Csaba Varga

CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON

Codification is a standard means for making the law public and available, as well as for recording the law in written texts. It is a tool known since the law's early development.

The fundamental task of codification in antiquity was the exclusion of any doubts in the presentation of the law, for example, the restoration by the Laws of HAMMURABI of the validity of ancient traditions in accordance with the prevailing interests of the ruler, declaration of law as the common body of rules for the social game by the Laws of Twelve Tables (at least according to TITUS LIVIUS' legend of its origin), and also as a halt of law's previous development by the *Codex* JUSTINIANUS. In the medieval era, codification made possible the registration, recording and uniform editing of the consolidated customs, adapted and brought up to date, prevailing in particular areas of customary law. In the modern era, the continued recording of recognised customs, the declaration of newly established national laws, the collection of an unambiguous body of law designated to be applicable by the sovereign power, as well as the activity of legal reform, often hidden and sometimes executed under the guise of restoring old-time conditions only ideologically postulated, have fallen within the domain of tasks for codification.

Earlier, the mere collection of portions of the law into quantitative summations proved to be enough for completing the task, without any structural renewal. However, on the European continent in the modern era, ending feudal disunity and division became the *sine qua non* for survival among competing empires and dynasties. In order to achieve this, the monarch had to organise the state army and its state financing separate from his own, as well as a bureaucratic institutional machinery to run them, which could function in an impersonal way to implant a far-reaching regulatory system. For the lucid arrangement and up-to-date handling of such a quantity of regulations, the old methods could not prove adequate. In other words, in the codification of continental Europe the quantitative collecting of legal material was replaced by their qualitative restructuring.

The genuine breakthrough was based on the idea of legality, the conceptualisation of laws into a sequence of legal rights and duties, which translated the bourgeois view of society into the language of

law, realised through complete structural reform, re-establishing and re-positing of the whole body of law. This was accomplished by Enlightenment's bold demand for change, by the planning ethos characteristic of rationalism, by the re-founding of natural law (by this time already opposed to feudalism), and, as to its methods, by taking the *more geometrico* [geometric manner] pattern from the axiomatic idea of the exact sciences (especially mathematics and physics). With the triumph of the idea of constructing *more geometrico*, the law became represented as a system having axiomatic logic as its ideal, replacing the chaotic mass of rules, disorderly and full of contradictions, built one upon the other by chance. The system was constructed as the well-ordered assembly of general principles, serving as foundation stones for the whole assemblage, general rules, specific rules, exceptions from the rules, and exceptions from the exceptions. All this was done in a code usually consisting of two parts, namely, the general part, which provided the directives for the entire legislation, and a special part, which offered regulation calibrated for standard situations (for example, individual contracts defined in civil law, or the legal facts that constitute a case in criminal law). Princely absolutism attempted to operate with casuistic precision (the General Law of the Prussian Territory 1791), but did not succeed. The Civil Code with which the French revolutionary renewal concluded (1804), then the Austrian (1811), the German (1897), and the Swiss (1907) codes of civil law, resulted in framing the influential bodies of the law on the European continent that are still in force today.

Codification meant new possibilities in the presentation of the law, as well as in its internal organisation and structure. The germ of the claim for legal positivism was first formulated in the imperial codification of Justinian and, later, Frederick the Great: the embodiment of laws in a series of concepts; the development of its fundamental classifications and conceptual system, with an emphasis on prohibiting interpretation except before an extraordinary imperial committee; and, finally, the reduction of law [*ius*] to the body of enacted laws [*lex*], that is, the exclusive identification of law with the outcome of its formal

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Szent István Társulat
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ABBREVIATIONS

ÁI	*Állam és Igazgatás*
ÁJ	*Állam- és Jogtudomány*
AJCL	*The American Journal of Comparative Law*
AJurid.	*Acta Juridica Academiae Scientiarum Hungaricae*
Akzin	B. Akzin 'Codification in a New State' in *Code Napoleon*
Allen	C. Allen *Law in the Making* 6th ed. (Oxford: Clarendon Press 1958)
Allott	A.N. Allott 'The Future of African Law' in *African Law Adaptation and Development*, ed. H. Kuper and L. Kuper (Los Angeles: University of California Press 1965)
Amos	Amos and Walton's *Introduction to French Law* 2nd ed. (Oxford: Clarendon Press 1963)
Anderson	J.N.D. Anderson 'Codification in the Muslim World: Some Reflections' *RabelsZ* XXX (1966) 2
Arnaud	A.-J. Arnaud *Les origines doctrinales du Code civil français* (Paris: Librairie générale de Droit et de Jurisprudence 1969)
ARSP	*Archiv für Rechts- und Sozialphilosophie*
Bacon	F. Bacon *The Works* II (London: Rivington 1778)
Baye	K.M. Baye 'Le droit africain: ses voies et ses vertus' *RSD* IV (1970) 7
Bayitch	S.A. Bayitch 'Codification in Modern Times' in *Civil Law in the Modern World* ed. A.N. Yiannopoulos (Baton Rouge: Louisiana State University Press 1965)
Bentsi-Enchill	K. Bentsi-Enchill 'Plaidoyer pour une commission du Droit Africaine' *RSD* III (1969) 5

Black	|H.C.| Black's *Law Dictionary* 4th ed. (St. Paul, Minn.: West Publishing Co. 1951)
BMDC	*Boletin Mexicano de Deredo Comparado*
Bónis	Gy. Bónis *A jogtudó értelmiség a középkori Nyugat- és Közép-Európában* |The Intellectual Class of Jurisprudents in Western and Central Europe of the Middle Ages| (Budapest: Akadémiai Kiadó 1972)
Bónis *Középkori jogunk*	Gy. Bónis *Középkori jogunk elemei Római jog, kánonjog, szokásjog* |The Elements of Mediaeval Hungarian Law: Roman Law, Canonic Law, Customary Law| (Budapest: Közgazdasági és Jogi Kiadó 1972)
Bousquet	G.-H. Bousquet *Le droit musulman* (Paris: Colin 1963)
Bukharin and Preobrazhensky	N. Bukharin and E. Preobrazhensky *The ABC of Communism* |Azbuka Kommunizma, Peterburg 1920| ed. E.H. Carr (Harmondsworth: Penguin 1969)
Caroni	P. Caroni 'Savigny und die Kodifikation: Versuch Einer Neudeutung des "Berufes"' *ZSS* LXXXVI (1969)
Cauvière	H. Cauvière *L'idée de codification en France avant la rédaction du Code civil* (Paris: Rousseau 1910)
Chénon	E. Chénon *Histoire générale du Droit français public et privé des origines à 1815* I (Paris: Sirey 1926)
ChQ	*The China Quarterly*
CMH	*The Cambridge Medieval History* II (Cambridge: University Press 1913)
Code Napoleon	*The Code Napoleon and the Common-Law World* ed. B. Schwartz (New York: University Press 1956)
Conrad	H. Conrad *Deutsche Rechtsgeschichte* I (Karlsruhe: Müller 1954)
Cotran	E. Cotran 'The Place and Future of Customary Law in East Africa' in *East African Law Today* (London: The British Institute of International and Comparative Law 1966)
CPC	*Eighth National Congress of the Communist Party of China* (|Beijing| Peking: Foreign Language Press 1956)
Dainow	J. Dainow 'The Civil Law and the Common Law: Some Points of Comparison' *AJCL* XV (1966-67) 3

