ibid.*, p. 40.

<sup>74</sup> L.J. Constantinesco, *op. cit.*, p. 105.

<sup>75</sup> R. Schott, *op. cit.*, p. 41.

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level, because these issues belong to legal ethnology.<sup>76</sup> Moreover, he differentiated between ethnology and comparative law, as he thought that those nations could not be studied where law was not objectivized yet, so it did not get separate from the sphere of ethics, which was a task for legal ethnology, again. When Joseph Kohler became the editor of *Zeitschrift*, this methodological differentiation elaborated by Bernhöft was given up, and this marked the beginning of examining the peoples who were regarded as being on the bottom of legal development. This ambition has led to a historically universal comparative jurisprudence, which has started to build a closer and closer relation to general philosophical efforts.

*4.2. Joseph Kohler's general philosophy of law*

The major representative of the German school of historical and evolutionary comparative law, that is to say the first paradigm of comparative law, was Kohler, who besides his oeuvre in patent law, law of intellectual property, competition law, international law and legal philosophy, put a lot of energy in comparative law as well.<sup>77</sup> As an author of the *Zeitschrift*, during his almost four-decade-long career, he wrote more than 300 publications belonging to the area of comparative law. His writings have covered most legal systems of historical and non-historical people, from Aztec rights to the rights of Australian indigenous people.<sup>78</sup>

The purpose of his theoretical writings was to create a comprehensive legal philosophy based on the comparative understanding of universal legal history of the world. In order to fulfil

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<sup>76</sup> This standpoint was developed by Bernhöft in his editorial introduction. F. Bernhöft, *Über Zweck und Mittel der Vergleichenden Rechtswissenschaft*, in *Zeitschrift für vergleichende Rechtswissenschaft*, vol. 1, 1878, p. 1 ss., as cited by L.J. Constantinesco, *op. cit.*, p. 116–117.

<sup>77</sup> About Kohler's attitude see R. Pound, *Scope and Purpose of Sociological Jurisprudence*, in *Harvard Law Review*, vol. 25, 1911/12, p. 158 ss.; R. Schott, *op. cit.*, p. 41–44. The complete list of writings on Kohler can be found here: *Archiv für Rechts- und Wirtschaftsphilosophie*, 1921–22, p. 12–13.

<sup>78</sup> R. Schott, *op. cit.*, p. 42.

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this ambition, he has incorporated into his research both the laws of uncivilized peoples and civilized nations, because he argued that law is very much present in the ordinary life of less-developed people, even if in ways which differ from the modern manifestations of law. This point, based on the theory of evolution, considered the laws of uncivilized peoples to be equal to modern laws, and had changed the previous editorial principles of *Zeitschrift* as developed by Bernhöft, and also stepped over the borders of the period's Europe-centric legal thinking.<sup>79</sup>

Hegel had a huge impact on the formation of Kohler's view of legal philosophy and philosophy in general. He was identified with the starting points of Hegelian philosophy to such an extent that Roscoe Pound considered him to be the leading figure of the so-called German new Hegelians,<sup>80</sup> while other contemporaries gave him the title "*Hegel revivendus*".<sup>81</sup> However, it is important to highlight that this Hegelian effect did not mean that Kohler accepted all components of Hegel's theory without reservations. For instance, in relation to the development of history, he outright rejected Hegel's dialectic view of thesis-antithesis-synthesis, because he was convinced that such a sterile, logical approach towards history cannot be justified. In this area, Kohler refined Hegel's doctrines by accepting the thought of historical development, however he did not think that the line of development could be determined with logical accuracy because history consists of ad-hoc and irrational events as well, which makes the path of development uncertain always. For Kohler, human history was a complex phenomenon and this complexity justified the necessity of studying the historical phenomena in detail, instead of explaining them in an abstract, philosophical way.<sup>82</sup> This eventual understanding of historical development, which is free from logical constraints, appears in Kohler's views on legal evolution.

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<sup>79</sup> L.J. Constantinesco, *op. cit.*, p. 113.

<sup>80</sup> R. Pound, *op. cit.*, p. 154–158.

<sup>81</sup> Z. Péteri, *A jogi kultúrák összehasonlításának előtörténetéhez*, in *Állam- és Jogtudomány*, vol. 48, 2007, p. 515 ss.

<sup>82</sup> J. Kohler, *Philosophy of Law*, Boston, 1914, p. 28–31 and 49. L.M. Ellison, *Kohler's Philosophy of Law*, in *Journal of Public Law*, vol. 10, 1961, p. 412–413.

