BOOK REVIEW

Wolfgang Fikentscher, Herbert Franke, Oskar Köhler (eds.), Entstehung und Wandel Rechtlicher Traditionen. München: Alber, 1980 (pp.820).

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While reading this impressive volume of essays (all of them in German) I was often reminded of Marx' word: "Die Idee blamierte sich immer als sie sich vom Interesse loslöste." But this may not be fair to all contributing authors. The book clearly has two aspects. On the one hand it is a collection of essays on various aspects of early, primitive and non-western law. As can be expected in any collection of that kind, some of the essays are excellent, some good, some rather mediocre. It would in fact be impossible, in a review of reasonable length, to discuss each essay thoroughly, and furthermore I lack the expertise to do so authoritatively for all the fields concerned. Who would not?

What distinguishes this from comparable collections of essays is its second aspect: its pretension to present a very wide conspectus of something called historical anthropology. The essays, some of which are written by senior authorities in their respective fields (e.g. Pospisil, Derrett, Wolff, Wieacker, Coing), cover very nearly all sorts of legal cultures we know of, both "primitive" (Pospisil, Schott) and otherwise: ancient Egypt (Helck), Babylon (Krecher), Jewish law (Falk), Islamic law (Klingmüller, Noth), China (Bünger), Japan (Rahn), India (Derrett, Von Stietencron), ancient Greece (Wolff) and early Rome (Wieacker), the Middle Ages (Van Caenegem), Byzantium (Pieler), Russia (Völkl) and Europe after the Middle Ages (Coing). Some of these essays were originally written for a symposium, held in Freiburg in Breisgau in 1977, others were written later, on invitation of the editors, and apparently added with the purpose of filling conspicuous gaps.

The ambitions which appear from the scope of the book are spelt out in the editors' own contributions. The other essays are pre-

ceded by the editors' views on the tasks and possibilities of an historic anthropology of law (pp.15-49), and the first part of the book, concerning theoretical problems of legal anthropology, opens with a lengthy and curious essay of Fikentscher on "Synepeik und eine synepeische Definition des Rechts" (pp.15-120) to which I will come presently. The introductory essay stresses several times that the authors, when using the term "legal traditions", do not mean to advocate traditionalism, but in fact their treatment of the matter is rather traditional. Thus, when sketching the outline of their anthropology, the authors begin to define the specific difference between man and beast as a difference in the relation of behaviour to rules: "Das Tier ist Regel, der Mensch hat Regel" (p.18). The italics, of course, do not explain anything, but it is easy to see what the authors mean. Law is defined in the usual way as a system of social control, as "Regelmechanismus" (Talcott Parsons was among the contributors), and consequently the question must pop up, what is the differentia specifica between law and other systems of social control (p.17); however, we do not get an answer. So it really is too much to say that this historial-anthropological reflection "hinter geschichtliche Konzeptualisierungen zurückfragt" (p.19).

It remains unclear throughout what the authors mean by historical anthropology. Most likely they intend to establish some kind of comparative study of legal systems, or rather "Rechtskulturen", starting off from a series of questions which would require an analytical rather than a hermeneutical methodology. Apparently they hope to be able to draw out of the mass of data accumulated by anthropology and history of law, generalisations concerning the birth, growth and acculturation of legal systems (significantly, the decay of legal systems is not considered). The whole enterprise can be seen as an instance of the general rapprochement between anthropology and history which, after a long period of mutual neglect, began in the early sixties and now is ranging very wide indeed (Van den Bergh, 1982).

A wide range of historical, sociological and philosophical questions are formulated at the outset (p.21), but what seems missing is the required methodological reflection. This is already apparent from the contents of the book. After some comparative essays on general themes, which in fact offer little news (De Josselin De Jong on custom and customary law, Nelson on comparative development in east and west and Alliot on legal transfers), only two articles on "primitive" legal systems follow (Pospisil on the marriage-system of the Australian aborigines and Schott on the Bulsa of Northern-Ghana), as against no less than fifteen on various legal systems in which historians of law have specialised, some of which are still alive, others long past. Though someone like Schott treats his subject in a no less "his-

torical" way than many of the others do theirs, the impression remains all the same that the two "primitive" legal systems are treated as representatives of a type, the others as historical identities. Many of the essays in fact hardly differ from what traditional legal history would have to say on the subject (e.g. Wieacker on early Roman law and Pieler on Byzantine Law).