David	R. David *Les grands systèmes de droit contemporains* (Paris: Dalloz 1964)
David 'Les sources'	R. David 'Les sources du Code civil éthiopien' *RIDC* XIV (1962) 3
Declareuil	J. Declareuil *Histoire générale du Droit français des origines à 1789* (Paris: Sirey 1925)
Diamond	A.S. Diamond *Primitive Law* Past and Present, 3rd ed. (London: Methuen 1971)
Dictionary	*The Dictionary of English Law* I, ed. Earl Jowitt (London: Sweet and Maxwell 1959)
Diehl	G. Diehl *Justinien et la civilisation byzantine au Ve siècle* (Paris: Leroux 1901)
Driver and Miles	G.R. Driver and J.C. Miles *The Babylonian Laws* I-II (Oxford: Clarendon Press 1952-55)
Elbir	H.K. Elbir 'La réforme d'un Code civil adopté de l'étranger: sur quelques problèmes posés par le mouvement de réforme du Code civil en Turquire" *RIDC* VIII (1956) 1
Engels	F. Engels *Anti-Dühring* Herr Eugen Dühring's Revolution in Science, trans. E. Burns (Moscow: Progress 1978)
Engels 'Socialism'	F. Engels 'Socialism: Utopian and Scientific' in *MESW* III
Engels to Schmidt	F. Engels to C. Schmidt |October 27, 1890| in *MESW* III
Eörsi	Gy. Eörsi *Comparative Civil (Private) Law* Law Types, Law Groups, the Roads of Legal Development (Budapest: Akadémiai Kiadó 1979)
Escarra	J. Escarra *Le droit chinois* (Peking and Paris: Vetch and Sirey 1936)
Esmein	A. Esmein *Cours élémentaire d'histoire du droit civil français* 15th ed. (Paris: Sirey 1925)
Esmein 'L'originalité'	A. Esmein 'L'originalité du Code civil' in *Le Code civil* I
Études	*Études juridiques offertes à Léon Julliot de la Morandière* (Paris: Dalloz 1964)
Fenet	P.A. Fenet *Recueil complet des travaux préparatoires au Code civil* I-II (Paris: Videcoq 1827)
Freund	J. Freund *Sociologie de Max Weber* 2nd ed. (Paris: Presses Universitaires de France 1968)

Friedman — W. Friedman *Legal Theory* 3rd ed. (London: Stevens 1953)

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Harrasowsky — Von Harrasowsky *Der Codex Theresianus und seine Umarbeitungen* I (Wien 1883)

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Hazeltine — H.D. Hazeltine 'Roman and Canon Law in the Middle Ages' in *The Cambridge Medieval History* V (Cambridge: University Press 1957)

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Hegel *Philosophie des Rechts* — G.W.F. Hegel *Grundlinien der Philosophie des Rechts* oder Naturrecht und Staatswissenschaft im Grundrisse |1821|

Holdsworth — W. Holdsworth *A History of English Law* XI, 3rd ed. (London: Methuen, and Sweet and Maxwell 1966)

Holland — T.E. Holland 'A Plan for the Formal Amendment of the Law of England' in his *Essays upon the Form of the Law* (London: Butterworths 1870)

Horvat	M. Horvat 'Quelques aspects politiques des codifications romaines' *RIDA*
Horváth	P. Horváth *A kelet- és közép-európai népek jogfejlődésének főbb irányai* |Main Trends in the Development of Law of the Eastern and Central European Nations| (Budapest: Közgazdasági és Jogi Kiadó 1968)
Ilbert	C. Ilbert *Legislative Methods and Forms* (Oxford: Clarendon Press 1901)
Ivanov	V.N. Ivanov 'Razvitie kodifikatsii ugolovnogo zakonodatel'stva' |Development of the Codification of Criminal Legislation| in *Razvitie*
JK	*Jogtudományi Közlöny*
Jørgensen	S. Jørgensen 'Les traits principaux de l'évolution des sources du droit danois' *RIDC* XXII (1971) 1
Karev	D. Karev 'O kodifikatsii i sistematizatsii zakonodatel'stva SSSR i soiuznykh respublikov' |On the Codification and Systematization of Legislation in the USSR and the Federative Republics| *SZ* 2/1956
Kenning	J. Kenning 'Some Remarks on Law and Courts in Africa' in *Integration of Customary and Modern Legal Systems in Africa* (New York and Ile-Ife: African Publishing Corporation and University of Ife Press 1971)
Kerimow	D.A. Kerimow *Fragen der Gesetzgebungstechnik* (Berlin |East|: VEB Deutscher Zentralverlag 1958)
Korkisch	F. Korkisch 'Die Entstehung des österreichischen Allgemeinen Bürgerlichen Gesetzbuches' *RabelsZ* XVIII (1953) 2-3
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Lenin *PN* — V.I. Lenin *Philosophical Notebooks* in Lenin XXXVIII

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Livy — Livy |T. Livius: Rerum Romanorum ab urbe codita| *with an English translation* II, trans. B.O. Foster (Cambridge and London: Harvard University Press and Heinemann 1967)

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Mann — T. Mann *The Beloved Returns* |Lotte in Weimar, 1939| trans. H.T. Lowe-Porter (New York: Knopf 1948)

Mannheim	K. Mannheim *Man and Society in an Age of Reconstruction* (London: Kegan Paul, Trench and Trubner 1940)
Markelov	V.N. Markelov *Ugolovnoe pravo Mongolskoi Narodnoi Respubliki* |Criminal Law of the Mongolian People's Republic| (Moscow: Iuriditsheskaia Literatura 1960)
Marx	K. Marx 'The Eighteenth Brumaire of Louis Bonaparte' in *MESW* I
Mazeaud	H. Mazeaud, L. Mazeaud and J. Mazeaud *Leçons de droit civil* I, 3rd ed. (Paris: Montchrestien 1965)
MECW	K. Marx and F. Engels *Collected Works* I- (Moscow: Progress 1975-)
MESW	K. Marx and F. Engels *Selected Works* I-III (Moscow: Progress 1969-1970)
MESWI	K. Marx and F. Engels *Selected Works in One Volume* (Moscow: Progress 1968)
MEW	K. Marx and F. Engels *Werke* 1- (Berlin: Dietz 1957-)
Mitteis	H. Mitteis *Deutsche Rechtsgeschichte* 5th ed. (Munich and Berlin: Beck 1958)
Montesquieu	Montesquieu *De l'Esprit des Lois* |1748|
Noda	Y. Noda *Introduction to Japanese Law* trans. and ed. A.H. Angelo (Tokyo: University of Tokyo Press 1976)
Orfield	L.B. Orfield *The Growth of Scandinavian Law* (Philadelphia: University of Pennsylvania Press 1953)
Pound	R. Pound 'Codification in Anglo-American Law' in *Code Napoleon*
Pound *American Law*	R. Pound *The Formative Era of American Law* (New York: Smith 1950)
Pravo	*Pravo v nezavysimikh stranakh Afriki* Stanovlenie i razvitie |Law in the Independent Countries of Africa: Its Emergence and Development| ed. R.A. Alianovskii (Moscow: Nauka 1969)
Pringsheim	J. Pringsheim 'Some Causes of Codification' *RIDA*
RabelsZ	*Rabels Zeitschift für ausländisches und internationales Privatrecht*
Rapports polonais	*Rapports polonais présentés au sixième Congrès international de Droit comparé* (Warsaw: Comité des Sciences juridiques de l'Académie polonaise des Sciences 1962)

Razvitie	*Razvitie kodifikatsii sovetskogo zakonodatel'stva* |Development of the Codification of Soviet Legislation| (Moscow: Iuriditsheskaia Literatura 1968)
Reich	N. Reich *Sozialismus und Zivilrecht* Eine rechtstheoretisch-rechtshistorische Studie zur Zivilrechtstheorie und Kodifikationspraxis im sowjetischen Gesellschafts- und Rechtssystem (Frankfurt am Main: Athenäum 1972)
Restatement	*Restatement of the Law of Contracts* As Adopted and Promulgated by the American Law Institute at Washington, D.C., May 6, 1932 (St. Paul, Minn.: American Law Institute Publishers 1932)
Riasanovsky	V. Riasanovsky *Fundamental Principles of Mongol Law* (Bloomington and The Hague: Indiana University Press and Mouton 1965)
RIDA	*Revue internationale des Droits de l'Antiquité* 3rd series IV (1957)
RIDC	*Revue internationale de Droit comparé*
Riegert	R.A. Riegert 'The West German Civil Code: Its Origin and its Contract Provisions' *TLR* XLV (1970)
RIFD	*Rivista Internazionale di Filosofia del Diritto*
RRSS	*Revue roumaine des Sciences sociales: Série des Sciences juridiques*
RSD	*Revue sénégalaise du droit*
Sagnac	P. Sagnac *La législation civile de la Révolution française 1789-1804* (Paris 1899)
Sarlós	B. Sarlós *A Tanácsköztársaság jogrendszerének kialakulása* |The Development of the Legal System of the Council Republic| (Budapest: Közgazdasági és Jogi Kiadó 1969)
Schlesinger	R.B. Schlesinger *Comparative Law* Cases - Text - Materials, 2nd ed. (London: Stevens 1960)
Seagle	W. Seagle *The Quest for Law* (New York: Knopf 1941)
Select Essays	*Select Essays in Anglo-American Legal History* I-II (Frankfurt: Sauer and Auvermann 1968)
SGP	*Sovetskoe gossudarstvo i pravo*

