

Ivan Padjen, PhD,
Full Professor*

Original scientific paper
UDK 340.12 (497.5)
Received: 1 May 2015

THE IDEA OF SOCIAL LAW IN CROATIAN LEGAL THOUGHT¹

Summary: *This paper consists of two addenda to the manuscript "Legal Philosophy and General Jurisprudence in Croatia in the XXth Century" for vol. 12 of A Treatise of Legal Philosophy and General Jurisprudence, devoted to 20th-century legal philosophy in civil-law countries, eds. Jan Wolenski and Alexander Broestl, gen. ed. Enrico Pattaro. The original manuscript was submitted as a work in progress to the Belgrade conference of the Centreal and Eastern European Jurisprudence Network in June 2011. The addenda were prompted by editorial comments, received in February 2013, to the original manuscript. The first concerned the statement "The hypertrophy of Western legal history had a far-reaching impact (sc. on Croatian legal thought)". The comment was "Do you mean here the influence of Western history on Croatian culture?" The second concerned the statement "the study of legal history generated the idea of social law, which was reinforced by the experience of the conflict between Western law and Croatian tradition". The comment was "Can you provide the Croatian expression? Moreover, it seems that this idea is crucial for understanding Croatian legal thinking. Perhaps you could give some more details to help the reader understand it. Or even a crucial quotation, possibly? We think that this idea of 'social law' is peculiar to Croatia and hence very interesting". The third comment concerned the statement "The idea implies that law is a unity of norms and actions created 'from below' (by local communes, economic markets etc.), reason and logic, imperfect and culture-bound as they may be, being inherent in law." The addenda exceed limits of the manuscript but may function as an independent paper or its core.*

Keywords: *Croatia, law, social law, legal theory, the idea of social law*

Legal education in Croatia, whose beginnings can be traced back to the 13th century, became a systematic and continuous institution with the foundation of the Law Faculty (*Facultas juridica*) of the Royal Academy of Sciences in Zagreb (*Regia Scientiarum Academia Zagrabien-*

* Ivan Padjen, PhD, Full Professor. Professor of law, senior fellow in political science, Rijeka University, Faculty of Law; part time Zagreb University, Faculty of Political Science and Faculty of Law. Residence: Boškovičeva 22, 10000 Zagreb.

¹ A contribution to the 2014 International Conference "Current Problems of Legal Theory and Comparative Law", Osijek, 24–25 October 2014. The author is grateful to Zoran Pokrovac, University of Split, Faculty of Law, for comments of an earlier draft of this paper.

sis) in 1776, reconstituted as the university Faculty of Legal and State Sciences (*Pravoslavni i državoslovni fakultet*) in 1874 (Čepulo 2007) and renamed as the Faculty of Law in 1926.² The Faculty, in the first half of the XXth century taught political economy, finance and, by the first chair in Austria-Hungary (1905-), sociology and criminology and even practical philosophy, as a required course in three terms taught by a philosopher. Nonetheless, the Faculty offered, due to the Austrian grounding of legal education in Roman Law and German legal history (see Simon 2007), philosophy of law and / or theory of law only as optional courses till 1933, when “Encyclopedia of Law” (“Enciklopedija prava”) renamed “Introduction to Legal Sciences” became compulsory (Metelko 1996, 95, 97; Čepulo 2007, 136–137; *Pravni* III. 2. 1997, 773–780; *Pravni* III.3 1998, 1023–1030; in periodicals see Pokrovac 2006).