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However, the dominant Hegelian effect is also shown by the fact that Kohler never considered law to be an isolated entity, but he saw it as a phenomenon closely related to a given people's own culture.<sup>83</sup> This centrality of culture, associated to his views on historical development, is the key to Kohler's general legal theory. First of all, it follows from cultural context that the ways in which law appears in reality may differ both in space and time: so, law is a historically constantly changing phenomenon. On the other hand, the concept of culture may help in understanding the consistence of law as well, because this constant element in the historically everchanging concept of law is the purpose of law itself, which connects the historical manifestations of law. The main task of law according to Kohler is to help and support the creation of culture or the so-called cultural development, which aims at the most intense elaboration of human capabilities, and thus, at securing human rule over nature.<sup>84</sup> Law can help in this process by creating a predictable system of relations, as opposed to the eventualities driving human relations, by regulating human relationships and maintaining order. According to Kohler, the insecurities of our lives can be tracked back to the often illogical factors of space, time, nature, chance, need and causality, and legal institutions are able to "tame" these factors due to their ability to maintain and preserve order, in other words, by making the world more predictable around us. This predictability, the precise organization of ad-hoc elements of life by regulation assures that law gets an important role in fulfilling the conditions of cultural development.<sup>85</sup>

Thus, legal development is inseparable from the transformations of human culture, according to Kohler. In his view, in all cultures we can find "legal postulates" which define the content of the legal system. Law is not only changing in a historical sense, but it is also developing within a given culture, always in a way to measure up to

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<sup>83</sup> J. Kohler, *Philosophy of Law* 4. and 58–61. For discussion: Z. Péteri, *A jogi kultúrák összehasonlításának előtörténetéhez*, cit., p. 516–517.

<sup>84</sup> Kohler, *Philosophy of Law* 58. For discussion: Z. Péteri, *A jogi kultúrák összehasonlításának előtörténetéhez*, cit., p. 516–517.

<sup>85</sup> Cf. Kohler, *Philosophy of Law* 28–31.

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the expectations of the culture.<sup>86</sup> In Kohler's words: "Thus every culture has its definite postulates of law, and it is the duty of society, from time to time, to shape the law according to these requirements."<sup>87</sup> Thus, a legal provision is not given in itself, but society always has to aim at recognizing the needs of law and shaping the actual rules accordingly.

This leads us to Kohler's critique against the legal theory of his era. In his view, legal theory, which neglected the cultural determination of law, could not yet pay enough attention to the sociological aspects of lawmaking, and therefore it simply overrated the role of the lawmaker in the process. It needs to be recognized that lawmakers are the "children" of their era, so the culture of the period affects them as much as it affects simple citizens. Consequently, law cannot be understood solely as the will of the lawmaker, but the certain rules should be examined in a sociological frame, in their cultural context.<sup>88</sup>

In addition, Kohler considered law to be inseparable from human nature, so he considered the customs of the people in the beginning of their development to be law in the strict term of the word. He thought that "people cannot exist without law", but there can be cultures which are not yet familiar with courts or where there is no organized state in the strict sense, but this does not mean that they do not have a law.<sup>89</sup> Law, or the idea of order is coded in our human existence and cannot be separated from it, as it is stressed by Kohler. However, it has to be emphasized that a legal order always reaches its final picture due to the individual and community impulses which shape the given culture.<sup>90</sup> Thus, law is a phenomenon which emerges as a totality of culturally determined, very complicated effects. Its

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<sup>86</sup> R. Pound, *op. cit.*, p. 156–157.

<sup>87</sup> J. Kohler, *Philosophy of Law*, cit., p. 4.

<sup>88</sup> J. Kohler, *Lehrbuch des bürgerlichen Rechts*, cit., p. 38. Cited by R. Pound, *op. cit.*, p. 158.

<sup>89</sup> Kohler's thought about this question are the following (translated by Schott): "Therefore there is no people without law: there are people without courts, there are people that lack a state organization [...] but [...] Man cannot be non-Man". R. Schott, *op. cit.*, p. 43.

<sup>90</sup> See in detail: L.M. Elison, *op. cit.*, p. 415–416.

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development is influenced by many impulses, so it can only be examined based on the broadest studies, which cannot simply be imagined without applying the comparative method.