Sominsk — A.S. Sominsk 'Osnovny tsh"erti kodifikatsiia' |The Basic Features of Codification| in *Teoretitsheskoe voprosy sistematizatsii sovetskogo zakonodatel'stva* ed. S.N. Bratus and I.S. Samoshchenko (Moscow: Gosizdat Iuridicheskoi Literatury 1962)

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Suhayda — J. Suhayda *Tanulmányok a polgári magánjogi codificatio terén* |Papers on the Codification of Civil Private Law| (Pest: Grill 1867)

SZ — *Sotsialistitsheskaia Zakonnost'*

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I. INTRODUCTION

Certain things are natural and taken for granted in our lives; things we assert, accept and use perfectly naturally, without ever questioning why they exist. In everyday practice, lots of our judgements reflecting results of human cognition tend to become recurring stereotypes. On the one hand, they can doubtlessly exist in their own right because they are epistemologically well founded and have been repeatedly affirmed in actual use. On the other, their transformation into social facts of life may obscure their original characteristics. True, their application is always accompanied by a concrete definition as to purpose, method, etc. However, since they are, as a general rule, socially useful, the sphere in which they are put to use is not one where the question of the *how* and *why* of their *raison d'être* necessarily crops up. In judgements of this sort, the content, method, purpose, and the context in question, in other words, the *how* and *why*, are taken as a matter of fact. These judgements strike us as unquestionably obvious even though their original content may get obscured; and a change in the original conditions may detach them from their content, indeed, it may even repudiate it.

There are social phenomena that are taken for granted spanning whole historical periods. In fact, that is what appears to be happening with the concept of codification, both in public opinion and in the literature on law.

It would certainly be unrealistic to blame antiquity or the Middle Ages for failing to provide some kind of doctrinal analysis laying down the theoretical foundations for codification. Yet, we shall see how natural and obvious the most ancient and primitive forms of codification were in those periods when writing was first used as a means of communication in state organization and administration; and we shall see how codification reached the highest possible level of development it could reach in the Roman Empire under Justinian, and how, as the model form of written legislation, it grew into a pattern to be followed in the Middle Ages.

The existence of codes was not theoretically challenged until the 18th century. It was in this century that bureaucratic codification (unifying the law of feudal absolutism) reached the height of its development and the elaboration of the codifications of the bourgeois revolutionary age was started. That was the time when philosophical rationalism, a world outlook arranged in mathematical order, the doctrine of natural law and its axiomatic conception combined to construct a unified system of views that could provide the ideology underlying the emerging *theory of codification.*

Both feudal absolutism and bourgeois revolution, the force aspiring to overcome absolutism, had to eliminate completely the legal consequences of feudal division, a task they could not have carried out without codification. The latter had, by then, proved its ability to unify national law and introduce revolutionary novelties into the law. And a theory such as this *did* materialize, indeed, it fulfilled its function in that it led to codes of a high standard and capable of meeting the demands of the age in which they came about. But the theory in question was rather one-sided; it was based on false premises and had bad results. It spoke of codification in general, whereas it challenged nothing more than the *ad hoc* problems of the present. It did not make it really clear that codification was in itself a neutral form, an *instrument* to bring about a transformation of the structure and content of the law. Consequently, it also failed to make it clear that the struggle for codification was only one of the many forms in which polit-

ical struggles are expressed and that there were always very definite economic and political aspirations behind the codification attempts of feudal absolutism or those of the rising bourgeoisie. The need for a theoretical foundation appeared even more marked in 19th-century Germany where the political stakes of codification manifested themselves quite openly. The same applies to Britain and the United States where codification offered, as it were, a change apparent only in the form of law and did not envisage a political transformation or even one in legal contents (but still shook, or could have shaken the whole institutional legal establishment). The controversy between Savigny and Thibaut in Germany, Bentham's lonely struggle in England, or the movement characterized by Field's work in the United States launched their decisive offensives from far more thoroughly prepared theoretical positions, and yet they failed in their attempted breakthrough. The socio-political content was discovered behind the legal surface and it was rejected as an undesirable alternative.

So there gradually developed a *theory of codification* to help pave the way, in the theoretical sphere, for the emergence of the classical type of codification. It raised questions of importance and provided answers of equal importance even if it was one-sided and was based on false premises. But codification was both socially and legally an *open* question, offering even chances to the most contradictory approaches. However, when codification became accepted and no longer required special justification, its theoretical foundation, one-sided, yet in constant search for a reply to the question of *why*, also disappeared. From here on the question of codification, if it appears in a theoretical form at all, is discussed only apologetically. The need for codification becomes a point of departure requiring no further justification. Investigation into the nature of codes assumes a distorted aspect, based as it is on the postulate of development without any alternative. No longer are the factors that lead to the given code examined. Instead, the code is postulated as a kind of absolute value, serving as a starting point for a search of the factors that, as compo-

nents of the national *gloire*, could be regarded as preparing codification as an outcome.

The social conditions favouring selecting the particular road of codification were more manifest in *socialist codification* than ever before. In the Soviet Union, the beginnings of consolidated social construction were marked by the switch-over to the New Economic Policy which ended temporary military communism, itself the consequence of the revolution. Social and economic consolidation ended the so-called revolutionary, indeed anarchic, phase of 'revolutionary justice' which was superseded by codification. As soon as the first code came about, codification was made the *only* alternative, and *par excellence* form, of socialist law.

This was brought about by a combination of factors. First, as to the form, Soviet law had specific traditions behind it (Russian, etc. traditions, in form of failed attempts at Europeanizing modernization, coded in Civil Law). Secondly, the need for social-legal consolidation emerged in the Soviet Union precisely at a time when the idea of classical codification in Western Europe (owing to the overwhelmingly jurisprudential adaptation of the law of liberal capitalism to the needs of monopoly capitalism against the codes) experienced a crisis. With the introduction of the New Economic Policy, the Soviet Union was striving to achieve a type of legally guaranteed social and economic security which Western Europe was just rejecting by its move towards the judicial development of law. The crisis of the classical type of codification in Western Europe was related to the crisis of the type of rule of law the Soviets wanted to ensure. So codification appeared to be a suitable method from this point of view too. Thirdly, socialist revolution set itself a programmed social construction and codification seemed to be the most adequate form for its legal implementation. In the context of Soviet development, this was all so obvious that it only required a definition of day-to-day practical tasks and not an extensive doctrinal explanation in the legal field. In other words, it is a major paradox inherent in the birth of socialist codification that it was chosen in the interest of *deliberate* social construction, while, with

respect to its theoretical foundations, the choice itself was not the outcome of a process of deliberate intention.

Codification became a still more natural development with the establishment of the Soviet-patterned satellite regimes, mainly in Eastern Central Europe. New factors were added. There was the example of the experiences accumulated in Soviet Russia and there were the attempts at codification made under the short-lived Hungarian Soviet Republic. Moreover, in several communist-ruled countries after the Second World War, codification was regarded as a task left half-accomplished by their societies midway through the process of bourgeois transformation. All these factors contributed to a unanimous will for codification. In addition, in several socialist countries in Asia and Europe, codification was the medium through which law had been Europeanized and, in fact, in Hungary, codification coincided with a break with the remnants of feudal customary law. Codification of law was so obvious to doctrinal thinking that it was regarded as the *only* form of legal superstructure befitting the economic basis of socialism. Looking back into history, there was no other realistic alternative indeed, not only for the communist parties, but also for short-lived bourgeois endeavours. Neither in practice nor in theory did people have doubts at all that codification was the best path to follow.

While the superiority of the path of codification appeared to be obvious, there was also a feeling that it would be one void of problems. This confidence led to various illusions, a not infrequent phenomenon in the history of revolutions in general and in the existing communist societies in particular. In the upsurge of revolutionary honeymoon, it was believed that codes were the *sine qua non* of socialist law and a major component in the socialist system of sources of law. However, practice in all socialist states indicates that the priority of codification in the system of sources of law may appear primarily as a wish and only to a very modest extent as actual reality. Only this can explain why, even under consolidated conditions, socialist law has been unable to eliminate the rule by decrees instead of laws.