Legal philosophy in Croatia was institutionalized originally in the course “General Legal History” (*Opća pravna povijest*). It had been introduced into the curriculum on the theory that Slavic laws could be a vehicle of legal development as they had common roots. However, the theory was discredited before the course opened (Kostrenčić 1970, repr. 1996, 264), Hence. The course and its offshoots performed several interrelated functions. The first one, which was taken from Hungarian legal education, was studying European legal developments with a view of preparing a ‘return’ to the European legal-cultural framework. Thus Zagreb law undergraduates studied historical legal subjects almost two out of four years, that is, even more extensively than their Austrian counterparts (Čepulo 2007, 137–138). Secondly, providing not merely a positivistic overview but also philosophy of legal history, and a Hegelian one at that; The anonymous lithographed lectures of 1.125 pages (Hanel, s.a.), written 1890–1894 probably by Josip Pliverić, 1847–1907, demonstrate the influence of Gustav Hugo, 1764–1844, Carl Friedrich von Savigny, 1779–1861, and above all, Eduard Gans, 1798–1839, whose Hegelian universal legal history claimed to exhibit nothing less than the logos of history (Gans 2005; Id. 1995, 102). The lectures are visibly influenced also by Joseph Kohler, 1849–1919, a neo-Hegelian who later on established IVR (*Internationale Vereinigung fuer Rechts- und Sozialphilosophie*). Thirdly, grounding “Encyclopedia of Law” – which was concerned with the concept of law, legal systems, systematization and sources of law – in general legal history (Mikulčić 1869); This is what explains why “Encyclopedia of Law and Methodology of Law” was assigned to the Chair of General History of Law, and why the course was considered by its teacher merely a teaching tool rather a distinct science (Mikulčić 1869, 1), which could be non-compulsory (Čepulo 1992, repr. 1996; Id. 2007, 137–140); finally, as a remnant of the original intent, exploring distinctly Croatian legal institutions as social laws and their relation to the largely transplanted modern laws. The functions remained central to Croatian legal scholarship throughout the XXth century. While its legal theory and dogmatic disciplines were professedly positivistic, that is, concerning themselves with positive law only and trying to keep philosophy at arm’s length, legal history with its philosophical assumptions – which made it a genuine sociological jurisprudence – remained a cornerstone of Croatian legal scholarship and legal education. Hence it was self-explanatory for a Croatian scholarly dissertation to start with a comprehensive review of Western, primarily German, legal developments as the model to be followed by the law valid in Croatia (which was primarily Yu-

2 Croatia came into being as a political entity in 812 and became an independent kingdom in 925 (see Čepulo 2012, 48–49). It entered into a union with Hungary in 1102 (52), and also with Austria in 1527 (59), while parts of Croatia were under Venetian and under Ottoman rule. Croatia became a part of the first Yugoslavia in 1918 (257–58) and, during the II World War, 1941–1945, a republic with internal sovereignty within the second Yugoslavia, which was ruled by communists, but independent of the USSR since 1948 (293–308). The Republic of Croatia adopted a liberal democratic constitution in 1990, declared independence in 1991 (351–355) and gained full control over its whole territory in the war of 1990–1995.

goslav 1918–1941 and 1945–1990) (e. g. Kalogjera 1941, Klarić 1981). When western law was too distant from Croatian practice, as it was the case with constitutional law at the time of communism, the dissertation would tackle western law only (esp. Sokol 1975, Smerdel 1984). Legal treatises opened with comprehensive general parts that often broadened the German (at first Austrian) conceptual framework with French, sometimes Italian, briefly – 1945–1948 – but at that time obligatorily Soviet, and, in the second half of the century, Anglo-American doctrines (e.g. Krbek 1937; Id. 1960–1962; Vuković 1959–60; Stefanović 1950; Id. 1956; Id. 1965). From the beginning of 1950s till the late 1970s a comparative introduction into European company law (Rastovčan 1951), was the principal textbook on Yugoslav company law on the ground that Yugoslav legislation was only a temporary departure from sound legal principles – as put succinctly by Aleksandar Goldštajn, 1912–2010, the senior professor of economic law, who had transformed the Soviet styled Yugoslav state *arbitrazh* into economic courts and chaired The Yugoslav Supreme Economic Court in 1954–59 (Padjen and Matulović 1996, 74).

The hypertrophy of Western history had a far-reaching impact: the continuity of law was, till 1945, taken to be self-explanatory; Croatian law was considered Western; what mattered was the thought of major Western authors; hence there was no pressing need for legal philosophy *qua* legal theory, concerned with legal systems and trans-systemic relations; bookishness was preferred to originality; public law scholarship, especially in international law, performed functions of theory of state and, together with private international law, of law. However; the study of legal history generated the idea of social law (*socijalno pravo*, *društveno pravo*), which was reinforced by the experience of the conflict between Western law and Croatian tradition. The idea implies that law is a unity of norms and actions created “from below” (by local communes, economic markets etc.), reason and logic, imperfect and culture-bound as they may be, being inherent in law. The mainstream Croatian legal theory has been resolving the conflict by a concern with law in action but a disregard for theory without books.