Another important thesis of Kohler is that the genie of humanity opens up to the researchers through the specific genie of peoples, and this makes it possible to realize that the legal development of humanity is influenced by the same civilizational effects. Humanity has always been striving for law, *Drang nach Recht*, since the first humans has appeared on Earth.<sup>91</sup> Thus, the specificity of human spirit is the strive for progression, so legal development is also subdued to the law of progression.<sup>92</sup> From the point of view of the evolutionist understanding of legal development, Kohler's opinion stemming from the critique of the Hegelian thought of development was that it was not necessary for legal development to happen quite similarly in all civilizations, because only the goals are fixed, the tools achieving those goals may differ significantly. Consequently, the main methodological principle of comparative law is that it considers different national laws to be parts of the same human civilization, and it searches for their relation with the development of humanity.<sup>93</sup>

Human civilization, which is united in its diversity, has and had different levels, and civilization itself is a developmental process from a lower towards a higher levels. Thus, for Kohler, the most severe mistake for a comparatist is to compare legal systems which are not on the same civilizational level, for example they compare the laws of a people which makes marriages through buying and selling women to a society which already stands at the level of religious marriage.<sup>94</sup> Besides this mistake, a comparatist also has to pay attention to

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<sup>91</sup> J. Kohler, *De la méthode du droit compare*, in *Congrès international de droit comparé. Tenu à Paris du 31 Juillet au 4 août 1900. Procès-verbaux et documents*, Paris, 1905, p. 228.

<sup>92</sup> *Ibid.*, p. 229.

<sup>93</sup> *Ibid.*, p. 230.

<sup>94</sup> *Ibid.*, p. 231. Pollock comes to the same conclusion when determining that only legal systems which are on the same civilisational level are worth comparing, taking into account their individual development. According to him, comparing Indian law and customs with modern English law would only lead to ridiculous and dangerous misunderstandings. F. Pollock, *History of Comparative Jurisprudence*, cit., p. 76.

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always examine the substantive correlations, and through this differentiate the important elements in legal development for the secondary phenomena.<sup>95</sup> The task of researchers is further hampered by the irregular path of legal development, which results in cases when a legal institution may not always appear in the same form in the case of a given people.<sup>96</sup>

Kohler's intellectual efforts integrated comparative law to the framework of general legal theory and created an individual understanding of jurisprudence as such. However, his philosophy-oriented work was not continued after his death in 1918, because his successors, Leonhard Adam and Richard Thurnwald gradually gave up their previously universalist aims, and directed their attention only towards uncivilized peoples.<sup>97</sup> Collaterally, the background of German legal ethnology has changed radically, too. Following World War One, the evolutionist thinking focusing on similarities which was created by Bastian and further developed by Post was discarded, and they turned towards the theory of cultural circles (*Kulturkreise*), which emphasized the uniqueness of historical development. According to this approach, every civilization is a unique historical phenomenon which develops individually and independently.<sup>98</sup> Moreover, legal development can be divided into typical and atypical elements, but the typical elements are not submitted to natural laws, so their significance can only be relative. These arguments fundamentally break up with the former paradigm-creating presumptions and mark the separation of German legal ethnology from comparative law.<sup>99</sup>

*5. The first paradigm of modern comparative law: a summary*

One may convincingly argue based on the earlier discussion that the first paradigm of modern comparative law gradually emerged in

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<sup>95</sup> J. Kohler, *De la méthode du droit comparé*, cit., p. 231.

<sup>96</sup> *Ibid.*

<sup>97</sup> R. Schott, *op. cit.*, p. 47–52.

<sup>98</sup> P. Koschaker, *op. cit.*, p. 277.

<sup>99</sup> *Ibid.*, p. 280.

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the second half of the 19th century and improved along its structural presumptions. Therefore, one may also point out that this process of four decades intellectual development meets two crucial points of Kuhn's philosophy on paradigms. First of all, as compared the earlier attempts to use comparative method in legal scholarship – mostly fragmentary and individual initiatives<sup>100</sup> – during the first half of the 19<sup>th</sup>, the methodological coherence of these English and German scholarly works, including their conceptual bases and working premises (generalizations in Kuhnian terms), is striking. Therefore, the 1860s can definitely be regarded as the end of the pre-paradigm period and the birth of the first paradigm in modern comparative law; that is to say, the idea of 'normal science'<sup>101</sup> came up in comparative law thinking in these years. Secondly, it is also apparent, that the work of these, either, German or English scholars mostly equals to what is called by Kuhn as puzzle-solving scientific activity.<sup>102</sup> As for both, methodological and substantive questions, the discourse on legal evolution and its details is to be regarded as product of mutual discussion and reflections.

It is also remarkable to what extent this 'normal' academic activity was based on the same scholarly premises shared by members of the comparative law academic community, at that time mostly scholars of the English- and German-speaking world. Obviously, this would have been impossible without the first wave of institutionalization, the birth of a network composed of journals, academic associations and university departments. The 'institutions' provided wide opportunity to get to know each other's work and to reflect on them. Even though, obviously, there were relevant differences in the works of the English and German authors due to personal and cultural reasons, they all started from the same set of presumptions (again, symbolical generalizations), although their

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<sup>100</sup> Leibniz, Montesquieu, Vico, Gans or Lerminier are to be regarded as major actors of this 'pre-paradigm' period. They tried to apply comparative methods in studying several aspect of law, however did so by relying on diverse methodological principles and their efforts had no community character. For a detailed discussion see: L.J. Constantinesco, *op. cit.*, p. 50 ss.