Neither codification in general, nor any of its variants, have a theory providing an explanation of the codification phenomenon or of its genuine historical background. What is missing is not papers on codification, as there are a great many works discussing it from the point of view of current legal policy or purely historical interest. However, these studies do not provide us with a theory since they are all based on seeing their subject as an unquestioned necessity. Their premises are theorems that should really only be the final outcome of a theoretical study. And, of course, they are somewhat in the nature of apologies.

The fact that the socially compelling desirability of codification has relieved professionals and society at large of the obligation to provide thoroughgoing analyses could be useful at the time. It prevented specialists from wasting energy on convincing people about the need for codification in general, and allowed them to concentrate on the technical problems involved in drawing up the codes in question. The underlying premises which had never been questioned or theoretically justified were further strengthened by various studies that had the appearance of scientific confirmation. The need for codification and its socially desirable effects seem to have in fact been proved by social and historical practice.

Before going any further, we should take a closer look at the term "codification". Some thirty years ago, there was a UNESCO-sponsored survey looking into the *basic sources* of various legal systems.[1] This reveals that 73 states out of a total of 110 had legal sources called "codes", "books of law" and the like; 421 such sources have been found. In other words, the form now termed codification exists in 67 per cent of known legal systems and each system consists of an average of 6 codes. On the one hand, this indicates the enormous significance of codification as a legal source, since codification in its role of defining the main outlines of the majority of legal systems is represented by fewer than five hundred codes in force. On the other hand, 114 of these (in other words, 34 per cent of all codes in force) were made, or received, in the last century, the classical age of codification. And so appearances

seem to suggest that codification has become prevalent in most existing legal systems, largely products of the 19th century.

Before trying to look further into this phenomenon, it is worth noting that the very word *"codification"* emerged in the 19th century. The word "code", meaning "Book of Laws", probably appeared first in the 13th century in Western Europe (e.g. in France around 1220[2]). However, the word "codification" was coined by Bentham from the noun "codex" and the verb "facis-facere", and it was an expression he first used in a letter to the Russian czar in June 1815.[3] The same compound served as a basis for the establishment of the verb "codify" (1800) and the noun "codifier" (1830).[4] These coinages spread fast. For instance, "codification" was to be used as a French word by Henri de Saint-Simon as early as 1819.[5]

The problems involved in codification are much wider than the sphere covered by the term "code". First, a phenomenon as a given quality cannot depend on the label provided by a name. The forms functioning as codes have a significantly wider sphere than the books called as codes. Secondly, codes are *par excellence* expressions of the complex function represented by codification in a legal system, but they are not the only ones. Naturally, the various codification processes reach mostly their peak in the code. Yet it would be inadmissible simplification to reduce the whole complex of problems related to codification to a single form. Codes as such are ultimately only means to an end. The code is a specific form of objectivation with the task of pointing beyond itself, by organizing contents to which the code merely lends expression. This is why, thirdly, theoretical analysis must not be limited to the form only. The code is to be understood in its own function. It is in a social totality that we have to reveal the motivating forces that influence legal development in the direction of the objectivation of law in the form of codes. The widest possible historical and comparative analysis should lead us to meaningful generalizations revealing some common features in the various preconditions, functions and performances of codification.

By codification I mean more than the rather traditional concept that links the birth of codification to the basic oeu-

vres enacted by 18th and 19th-century feudal absolutisms of Prussia, Austria, etc. and those drawn up during the French revolution.

Setting out from the origins and some common fundamentals of the diverse forms of codification, this book is aimed at locating functions in the social development of law that are individual manifestations of codification.

This is why a historical inquiry into codification requires a study of all those phenomena which resemble or have even been a substitute to codification in antiquity, in English-American or in Afro-Asian societies. The pursuit of universality in historical analysis does not follow from some abstract claim to completeness. The lessons such an analysis might teach us are indispensable for codification in our own age, and might bring us closer to an understanding of its methods, possibilities, and of the solutions it can offer.

We shall see that the codes, as social products, enjoy relative autonomy. Economic and other factors may influence the extent to which they can fulfil their function. However, these factors do not determine the codes' form, either. Therefore, we also have to consider some secondary factors, such as the traditions of a country, the system of its sources of law, etc. Thus, the examination of purely social conditions are to be supplemented by an analysis of purely legal traditions, taking into account purely formal, and relevant ideological, factors as well.

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This study was finished in 1976. Both its Hungarian original manuscript published as a series of papers[6] and, then, redrafted as a monograph,[7] and its partial translation into western languages[8] were given critical appreciation by a number of reviews.[9] The present edition is a drastically abridged version of the original manuscript, slightly revised only in style and not in its data or argumentation.

Since the time of its writing, I have had no particular interest in codification as a special field or main subject of

research, except for some well-defined rare occasions (e.g., of a synthesis as to its legal policy conclusions, commissioned by the Legal Department of the Secretariat of the Council of Ministers of the Hungarian People's Republic, 'A kodifikáció és határai' |Codification and its Limits| *ÁI* XXVIII |1978| 8-9, pp. 702-718, revised in 'Sistematizatsiia i kodifikatsiia zakonodatel'stva' |Systematization and Codification of Legislation| in *Sotsialistitsheskaia pravotvortshestva* ed. V. P. Kazimirchuk |Moscow: Nauka forthcoming|; or, of an encyclopaedia entry, 'Jogalkotás' |Law-making| in *Állam- és Jogtudományi Enciklopédia* ed. I. Szabó |Budapest: Akadémiai Kiadó 1980| pp. 811-825, especially ch. III, at 821ff, as forepublished in 'A jogalkotás elméleti alapkérdései' |The Theoretical Fundamentals of Law-making| *ÁJ* XXII |1979| 1, pp. 65-91, in abridged version 'Rechtssetzung als Objektivationsprozess' in *Filosofia del Derecho y Problemas de Filosofia Social* IV |Mexico: Universidad Nacional Autonoma de México 1984| pp. 91-105). Nevertheless, some of the underlying ideas, in particular those connected with the ideal of rationality and the growing tendency and practical failure of formal rationalization and their impact on western legal arrangement and ideology, have been largely developed in several of my more recent papers (e.g. 'The Relative Autonomy of Formal Rational Structures in Law: An Essay in the Marxist Theory of Law' *Eastern Africa Law Review* 8 |1976| 3, pp. 245-260; 'La question de la rationalité formelle en droit: Essai d'interprétation de l'*Ontologie de l'être social* de Lukács' in *Archives de Philosophie du Droit* 23 |Paris: Sirey 1978| pp. 213-236; 'Átalakulóban a jog?' |Law in Transformation?| *ÁJ* XXIII |1980| 4, pp. 670-680; 'Macrosociological Theories of Law: From the "Lawyer's World Concept" to a Social Science Conception of Law' in *Soziologische Jurisprudenz und realistische Theorien des Rechts* hrsg. Eugene Kamenka, Robert S. Summers, William Twining |Berlin: Duncker und Humblot 1986| pp. 197-215 |Rechtstheorie, Beiheft 9|, enlarged in 'Teorias macrosociológicas del derecho: Panorama y valoración' in *Anuario de Filosofia* del Derecho |Nueva Epoca| V |Madrid 1988| pp. 23-53; 'Rechtskultur – Denkkultur: Einführung zum Thema' in *Rechtskultur – Denkkultur* hrsg. E. Mock and Cs. Varga |Stutt-

gart: Steiner 1988| pp. 9-13, *ARSP* Beiheft Nr. 35). Notably, these ideas have influenced the conceptualization of the set-up of modern formal law and, within its context, the jurisprudential interpretation of the philosophical oeuvre of the late Hungarian classic of Marxism, György Lukács (first of all, 'Moderne Staatlichkeit und modernes formales Recht' *AJurid.* XXVI 1984 1-2, pp. 235-241 and *The Place of Law in Lukács' World Concept* |Budapest: Akadémiai Kiadó 1985| 193 p.). They have offered a conceptual background for the theoretical approach to some basic aspects and notions of law (e.g., 'Law and Its Approach as a System' *AJurid.* XXI |1979| 3-4, pp. 295-319, reprinted in *Informatica e Diritto* VII |1981| 2-3, pp. 177-199; 'Heterogeneity and Validity of Law: Outlines of an Ontological Reconstruction' in *Rechtsgeltung* hrsg. Cs. Varga und O. Weinberger |Wiesbaden: Steiner 1986| pp. 88-100 |*ARSP* Beiheft Nr. 27|), and they have provided some useful suggestions to the understanding of the complexity of law-applying processes (e.g., 'Law-application and Its Theoretical Conception' *ARSP* LXVII |1981| 4, pp. 462-479 and 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives' in *Legal Development and Comparative Law* ed. Z. Péteri and V. Lamm |Budapest: Akadémiai Kiadó 1982| pp. 45-76), a topic I wish to discuss in a greater depth in the near future by having a dual approach to it, developing the logic of the subject through the logic of its historical unfolding.