The lack of methodological reflection may help to explain the ingenuousness with which some of the results are presented. The authors claim as one of the most surprising results of the conference that in many contributions the same topoi reappeared, such as law as a species of rule-directed behaviour, law and religion, law and professionalisation, law and codification, law and equality, law and appropriateness, the basic elements of law (rules, cases or decisions), the evasion of law (28ff.). Here, I believe, two remarks are in point. In the first place the word topos is here again used in the very loose, in fact indiscriminate sense which unhappily was introduced by Viehweg (cf. Horak, 1969: 45ff.). The problems just enumerated are topics of study but no topoi, not arguments in a debate. Secondly, it may well be that the surprising recurrence of similar questions in various essays has nothing to do with the structure of the subject, but rather with the roughly similar background of the scholars who were invited to contribute to the volume. They all come from western countries, all are academics, all are mildly neo-Kantian in philosophy (the Sein-Sollen dichotomy), mildly neo-positivistic in scientific attitude. Moreover a number of them are by training jurists, imbued with the dominant legal ideology. Not one of the contributors is a Marxist, not one comes from the third world, not one from China, Japan or a centre of Islamic studies in Arabia or Asia. So the list of "topoi" just mentioned should rather be regarded as a checklist of the ethnocentric obsessions of western thought about law.

Let me give one more example of this attitude. The introduction opens with a pompous piece of nonsense about law, medicine and theology as professiones, playing on the various meanings of the Latin word professio, which indeed may mean, among other things, "öffentliches Bekenntniss, Gelobniss" (p.15). Out of this the authors draw a conclusion, which is put in a sentence that could only flow out of the pen of a German professor: "Wichtig ist, dass sie (i.e. law, medicine and theology) eine anthropologische Bedeutung haben, der ein so hoher Rang zugemessen wird, das alles, was in diesen Lebensbereichen geschieht, unter die ausserordentliche Verpflichtung einer Professio gestellt ist." The possibility that professio with regard to medicine, theology and law may have something to do with the medieval system of education, in which the three occupied the higher faculties of the university, is never even contemplated.

Wolfgang Fikentscher's lengthy essay on "Synepeik und eine synepeische Definition des Rechts" deserves a special note in this context. I must confess I cannot remember ever having read a piece of "scientific" prose which was more openly ethnocentric and ideological than this one. What in fact is "Synepeik" (a neologism of Fikentscher's)? It is a way of thinking which Fikentscher developed mainly, as it seems, as an answer to his disconcerting experiences in the student revolt of 1968. Synepeic theory holds that you can judge any philosophic, political or legal creed from the results it necessarily must have. If for instance, you accept the basic tenets of Marxism, you cannot expect to end up as a believer in democracy; if you start with Hegel you will never come to human rights (p.62). This is not a new variety of pragmatism; evidently the "synepeic" necessity is seen as a purely logical one. This simple idea, stuffed with a lot of erudition vel quasi, is then applied in different ways, for instance to the distinction of primitive and developed societies. With this theory Fikentscher hopes to reconcile a fundamentally neo-positivistic theory of law with the notion of values. In effect he practises here a kind of para-scientific ars combinatoria in the tradition of Mannerism. As an example I only cite the following sentence: "So kann es, um nur ein Beispiel zu nennen, nicht überraschen, dass das 20. Jahrhundert zugleich, vor allem durch Picasso, eine Wiederbelebung der aspektivischen Malerei, und, vor allem durch Theodor Viehweg, die Wiederentdeckung topischen Denkens erlebte (p.83)." It may be remarked that Picasso began to paint "aspectivistically" in 1908 and Viehweg's book was first published in 1953, two dates between which we find such trifles as two world wars, a major economic crisis, the rise of fascism and the industrialisation of genocide, decolonization and secularization, etc., but that never will discourage visionaries of this kind. Neither will, I fear, the question what exactly the common element is in "aspectivistic painting" and "topic thinking", apart from the fact that they both seem a departure from Fikentscher's bourgeois Weltbild? The question is hardly worth mentioning.

To return to the basic idea of "synepeics", I think that it is basically misguided. No deduction can be logically necessary unless the premisses are defined unequivocally, and that is not the case here. There are, for instance, so many brands of marxism and neo-marxism, that the word "marxism" hardly means anything. The same can be said of "democracy". So from a logical point of view the validity of Fikentscher's synepeic conclusion is nil. The whole theory is no more than a very muddled dressing-up of a set of very familiar ideological and ethnocentric prejudices. Needless to say, in the whole of this voluminous book on the birth and growth of legal systems the political-economic aspect of the question is hardly ever touched upon.

My critical remarks should not be taken to mean that the whole book should be ignored. As I said before, some of the essays are excellent and many bring a useful contribution to their respective fields of research. It is especially to be welcomed that some scholars, for instance Van Caenegem, try to present a general view of a field of history on which the body (or should we say the bulk) of learning has grown to such impressive proportions as to dishearten many interested, but unspecialized scholars.

No doubt the growth of knowledge about early and primitive societies and their law which anthropology has achieved over the last sixty years makes it urgent to develop a theoretical framework which could replace the obsolete generalisations of Sir Henry Maine and others. If in this respect the contribution of this volume leaves much to be desired, the effort can nonetheless be appreciated.

References:

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