The idea is central to Eugen Ehrlich’s *Sociology of Law*, which claims that society rather than the state has been the centre of gravity of legal development (Ehrlich 1913, Vorrede) and defines law as “an intellectual thing” (“*ein gedankliches Ding*”) (Ehrlich 1916, 848). Ehrlich recognized Baltazar Bogišić’s concern with living law (*Zbornik sadašnjih pravnih običaja južnih Slavena* 1874; Čepulo 2006; Id. 2010) as one of its precursors (Ehrlich 1911; Id. 1913, 299), and probably inspired in turn Ivan Strohal, 1871–1917 (esp. 1915). Baltazar Bogišić, 1833–1908, who was a member of the Yugoslav Academy of Sciences and Arts in Zagreb and was interested in a teaching position at the Zagreb Law Faculty (Čepulo 2011), has been the foremost Croatian (as well Montenegrin and/or Serbian) student of social law (see: Bogišić 1967; Id. 1999), but intellectually in the XIXth century (Đivanović 1985; Zimmermann 1962; Čepulo 1992, repr. 1996). Ivan Strohal, 1871–1917, (Zagreb Law Faculty/Roman Law, 1898–1917) The latter analyzed, in light of Bogišić’s and Kantorowicz’s views, discrepancies between the transplanted Austrian civil law and the relations within extended families in Croatia (Strohal 1908).

A source of the idea of social law is “the peasant home” (communal joint-family), proposed to be the basic constituent of “The Peasant State” by “The Constitution of the Neutral Peasant Republic of Croatia”. It was drafted by Stjepan Radić, 1871–1929 (Radić 1921, repr. 1995, B.5.5; Cipek 2001, 163), a student of law in Zagreb and Prague and a graduate in political science in Paris, who founded and headed the Croatian Peasant Party which commanded routinely 90% of Croatian votes in the First Yugoslavia (1918–1945). However, it was noted that

self-management had originated not only from socialist but also from Croatian political tradition, most notably from the teaching of another peasant leader, Antun Radić (1868–1919; Stjepan's brother), that "the state machine" is an "awesome and merciless *fatum*" (Pusić 1967, 10). The "peasant home" provides the unintended, i.e. functional missing link between the peasant custom and the "basic organizations of associated labour", which were defined as the basic units of socialist self-management and, as such, constituents of the socialist economic and political system by the Croatian as well as the Yugoslav constitutions in 1974 (Ustav SRH 1974, čl. 14; Ustav SFRJ 1974, čl. 14). The original intent of Yugoslav communists was to build a Soviet type state, which would transubstantiate by central planning agricultural communities into industrial enterprises. However, after the Yugoslav-Soviet rift in 1948 Yugoslavia was radically decentralized. The unintended result was that both politics and economy were parochialized, functioning largely as an industrialized mirror image of a peasant republic, where communist party, extended family, village neighbourly and old boys affiliations rather than proclaimed legal rules were governing social relations. Although socialist self-management was thus more an ideological program than a legal order, it still looked as a viable alternative to other political and economic systems of its time (e.g. Lindblom 1977, 330–343). An indication of its qualities is the fact that Croatian communists remained in power after 1990 by merely changing ideology from communism to nationalism (and liberalism in the third millennium) (see e.g. Pickering and Baskin 2008) but promptly dismantling socialist self-management by transforming and privatizing social property, which was the "object" of the self-management (see Petričić 2000). Another indication is two social institutions, namely, huge public corporations, which perform largely social functions, and comprehensive systems of social and health security have survived privatisation.

The idea of social law could be derived partly also from Hegel's *Philosophy of Right*, which recognizes that a class and its corporation link a person to a universal (Hegel 1972, pars. 200–208, esp. 207); and inquires into logos in history (Id., 11; Gans 2005; Id. 1995, 102). Hegel's ideas, which had formed the core of Zagreb "General Legal History", reappeared when Berislav Perić, 1921–2009 (Zagreb Law Faculty / Theory of State and Law, 1949–1992), construed a Marxist philosophy of law on the basis of Hegelian dialectics (1962, 1996). Perić expanded his philosophy by the idea of social law as developed by Georges Gurvitch (1932) on the basis of the experience of Soviets and workers's factory councils in the first stage of the Russian Revolution in 1917 (Hunt 2009, 164 f). Perić used the idea to both explain and justify Yugoslav socialist workers' self-management (Perić 1964, ch. III.F).