As regards the very methodological teaching of the present investigations into codification, I firmly and invariably believe that only such a complex analysis, based as it is on the social and historical dialectics of actual processes, can promote efforts to lay the foundations for a theoretical explanation of forms and issues of the manifestations of codification. Only such an analysis can provide an adequate theoretical basis for research into their current and future trends, including the examination of their changing functions and inherent limitations.

NOTES

1 *Catalogue des Sources de Documentation Juridique dans le Monde - A Register of Legal Documentation in the World* 2nd ed., (Paris: Unesco 1957).

2 *Grand Larousse de la langue française en six volumes* II (Paris: Larousse 1972).

3 Cf. J. Bentham *Papers Relative to Codification* (London: Preery 1817) and J. Vanderlinden 'Code et codification dans la pensée de Jeremy Bentham' *TRG* XXXII (1964) 1, p. 46.

4 *The Compact Edition of the Oxford Dictionary* I (Oxford: Clarendon Press 1971) p. 456.

5 Cf. P. Robert *Dictionnaire alphabétique de la langue française* I (Paris: Société du Nouveau Littré and Presses Universitaires de France 1953).

6 'Kodifikációs előformák az ókori jogfejlődésben' |Pre-forms of Codification in the Ancient Law Development| *ÁJ* XVII (1974) 1, pp. 83-100; 'Kodifikációs megnyilvánulások a középkori jogfejlődésben' |Forms of Codification in the Development of Law in the Middle Ages| *ÁJ* XVIII (1975) 1, 135-158; 'Kodifikációs tendenciák a felvilágosult abszolutizmus korában' |Tendencies of Codification in the Period of Enlightened Absolutism| *JK* XXXI (1976) 2, pp. 70-80; 'A kodifikáció klasszikus típusának kialakulása Franciaországban' |The Formation of the Classic Type of Codification in France| *ÁJ* XVII (1974) 3, pp. 457-479; 'A polgári átalakulás kései kódexei és kodifikációs problematikája' |Codificational Challenge at the Age of Bourgeois Transformation and the Late Codes Brought about by this Transformation| *JK* XXXII (1977) 6, pp. 320-329; 'A kodifikáció és hanyatlása a burzsoá demokrácia fejlődéstörténetében' |Codification and its Decline in the History of the Development of Bourgeois Democracy| *JK* XXXIII (1978) 9, pp. 531-536; 'Kodifikáció az angolszász rendszerekben' |Codification in the Common Law Systems| *ÁJ* XVI (1973) 4, pp. 611-634; 'A kodifikációs kísérletek alakulása az Egyesült Államokban' |Development of the Attempts at Codification in the United States| *ÁJ* XV (1972) 2, pp. 305-329; 'A jogmodernizáció és kodifikációs útjai az afroázsiai rendszerekben' |Modernization of Law and Its Codificational Trends in the Afro-Asiatic Systems| *Gazdaság- és Jogtudomány* 1974/3-4, pp. 419-457; 'A szocialista kodifikáció születése a Szovjetúnióban' |The Birth of Socialist Codification in the Soviet Union| *JK* XXIX (1974) 10, pp. 559-567; 'A szocialista kodifikáció kiteljesedése' |The Accomplishment of Socialist Codification| *JK* XXX (1975) 1, pp. 11-20; 'Kodifikáció-fogalom s a kodifikációs jelenség történetisége' |The Notion of Codification and the Historical Nature of the Codification Phenomenon| *ÁJ* XVIII (1975) 13, pp. 436-463; 'Racionalitás és jogkodifikáció' |Rationality and Law-codification| *Szociológia* 1975/3, pp. 359-378;

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9 For reviews of items in notes 6 and 7, see *Strani pravni zivot* 1978 No. 98, pp. 36-38, No. 99, pp. 38-40 and P. Malonyai *Magyar Nemzet* XXXVI (1980) 199, p. 4; A. Visegrády *ÁJ* XXIII (1980) 3, pp. 534-539; F. Majoros *RIDC* 32 (1980) 4, pp. 873-876; J. Szabó *Österreichische Zeitschrift für öffentliches Recht* 32 (1981) 1, pp. 123-128; L. Bianchi *Právny Obzor* 64 (1981) 1, pp. 60-63; S. Sipos *Universitate Babes-Bolyai - Iurisprudentia* 26 (1981) 1, pp. 76-78; Gy. Bónis *Századok* CXV (1981) 6, pp. 1325-1327; E. Nagy *ÁI* XXXII (1982) 6, pp. 506-514; V. Bolgár *AJCL* 30 (1982), pp. 698-703; G. Brunner *RabelsZ* 46 (1982) 3, pp. 579-580, respectively. For reviews of titles in note 8, see G. Conac *RIDC* 29 (1977) 4, pp. 861-862; B.-O. Bryde *RabelsZ* 42 (1978) 3, pp. 587-588; K. E. Heinz *ARSP* 65 (1979) 1, pp. 146-148; M. A. Supataev *SGP* 1978/12, p. 148; F. E. Rodríguez *BMDC* XII (1979) No. 35, pp. 672-673 and J. Dalberg-Larsen *Retfaerd* (1978) No. 8, pp. 86-93; M. del Refugio González *BMDC* XII (1979) No. 34, pp. 300-302.

PART ONE

HISTORICAL MANIFESTATIONS OF THE IDEA OF CODIFICATION

II. EARLY FORMS OF CODIFICATION: ANTIQUITY

1. REFORM OF CUSTOMS AND THEIR RECORDING IN EARLY ANTIQUITY

Forms reminiscent of law codes appeared at the dawn of legal development. Following the invention of writing, code-like phenomena arose as early as the very first written records of the law. Our knowledge of them is, however, rather limited. It may be enough to mention that the most important relic, the diorite slab containing Hammurabi's Laws, was discovered by chance in the course of excavations in the early years of this century. The social conditions surrounding the recording of laws are unknown, as are its ideological aspects and the legal practice it was to express. Indeed, even the authenticity of the surviving texts is doubtful. (This is but small wonder, if we consider that often the code text is the only surviving document from which one can draw conclusions concerning the legal and political arrangements of the society in question.)

In order to understand the early codes, we have to realize that the underlying law was of a *customary* character inherited from one generation to the next, reproduced and adapted in the course of the everyday practice of solving conflicts. Customary law, governing society after the primitive communal systems had disintegrated, remained an organic component of everyday life in spite of having become "exteriorized". It was made distinct from other social norm-systems, but its distinctiveness did not receive formal expression. It developed in organic unity with practice. Its *recording*, however, meant a stiffening of law. Law got *objectified*.

Earlier, law was left to *human memory* and was inherited as an *oral tradition* living with the community and also changing with it. Recording takes the place of memory, and its memorization in stanzas[1] and professional law reciting[2] turns out to be unnecessary. Thereby the *monopoly of memory*, which was a source of much class-like tension, may also be over. Under the circumstances, even the putting of law into writing can bring some democratism into the knowledge of the law by ensuring direct and authentic legal information to everybody.

Maine simplified much when he wrote that "the ancient codes were doubtless originally suggested by the discovery and diffusion of the art of writing".[3] The *invention of writing* and the emergence of written law were to a certain extent coincidental in time.[4] Nevertheless, I believe that the invention of writing was not the cause but only an opportunity.