<sup>101</sup> Cf. T.S. Kuhn, *The Structure of Scientific Revolutions*, cit., p. 23 ss.

<sup>102</sup> *Ibid.*, p. 35 ss.

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emphases may have differed obviously. For example, German authors most often strove for identifying and understanding general tendencies,<sup>103</sup> while the English interest in legal comparison was partly dominated by its focus on particularities and aimed at examining unique phenomena as a starting step.<sup>104</sup>

In the center of these presumptions stood the insight that legal development, similarly to the previous biological understanding of evolution, is ruled by laws and these laws can be discovered through a devoted scholarly work. Each scholar in the paradigm attempted to reveal these universal laws determining legal development and the consecutive stages of legal evolution. They intended to carry out this research plan by examining legal development with an empirical interest – in this context this term meant the opposition to pure deduction and fictions, a robust attention to the facts of legal history – and by comparing the legal systems of different periods and peoples. The step-by-step examination of legal evolution was especially relevant because one of the major hypotheses of the paradigm stated that legal development goes through the same path, so by studying the legal systems of ‘uncivilized’ peoples such early periods of the legal history of ‘civilized’ nations can be met that were previously not recorded in written sources.

That is, a paradigm-creating community dominantly composed of English and German legal scholars emerges in front of our eyes. They were not able to fundamentally change the dominant, basically legal-positivist and dogmatic legal scholarship of the period, but they still created a framework and achieved such results, that it can be argued that they created the first paradigm of comparative law laying on stable methodological premises and research goals. The maturity of the paradigm is proved by the simple fact that when the paradigm-

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<sup>103</sup> Cf. R. Schott, *op. cit.*, p. 38.

<sup>104</sup> According to Vinogradoff: “The necessity for revising the comparative method is one of the lines on which modern jurisprudence has to take up the thread of investigation. Inferences must be preceded by a careful study of individual cases, and in this study juridical analysis ought to receive more attention than has been the case hitherto. This side is very poorly represented in the books of anthropological jurisprudence Sir P. Vinogradoff, *Outlines of Historical Jurisprudence I*, London, 1920-22, p. 149.

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shift occurred in the first decades of the 20th century, the representatives of the new thinking set forth their starting points in relation to or in opposition to these presumptions.<sup>105</sup>

In sum, in the 19<sup>th</sup> century English and German scholars played the leading role in the development of modern comparative law thinking and the formation of the first real paradigm, while French legal scholarship did not participate with such intensity in creating this paradigm. However, the Parisian International Congress of Comparative Law held in 1900, will not only swiftly change the general understanding of comparative law by triggering the first paradigm-shift in the history of comparative law, but the geographical focus of comparative law studies in Europe will also be altered as France will become the centre of this new paradigm (*droit comparé*). Édouard Lambert and Raymond Saleilles will set forth such new insights on the nature and goals of comparative law that will be totally incompatible – that is to say: incommensurable – with the earlier, well-developed premises.<sup>106</sup>

**Abstract:** This paper aims at revising some parts of the history of modern comparative law. In essence, it argues that paradigms can be identified in this story, and it justifies this point by reconstructing the first paradigm of modern comparative law. By applying some concepts of Thomas Kuhn's philosophy of science – pre-paradigm period, scientific community, paradigm, and symbolical generalizations – it argues that the first paradigm of modern comparative law was born in 1860-80s. This paradigm – called as either comparative jurisprudence or *Vergleichende Rechtswissenschaft* – was inspired by positivism and

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<sup>105</sup> Lambert, for instance, differentiates between the goals of the historical school and the new thinking. See E. Lambert, *op. cit.*, p. 32., Rabel, within the framework of systemic-dogmatic comparative law, sets fundamentally different goals for comparative law than the previous ones. M. Rheinstein, *op. cit.*, p. 246–247.

<sup>106</sup> As for instance, Lambert advocated a new concept of comparative law being different from the ideas of Maine, Bernhöft or Kohler. In his eyes, comparative law must be focused on contemporary continental systems of private law – especially those of with Latin and German roots – and try to identify the common points of these laws (*droit commun législatif*). See E. Lambert, *op. cit.*

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the idea of evolution. A main premise of this paradigm was that legal development, similarly to the biological understanding of evolution, is ruled by laws and these laws can be discovered through a devoted scholarly work. Each scholar in the paradigm, either English or German, attempted to reveal these universal laws determining legal development and the consecutive stages of legal evolution.

**Keywords:** history of comparative law – paradigm – methodology – evolutionism - historicism

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