AN APPLICATION OF PRAGMATISM: LEGAL PRAGMATISM

INTRODUCTION

Alexander Kremer

Editor in Chief
University of Szeged
alexanderkremer2000@yahoo.com
kremeralexander5@gmail.com

If we look at pragmatism from the point of view of continental philosophy, we are able to realize their basic differences immediately. The rational tradition may be regarded as dominant in the twenty-five century long tradition of Western philosophy, which means that theory has got a central role contrary to practice. Pragmatism, on the contrary, has preferred practice to theory. According to both the old and the new pragmatism, life is basically practice, and theory is only one of the tools (philosophy included) we use in this practice to improve our own life and society. Needless to say, any kind of condemnation of theory is not inferred from this standpoint, only the denial of a theory-centered philosophical standpoint.

Pragmatism has never been a canonized philosophical movement. In leaving out of consideration the particular differences, we can claim now that both the old and the new pragmatism's representatives agree in some common principles (priority of practice to theory, anti-essentialism, panrelationism, meliorism, etc.), and they draw – among others – also the conclusion that the only ultimate criterion of theory's trueness is its practical usefulness. This is the case in the legal field, too. The pragmatist approach is applicable in every dimension of life, and if we apply it to law then we call it legal pragmatism. Legal pragmatism had a different meaning in some sense at the time of its birth, than it has nowadays, but there are some obvious continuities primarily in respect of the rejection of legal formalism, secondly in connection with the holistic approach of the particular legal cases, and thirdly regarding the consideration of the judicial application of law as making law. Within the latter theme Thomas C. Grey emphasizes in his article, *Judicial Review and Legal Pragmatism* (2003) that the constitutional judicial review has become a common practice in democratic countries after World War II, which has a pragmatic nature:

> „Over the last half-century, judicial review has gone from rare to almost universal in democratic regimes around the world. The judges who review legislation for constitutionality seem generally to do so in a style that is relatively informal or pragmatic, compared to what is usual in the rest of their legal system. This less formal juristic style seems to be contagious, sperading out to influence the way judges, lawyers, law teachers and legal scholars look at law more generally in the systems that have adopted active judicial review. Partly as a result of this, civil law systems are moving away from their traditional conceptualist notion of law as a gapless and determinate system of general principles controlling subordinate rules."
> (Social Science Research Network Electronic Paper Collection, http://papers.ssrn.com/abstract=390460)

Richard Rorty sets off his view regarding legal pragmatism on a general level, when he emphasizes, first of all on the basis of Thomas C. Grey's article, *Holmes and Legal Pragmatism*, that:

> „I think it is true that *by now pragmatism is banal in its application to law*. I also suspect that Grey is right when he claims that *'pragmatism is the implicit working theory of most good lawyers'. To that extent, at least, everybody seems now to be a legal realist.* Nobody wants to talk about a 'science of law' any longer. Nobody doubts that what Morton White called 'the revolt against formalism' was a real advance, both in legal theory and in American intellectual life generally." (PSH, 93. – Emphasis added: A. K.)

Rorty has obviously ceased from continuing the pragmatist tradition in some respects. It is out of question however, that his neopragmatism not only originally renewed the traditional pragmatism (incorporating even the latest European philosophical development: Wittgenstein, Heidegger, Sartre, Gadamer, Foucault, Derrida, etc. left out of consideration by the classic pragmatists), but his views are also in eminent harmony with some of Dewey's philosophical intentions:

> *„Dewey preferred to skip talk of 'authority', 'legitimacy' and 'obligation' and to talk instead about 'applied intelligence' and 'democracy'. He*

> *hoped we would stop using the juridical vocabulary which Kant made fashionable among philosophers, and start using metaphors drawn from town meetings rather than from tribunals.* Ha wanted the first question of both politics and philosophy to be not, 'What is legitimate?' or, 'What is authoritative?' but, 'What can we get together and agree on?' This is the strand in Dewey's thought which Rawls, especially in his later writings, has picked up and developed.
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> *Posner's vision of the function of American judges – his vision of their ability to travel back and forth between the present and the future and to try to fashion a moral unity out of our national history – fits nicely into Dewey's way of thinking.* Nor is Posner's vision very different, I suspect, from that of most Americans who take an interest in what the courts, and especially the Supreme Court, are up to – at least those who are grateful for the Court's decision in *Brown* v. *Board of Education*. *For those who believe that the Civil Rights Movement, the movement which Brown initiated, was an enormous boost to our national self-respect and a reassuring instance of our continuing capacity for moral progress, the thought that the courts do not just apply rules, but make them, is no longer frightening*." (PSH, 111. – Emphasis added: A. K.)

On a more general, philosophical level Rorty makes his standpoint even more unequivocal, when he writes that:

> "I agree with Grey when he says: 'Pragmatism rejects the maxim that you can only beat a theory with a better theory… No rational God guarantees in advance that important areas of practical activity will be governed by elegant theories.'
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> Further, I think that pragmatism's *philosophical* force is pretty well exhausted once this point about theories has been absorbed. *But, in American intellectual life, 'pragmatism' has stood for more than just a set of controversial philosophical arguments about truth, knowledge, and theory. It has also stood for a visionary tradition* to which, as it happened, a few philosophy professors once made particularly important contributions – a tradition to which some judges, lawyers, and law professors still make important contributions. These are the ones who, in their opinions, or briefs, or articles, enter into what Unger calls 'open-ended disputes about the basic terms of social life'." (PSH, 99-100. – Emphasis added: A. K.)

The present issue of *Pragmatism Today* has three main parts. Our readers will find in the first part the thoroughly elaborated writings about legal pragmatism. These analyses undertake clearly the defence of legal pragmatism, and two excellent treatises of them, that of Susan Haack and Frederick Kellogg, rehabilitate Oliver Wendell Holmes' views. They interpret him in different ways, but one of their final results is the same: the early views of Holmes show the features of legal pragmatism.

The second main part offers a fantastic collection of the (into English translated) best papers of a pragmatist conference 2011. The participants of the II. International Pragmatist Conference of Córdoba (II Coloquio Internacional Pragmatista: Filosofía, Psicología, Política (28, 29 y 30 de septiembre del 2011, Villa General Belgrano, Córdoba, Argentina)) have analysed both the views of the traditional pragmatists, and that of the neopragmatists, so the reader may get an interesting panorama of the South American interpretations of the topic.

In our final main part, titled „Miscellanies" we offer a treatise from Janos Boros („Truth in philosophy after Rorty and Dewey") and a book review from Roman Madzia (Richard Rorty, *An Ethics for Today: Finding Common Ground Between Philosophy and Religion*).

Literature

Grey, Thomas C., „Holmes and Legal Pragmatism", 41 Stanford Law Review 787-870 (1989)

Grey, Thomas C., „Judicial Review and Legal Pragmatism", 38 Wake Forest Law Review 473-511 (2003) and Social Science Research Network Electronic Paper Collection, http://papers.ssrn.com/abstract=390460

Rorty, Richard, „The Banality of Pragmatism and the Poetry of Justice". In: Rorty, *Philosophy and Social Hope* (Penguin Books, 1999, PSH)

Rorty, Richard, „Pragmatism and Law: A Response to David Luban". In: Rorty, *Philosophy and Social Hope* (Penguin Books, 1999, PSH)