The earliest data indicating the emergence of a state in *Mesopotamia* are from the beginning of the 3rd millennium B.C. The same data also point at accelerated development. The change from the hoe to the wooden plough gives an impetus to agriculture, and metal processing is also developed. Agriculture requires the construction of irrigation systems, and the scarcity of raw materials promotes commerce. The tendency to extend state power is basically due to these factors. The princes of Lagash control increasingly larger areas; a growing number of the prisoners of war become slaves; agriculture, industry and trade lead to deepening social stratification. The organization of irrigation systems, the development of trade, constant wars, as well as the need to control increased area make central administration inevitable.

The *"Reforms" of Urukagina*, perhaps one of the earliest legal records known (about 2400 B.C.), were to cope with organizational problems and also to make customs adapted to changing conditions and intensifying social tensions. The *Laws of Hammurabi*, authored by the ruler of Babylonia crowning the unification of Mesopotamia (somewhere between 1728 and 1686 B.C.), were meant to consolidate central power.[5]

Analysis comparing texts and underlying reality (reconstructed mainly from private legal documents) suggests, however,

that the field covered by the codes must have only been a minor part of legally controlled relations. And all this is only to feed the suspicion according to which "the laws do not form the whole of Sumerian-Akkadian law. In reality, the main source of the law in Eastern Antiquity was custom".[6] This led to an apparently contradictory result. The subsequent codes showed tendencies of gradual expansion in depth as well as in breadth.[7] But this only served the modification of customary law. Accordingly, "legal provisions relate to cases which, if not exceptional, are at least different from the normal alternatives of settlement", consequently the neglect of certain matters only means that "these were already ruled by a more uniform custom".[8]

The birth of the early codes basically sprung from the fact that *empires* of differentiated communities, divided by deepening tensions and embracing large areas and populations, for the first time in history developed in line with production conditions and as a result of wars of conquest, in which the traditional arrangement of customary laws could no longer meet the requirements of adequate adjustment to accelerating change. A tool was needed to render the law flexible, yet *uniformly enforceable* in time and *extendable* in area.

The emergence of written law to supplement customary law represented a sudden change. For the first time in history, it enabled law to adapt to the renewing requirements of social progress, in a uniform way as operated and controlled by a central power, and all this at a moment fixed, in other words, predetermined in space, time, and effect. Thereby law became separated from society, confronting an *external* force to it.

The consciously attempted reform of the law did not only indicate a simple change in methods.

It assumed the polarization of the relations between those who ruled and who were ruled and expressed them with a hitherto unknown clarity. The *divine authorship* of the first codes gradually gave room to the *temporal author* who actually exercised power and thus became the true lord of the law in the practice of subsequent centuries, when state power became established and written law consolidated.[9] (The myth of the divine author

did not fade away easily. First the next world – as a token of authenticity – became secularized in the legislation of the Twelve Tables into a far-away world. "As Moses had retired to Sinai, the secular legislators had to go to some distant land"[10] – in order to prove the righteousness of their creation and to have them accepted as necessarily as natural laws. These ideological props to authority withered away only at the time of Roman domination.)

At the same time, the circumstance that not only god appears in these codes as the guardian of the order of the community, but also a social policy concept that urges change, indicates the emphasis on the reform character, involving also the requirement of a certain social levelling. Code formulations containing complaints about the sharpening of conflicting interests and the spread of injustice,[11] made the necessity of *legal change* obvious, yet they also gave it the *character of a restitution:* they interpreted changes in the law *as a remedy*, as a return to an ideologically postulated *status quo ante.* This, supposedly, served just as much as a prop to the revolutionary changing of traditions, as did the declaration of divine authorship of legislation.

A further factor, apart from reform, was certainly also involved, namely the requirement of *unity* and/or *export of the law* to the areas conquered. This was manifest as a problem of the unity and certainty of the law applied.[12] Stabilization and standardization of the administration of law and justice might be a fundamental necessity for the establishment of imperial unity, which obviously could not be ensured by means of custom. And the necessity for the "unity of practice over a freshly conquered realm hitherto governed under local dispensations"[13] also had to be realized by codification; this was emphasized in the Laws of Hammurabi for the first time.

In contrast to Maine's concept, the conclusion seems to be more substantiated according to which "|w|riting was primarily connected with the idea of change, rather than record, and thus written laws could appear before written documents".[14] Early codes provided either modifications of customary law or reinforcement of some of its doubtful parts: they either displaced

or restored old customs. This function might be coloured by supplementary ones,[15] but these did not change the basic reason for the birth of the first codes.

It is very likely that there was one ancient customary law common to the region of the Fertile Crescent, and that Sumerian, Babylonian, Assyrian and even Mosaic laws were only variants of it.[16] This, however, does not refute the simultaneous existence of diverging systems of customs, which developed more or less in an autochthonous way; this proved to be a threat to the legal unity in the course of *Empire building*. According to Seagle: "Parliament never passed a good law merely because it was a good law; no ancient legislator ever enshrined existing custom in his code merely because it was existing custom." Written recording, however, could play a supplementary role in the process in which the expansion of empires brought about codification.[17]

However, when the law of the conqueror is imposed upon the conquered, the new law may become subject to controversy. The written recording of customs could easily serve the restatement and export of any law. This seems to strengthen my hypothesis connecting the birth of codification with *change in law*.

2. COMPILATION OF LAWS BY LATER CODES

Moving on from ancient Mesopotamia, we find signs of growing independence. In at least two cultures of Antiquity on the threshold of a vast development, we encounter signs of democratism latent in the bare possibility of the common access to laws. To the onlooker today this democratism may seem to be rather embryonic, yet in ancient *Rome* and *China* it must have been looked upon as a watershed. As is known, the popular demand for *public access to the law* was a reaction to the mystical, secret nature of law and to the arbitrariness of the ensuing procedures. Class despotism in the application of unwritten law was inevitable, since those who knew the law's secrets were the feudal nobles in China and the patrician consuls in Rome.

These codifications were free of the requirement of any substantial change in law, as is clear both from historical accounts[18] and from the prehistory of the Twelve Tables.[19] They were aimed exclusively at the written recording and publication of the normative material of law. This was perhaps the first instance in history when a *political confrontation* developed exclusively *about* the acceptance of *a given form.* The issue of the struggle, of course, was not the mere form. The recording and publishing of all laws applied were aimed at discontinuing their arbitrary administration. And since arbitrariness is rooted in the absence of restrictions and in the practical possibility for uncontrolled improvization, these aims disguised the desire for genuine change.

The ambition of the oppressed to have law recorded, to establish equal chances for getting to know the law, to establish security based on law and to standardize its application, affected political interests. This may explain the violence of the struggle for and against codification. Max Weber is justified in seeing a fine early example of *legal revolution* and *class compromise* in the Twelve Tables.[20] The compromise gave something to both parties. It made concessions to the plebeians and secured privileges for the patricians. It did all this in the form of codification that fixed the class struggle in a given state. It stabilized the given *status quo*, which could no longer be made more rigid by the patricians. Neither could it be put in question by the plebeians. Codification served not only as a means for simply recording the given state and wording of the law, but also as a means for recording a class compromise obliging both parties.

The development of codification in ancient times produced new phenomena in the subsequent period.

It is apparent that its function displays an ever growing exclusiveness. Naturally, this is not the only characteristic. Codes were introduced whose sole *raison d'être* was the *export of the law* i.e. the substitution of the traditional law of conquered realms.[21] Obviously, their genuine goal was to secure the *legal unification* of the empire. However, codification did

not replace customs but it created a *modifying special order* in addition to the former exclusivity of customs.

The function of *substitution* was realized in a pure form and for the first time in the *Edictum perpetuum* (about 130 A.D.), "the first published code of practice in any system".[22] The collection of laws served the purpose of their systematical arrangement here and, mainly or additionally, the end of any spontaneous development. It brought to an end nearly three hundred years of jurisprudential development by marking the end of the *ius honorarium*. The measure by which the emperor had to be asked directly for guidance or to fill gaps in doubtful cases was the consequence of this need for normative completeness, the completion of the substitution.

The period of the principate saw the development of the emperor's right to issue decrees, and this soon became the exclusive factor in legal development.