According to Eugen Pusić, 1916–2010 (Zagreb Law Faculty/Administrative Science, 1955–2010), workers' self-management had a chance of developing in working groups of specialists regulated primarily by technical rules, such as research, surgical or project teams (Pusić 1968, 56–95, esp. 92). Šimonović explored in Pusić's framework self-management after its demise (1992). Pusić applied his theory to university (Pusić 1970), thus linking inherited scholarly self-governance, student participation in university governance and socialist workers' self-management. This gave a new twist to the idea of social law. Eugen Pusić and some of his colleagues and students at Zagreb Law Faculty "believed in the reforming 1960s (and perhaps much earlier) that the beginning of the university was in the mid 11th century, that is, even before mythical beginnings of the first law school in Bologna, when the Archbishop of Milan allowed teachers of his capitular school of theology to lecture without submitting their lectures to a prior imprimatur of Church authorities. Although the belief is not corroborated by available

evidence, it expresses the idea that university is not rooted in teaching and research or even abstract intellectual freedom, let alone such trivia as higher education; rather is the core of university a legal right to intellectual activity that centres around the search for truth; maturation by self-discipline, and in that sense education, being implied. The idea resulted in a decision of the Croatian Constitutional Court that university autonomy, guaranteed by Croatian Constitution" (Ustav RH 1990, čl. 67) "is necessary for the very existence of the university, because the university as an institution that creates new scientific knowledge and introduces students into research can exist only to the measure in which it independently arranges its organisation and work" (USUD U-I-902, Obrazloženje II.4.1; Padjen 2000, A.2.1.2.2.aa). Perhaps the most striking Court's pronouncements were that the Law on Institutions of Higher Learning (ZVU 1993) was unconstitutional because it created university governing councils as hidden organs of the State and, in addition, failed to link council members to the interest groups they were supposed to represent (Padjen 2000, A.1.1.1.1.a; USUD U-I-902/1999, Obrazloženje III.2.1.1.4). Not surprisingly, both the Court's President who advanced the decision (Smiljko Sokol, 1940-) and the Judge who wrote it (Jasna Omejec, 1962-) were Pusić's students and later on colleagues at Zagreb Law Faculty (Padjen 2007, 389).

Relying on a wide variety of sources, including Marxism, Nikola Visković, 1938- (Split Law Faculty/Theory of State and Law, 1961), recognized legal pluralism as both a reality and an idea (Visković 1976, 2nd ed. 1981, 237–244), adding to them his own account of Yugoslav self-management law (325–346). His study of argumentation demonstrated his concern with reason in law (1997).

The idea of social law – but without idealization typical of high theory – provided the background of the study of the sources of autonomous international commercial law, which preoccupied Aleksandar Goldštajn, 1912–2010 (Zagreb Law Faculty/Economic, Commercial and Company Law, 1959–1982; president of the Yugoslav Economic Court, 1954–59)(Goldštajn 1986).

The idea was backed also by Peter Winch's *Idea of a Social Science*, which argues that "a principle of conduct and the notion of meaningful action are intervoven", with the criteria of logic arising out of, and being intelligible only in the context of, ways of living or modes of social life (Winch 1960, 63, 100). Ivan Padjen, 1947- (Rijeka Law Faculty/Theory of State and Law, 1978-; Zagreb Faculty of Political Science/Legal Theory and Public Law, 1990-; Zagreb Faculty of Law/Theory and Methodology of Public Law, 1995-), <I> used *inter alia* Winch's *Idea* to explain the distinctiveness of hermeneutic – including legal – scholarly disciplines (Padjen 1984, 1988) and thus to prepare the recognition of the autonomy of every single scholarly discipline in universities by the Croatian Constitutional Court in 2000 (Padjen 2000, A.2.1.2.2.ac; USUD U-I-902/1999, Obrazloženje II.6).

Social law and legal pluralism received a new meaning at the end of communist rule when scholars in Croatia as well as in other parts of Central Europe, including Zoran Pokrovac, 1955- (Split Law Faculty / Theory of Law and State, 1980-), explored the idea of civil society with a view of preparing political pluralism. The idea was used to separate civil society from the state to provide room for the exercise of the freedom of association into first non-governmental organizations and then political parties. (Pokrovac 1988/1; Id. 1988/2; 1990/1; Id. 1990/2; Id. 1991).