These *constitutiones principum* also transformed legal sources. The accumulation of great numbers of them soon necessitated some measures. Thus, just as the quantitative growth of a given source of the law required codification in order to avoid chaos *(Edictum perpetuum)*, the *Codex Theodosianus* also came into being as a result of a systematizing compilation.[23] It mainly differed from the *Edictum perpetuum* in that it was aimed not at substituting a source of the law, but at *keeping pace* with its quantitative growth. And it differed also from its predecessors in that its value as a source lay not in the validity of the acts collected, but in the validity of the codifying work itself. That is, by having the acts adapted to suit its own purpose, the code eventually *invalidated* the original constitutions.

Since the *Codex Theodosianus* could only create order in the emperors' *constitutiones* production temporarily, the incessant growth of the written sources in a comparatively short time became again unbearable. Hardly 90 years passed before Justinian was complaining about *supervacua prolixitas*. The *Codex Justinianus*,[24] his own response, brought a new aspect to codification development in that it both postulated the formal substitution of an earlier code issued by way of legislation and legally

sanctioned the validity of the new code by expressly forbidding any reference to any earlier collection (and, of course, to the original constitutions). By suspending former validity of parts, the code acknowledged them as its precedents, but ones of merely historical importance.

The danger of anarchy arising from the excessive growth of the law emerged not only in the field of legislation. Justice was administered by laymen, and judges obtained opinions concerning alternatives of legally justifiable patterns of decision from jurisprudents. The practice of giving *respondum* became a sanctioned component of legal process under Augustus. The opinions on individual legal cases which accumulated at a rapid space assumed chaotic proportions, becoming a conglomerate of legal views whose applicability was also limited by inner contradictions. The need for uniformity of the imperial administration of justice made copying and re-copying necessary, and this became a source of distortions. This vast body of legal opinions could not be copied in sufficient numbers, and in the faraway provinces of the empire there was a shortage of them. This was the reason for the birth of the giant work which, under the title *Digesta seu Pandectae*, eventually erected "the holy temple of Roman justice".[25] Justinian validated his collection with exclusivity: he ordered it to be the sole reference, replacing all earlier works. He also forbade its interpretation in order to underline its perpetually sacred character and to eliminate even the emergence of any dispute about it.

According to Weber, the codification work undertaken by Justinian was mainly motivated by the need to restore domestic legal security, to make the masses of officials function uniformly and, not least, to secure the personal prestige of the monarch.[26] But apart from this, Justinian's work came at the same time as military successes and as a condition and product of the reinforcement of centralized state power. Yet these features do not sufficiently pinpoint the work. Just as the struggle to codify the law was a component of a variety of social processes (which also differed in the results it had in traditional China, as well as in the Rome of the Twelve Tables, in

spite of the apparent similarity),[27] Justinian's code was unique in ancient development. He consolidated the unity of the Eastern Empire by military means and used codification to support that unity and to ensure a *conservative restoration.* He wanted to adapt the law of his empire to the absolutist ideology and style of his rule. The contents and autocratic-bureaucratic intentions of the codification suited the traditionalist-bureaucratic and stabilizing tendencies prevailing at the time, as well as the political purpose of a *status quo ante* restoration.[28]

Justinian codified the law in a declining society. He created perhaps the most imposing work in the history of codification in respect of its vast volume, completeness, and the ambitious concept of regarding the systematization of legal provisions as the consummation of the law itself. His work, however, was a climax in the development of Roman law which was followed by nothing but a void. He did not fashion his collection to the size of a disintegrating society, thus it was anachronistic and condemned to failure at the very moment of its birth. The conclusion is inescapable, therefore, that the greatness that surrounds his memory is due rather to the historical chance that gave him such a great role in saving the achievements of Roman law the world over.

3. GENERAL FEATURES OF ANCIENT CODIFICATION

Ancient codification is characterized by diversity. Various forms embodied different functions. The first products of legislation bore *reform* tendencies: they were aimed at the establishment of a *separate order* erected above (and partly replacing) custom. Recording the laws also appeared first as a supplementary then, a few thousand years later, as a basic function. Later on, there appeared also codes in which the need for recording met the necessity for a *change* in the law. These codes restablished the law by adapting and reforming it.[29]

Ancient codes are all related to the institutionalization of *a new source of law.* This source, based on the use of writ-

ing and aiming at a conscious, planned and controlled legislation, was introduced by them. Their acceptance is indicated by the fact that not only did they bring a change to the previous slate of customs, but they themselves, as the embodiment of the law, became the subject of later reforms.[30] Their promulgation, dissemination and copying also show great care. The written form is not the first in legal history where the element of *formality* arose; yet it is undoubtedly the first in ensuring the acceptance of a completely formal element as sufficient reason for, and proof of, the existence of law.

The new form also became the source of some tension. The rudimentary nature of early writing made the multiplication and distribution of the texts almost an impossible undertaking, although they could only be effective all over the empire if they were sufficiently accessible. Thus, it is by no means indifferent that, from the Laws of Hammurabi onwards, traces and increasingly well-pointed references are found, which portray the *creation* of a code and its *multiplication* and *distribution* as factors of almost equal importance.[31]

The first codes were created for the purpose of reforming customs by conscious and quick changes in the law and by a uniform enforcement all over the empire. They did not intend to substitute custom. As their contents-analysis shows, they might mainly serve the *resolution of particularly dangerous conflicts* that threatened the community as a result of private injuries (i.e. the preservation of *shalom*, that is "peace" so that "life can be lived without disturbance"), and not the full range of relations governing communal life.[32] But the functions of recording and collecting laws soon became dominant, aspiring to *completeness* precisely in the interests of the unity and security of law. Codification soon intends to become the sole expression of the law. The question here is chiefly the emergence of a social demand for the formally standardized means of social mediation. This tendency also displays the need for the merciless reduction of law to recorded text, which is perhaps the first emergence of the formula *law is whatever is enacted as law* and the first actual reflection of the emerging ideology of legal positivism.

The Epilogue of the Laws of Hammurabi may be interpreted as pointing towards such a concept; in it the ruler tries to ensure that his successor retain his Laws or be damned.[33] However, in a full-pledged form this concept emerges only in the myth of origin of the Twelve Tables, expressly referring to the motive of regulatory *completeness*. The expression *corpus omnis Romani iuris*[34] refers to the aspiration to completeness and exclusiveness in a clearly unambiguously positivist sense. But it only became a rule sanctioned by well-formulated prohibitions with Justinian.

The picture outlined above may suggest that codification was a complete and finished phenomenon in ancient times. Maine had this to say: "When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without... A new era begins... with the Codes."[35] Early codes began the practice of legal change carried out "deliberately and from without": they contributed to the law becoming a conscious, purposefully applied means of social control. Laying down the text of the law was beneficial for both basic requirements, with which customary law could no longer cope: codification was useful for both reforming and unifying the laws of the empires. Yet, Maine's vision, which suggests a dramatic and irreversible development, was not proved true even in respect of the most orthodox code practice, namely the jurisprudence of *Code Napoléon*. For in harmony with social development, a newer innovative code or judicial practice will sooner or later crop up as an agent of adaptation. It is a different matter that the majority of ancient reform codes did not even intend to abolish customary law. They were aimed at establishing a *tabula rasa* that clearly reflected the legal situation *hic et nunc*. The end of customary legal development and the channelling of further development along a consciously constructed, controlled path only emerged as an inner motive force behind the Justinian modification. But as subsequent development proved, this did not and could not fully succeed.

These early forms of codification attempted to reduce law to a set of rules formulated in a given text; they rendered the law certainly more precise and concise. In terms of contents, codification left the law more or less intact. The *tripartite structure*, complete with prologue and epilogue was present in the first forms of these codes. Their *system* is rudimentary, yet proves the intention of classification.[36] However, their *verbal formulation* is developed: texts are in the third person and, almost without exception, in the conditional, where disposition and sanction are suitably coupled.[37] These codes are struggling with the elementary difficulties of objectifying law in writing; they do not look for the inner coherence and organization of their material and do not explore general principles that cover common features. They do not rise above the casuistry of the regulation they are to codify. This has as a consequence that they at the most establish a *tabula rasa*, reproducing the same difficulties the code intended to cope with. In other words, all these efforts were meant to solve but one task of extraordinary importance: to substitute customary law with written law and, thereby, to work out the means for the conscious controlling of human behavior. The use of the form we are discussing now was rather incidental. Social development by no means required that codification should become one of the fundamental ways of law-making. And since its role in systematizing the law was slight, it did not aim at reforming the structure of casuistics, either.