After the Republic of Croatia adopted a multiparty political system in 1990 and gained international recognition in 1991-92, it entered into four international agreements with the Holy See in 1997-98. The criticism that the agreements violated the equality of all religious communities before the law (Ustav RH 1990, čl. 41 st. 1; Padjen 1999, 200-204) implied that the Catholic Church in Croatia re-positioned itself from a unit of a trans-national legal system with a status of social law into a co-sovereign. When the Republic of Croatia entered into similar public – but not international – agreements with a dozen of other religious communities in 2002, the agreements were, together with similar development in Hungary (Schanda 2003, 125), interpreted as a significant building block, or at least a sign, of a revival – *pace* Berman and Witte (1987, 495) – of legal pluralism (Padjen 2004, 106).

When all is said and done, it may well be the legal status of religions that explains the proclivity of Croatian lawyers to the idea of social law. Just as religion is defined by law (Padjen 2010) so is Croatia. While that may be – by definition – true of any nation, what distinguishes Croatia is that the law defining Croatia was in the past millenium more often than not merely an autonomous law, that is, a social law, and at times merely a memory of such a law (see Čepulo 2012). Viewed against the background of Croatian participation in networks of legal orders (esp. in the Austro-Hungarian Empire and Yugoslavia), the concern with social law may be recognized as an interest in the central problem of legal theory, which is not merely a legal system (Raz 1972, 2; Kelsen 1961, 3) but also trans-systemic normative relations <45> (Padjen and Matulović 1996, 28-29).

Now, if Croatian concern with social law still seems odd, it may help to notice that the idea of social law is used to explain the nature of even international law (by Reismann 1989, 6-7, 147).

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Dr. sc. Ivan Padjen, redoviti profesor društvenih znanosti, polje pravo, grana teorija prava i države, u trajnom zvanju, znanstveni savjetnik politologije

IDEJA DRUŠTVENOG PRAVA U HRVATSKOJ PRAVNOJ MISLI

Sažetak

Rad se sastoji od dva dodatka rukopisu "Legal Philosophy and General Jurisprudence in Croatia in the XXth Century" za 12. svezak A Treatise of Legal Philosophy and General Jurisprudence, posvećen 20-stoljetnoj filozofiji prava u zemljama kontinentalnoeuropskog, tj. romanskogermanskog prava koji su uredili Jan Wolenski i Alexander Broestl, uz glavnog urednika Enrica Pattara. Izvorni rukopis bio je podnesen kao prethodno priopćenje beogradskom skupu Central and Eastern European Jurisprudence Network u lipnju 2011. Dodaci su potaknuti uredničkim osvrtom, primljenim u veljači 2013., na izvorni rukopis. Prvi se ticao iskaza "preuhranjenost zapadnom pravnom historijom imala je dalekosežni utjecaj" (na hrvatsku pravnu misao). Osvrt je glasio: "Mislite li ovdje na utjecaj zapadne pravne historije na hrvatsku kulturu?!" Drugi osvrt ticao se iskaza "studij pravne povijesti stvorio je zamisao društvenog prava, koja je bila osnažena iskustvom sukoba između zapadnog prava i hrvatskog nasljeđa". Osvrt je glasio: "Možete li navesti hrvatski izraz? Štoviše, čini se da je zamisao krucijalna za razumijevanje hrvatske pravne misli. Možda možete navesti više detalja kako biste olakšali razumijevanje čitatelju ili još bolje, navedite citat, ako je moguće. Mislimo da je zamisao 'društvenog prava' osobitost Hrvatske i stoga veoma zanimljiva." Treći osvrt ticao se iskaza "Misao (o društvenom pravu) uključuje da je pravo jedinstvo normi i djelovanja stvoreno 'odozdo' (mjesne zajednice, privredna tržišta itd.), a razum i logika su, ma koliko bili nesavršeni i određeni kulturom, od prava neodvojivi." Dodaci su nadišli granice rukopisa, no možda mogu biti samostalni rad ili njegova jezgra.

Ključne riječi: Hrvatska, pravo, društveno pravo, pravna teorija, zamisao društvenog prava