4. CONCLUSION

The earliest codes came into existence as the first manifestation of written law. They were born after the discovery of writing, yet this was not the reason, only the means for their development. Their emergence is basically explained by the acceleration of development. Written legislation over more than a millennium took shape in reform codes, since the empires with accelerated development required the building of centralized administrations. Thus, the uniform reform of the law was made

instantly available all over the empire. Quickening development, the struggle to form larger state units, the boom in productive and trading activities, i.e. the increased importance of central organization, demanded all at once law-reform, legal security and legal unity. The reform, establishment and extension of laws to new regions and areas were the functions which could be no longer realized under the realm of custom, for it demanded some manageable and manipulatable form. The necessity to fulfil definite functions developed a form which also proved to be adaptable under different conditions. This is the form which made law a direct, and formally distinct, means of exercising power and which led formalization from the rites of legal practicing to the embodiment of the law itself.

The decisive element in early codification development was reform. The function of collecting and recording laws appeared only later and in an incidental way. It only became dominant at the middle of the first millennium B.C.

Thus, initially, ancient reform codes played a role in the transformation of the sources of law by establishing, in addition to the hitherto exclusively prevailing customary law, a separate order. Then the codes, collecting and recording laws, made written law the basic form of law. Finally, also the need to replace custom by reducing any law to written laws arose. Here, the codes of the Roman age played a primary role. But the emphasis on the form could also be illusory in the case of these codes. For the change of forms stood for substantive needs that demanded a real solution, such as substituting the despotism of the patricians with rational standards in fixing the *status quo* achieved in China and in Rome, or the desire for political restoration behind Justinian's codification.

Ancient codification came into being under varying socio-economic conditions, yet it was an appropriate response to the social requirements of the reform, establishment, extension, and formal objectification of law which superseded customary law. These early forms proved to be mostly *ad hoc* means, invented and re-used time and time again to satisfy concrete socio-legal needs.

NOTES

1 A practice, customary before the invention of writing, in early Ionic and later Breton, Frisian and Swedish tradition. Seagle, p. 108.

2 Such as the practice of the Judge of Israel, or of the Icelandic and Swedish *lag-saga* used to be. L.M. Pákozdy 'Törvény és igazságszolgáltatás a Bibliában' |Law and Administration of Justice in the Bible| in *A Biblia világa* |The World of the Bible| ed. L. Rapcsányi (Budapest: MRT and Minerva 1972) p. 146; Orfield, pp. 89 and 253.

3 S.H.S. Maine *Ancient Law* Its Connection with the Early History of Society and Its Relation to Modern Ideas |1861| 14th ed. (London: Murray 1891) p. 15.

4 The very first, basic elements of *writing* emerged in the 4th millennium B.C., but the rather rudimentary and clumsy pictography only became suitable for administrative purposes around the turn of the 3rd and the 2nd millennia. For diplomatic correspondence, it started to be used later, at the middle of the 2nd millennium.

5 To continue the enumeration, the *Hittite Laws*, based on legislation around 1500 B.C., reflecting the strengthening of Hittite state, and put in writing between 1300-1250 B.C., were also the result of conquests. The relationship between the spread of writing, the growth of state administration and the establishment of early codes is emphasized by E.N. Gladden *A History of Public Administration* I (London: Frank Cass 1972) pp. 16ff.

6 Szlechter, p. 8.

7 A textual reconstruction reveals that the Laws of Lipit-Ishtar (around 1930 B.C.) contained about 100 clauses, the Laws of Eshnunna (around 1900 B.C.) about 60, and the Laws of Hammurabi 282 clauses. Cf. Diamond, pp. 14 and 15.

8 Szlechter, p. 9, on the one hand, and Gadd, p. 16, on the other.

9 The ancient codes reveal a slow *secularization* of the ideological expression of legislative power in their prologues and epilogues as well. The earliest legal relic, the "Reforms" of Urukagina refers exclusively to the divine prerogative of legislation and the intermediary role of the secular code. Urukagina "proclaimed the words pronounced by his King, the god Ningirsu" |B-C, VIII, 10-13|. The transition occurred in the "Reforms" of Gudea (about 2070 B.C.), in which the ruler attributes "decrees", "orders" and "laws" to the gods, but he also talks about "my decisions" |B, VIII, 17-18|. Legislation gradually becomes secularized after this. It is cloaked in modest forms at first, the gods

of the Empire protect the ruler but the active role of legislation is already clearly dominant. In the Laws of Ur-Nammu (about 2050 B.C.), "Ur-Nammu... establishes equity in the country with the force of Nanna" |III, 104-113|; and in the Laws of Lipit-Ishtar, the ruler proclaims: "I establish equity on the order of Ellil..." |III, 52-54|, and "At the true word of Utu, I have established equitable law for Sumer and Akkad" |Epilogue|. The first ruler who masters his own law, who thanks his god only for his rule and talents, yet whose work is his own, so his god can only help preserve it after his death in the realization of his curses, is Hammurabi. He proudly proclaims, conscious of the joy and arrogance of *creation:* "I am Hammurabi, the just king, to whom Shamash has granted the truth" |XXV, 95-98|, "The Lord Hammurabi, who is a true father to the people" |XXV, 20-25|, as "I set forth truth |and| justice throughout the land and prospered the people" |V, 20-22|, because "|these are| the just laws which Hammurabi, the able king, has stablished and |thereby| has enabled the land to enjoy stable governance and good rule" |XXIV, 1-5|. Szlechter, pp. 6f, and Driver and Miles, passim.

10 Seagle, p. 106.

11 It is written in the "Reforms" of Urukagina (and also of Gudea) that the ruler, Urukagina, "having reinstated liberty, |decided| that neither the orphan nor the widow should be handed over to the wealthy" |B-C, XII, 21-25 and B, VII, 42-43|. The requirement of justice, of the overcoming of abuses and anarchy also appears in the Laws of Ur-Nammu and the Laws of Lipit-Ishtar |III, 104 and I, 20|, and also the requirement in the Laws of Hammurabi that the ruler should have the words "That the strong may not oppress the weak |and| so to give justice to the orphan |and| the widow" |XXIV, 59-62|. Szlechter, pp. 7f, and Driver and Miles, II, passim.

12 The inscription of Ur-Nammu has this to say: "Utu polished up his equitable law, and made judgements certain" |16-19|. Szlechter, p. 7.

13 Gadd, p. 15.

14 Seagle, p. 102.

15 The *healing* function, remedying abuses of the right, still clearly predominates in the "Reforms" of Urukagina and of Gudea. Szlechter 'Codifications'. Then the will of change, i.e. the tendency of a genuine *reform*, becomes a general determinant, though other factors also colour it. Such are the reinforcement of earlier customs and the unification of customs. Driver and Miles, I, pp. 41-48, especially at 45; Szlechter 'Codifications', p. 77. Law reform and the supplementing of earlier settlements were also the aim of the Middle Assyrian Laws. G.R. Driver and C.J. Miles *The Assyrian Laws* (Oxford: Clarendon Press 1935) pp. 12-14; G. Car-

dascia 'La codification en Assyrie' *RIDA* pp. 65f. In the final analysis, "the regulation of controversial matters" provided the subject of Hittite Laws around the 12th century B.C., too. It is to be noted, however, that its two linguistic layers covered two layers of the law: the laying down of law "from the past" and law "to the future"; hence the intertwinement of the establishment and change of the law, as well as of change and law-making. V. Korosec 'Le problème de la codification dans le domaine du droit hittite' *RIDA* passim, especially at p. 93; E. Neufeld *The Hittite Laws (London: Luzac 1951) pp. 95-102, especially* at 95f; Diamond, pp. 71f. Finally, the Gortynian Laws also served the modification and/or supplementing of existing Cretan laws. M. Lemosse 'Les lois de Gortyne et la notion de codification' *RIDA* pp. 136f.

16 Driver and Miles, I, pp. 9-11.

17 Seagle, quotation at p. 107 and reference to p. 114.

18 In *China*, "Not until the sixth century B.C. were the laws of the various states revealed to the general public. In 536, the state of Chêng, in 513 Chin, and between the fifth and fourth centuries B.C. Wei promulgated their laws, creating a revolution in Chinese legal history and in the ways of the ruling and the ruled. The publicizing of the law always worked to the disadvantage of the ruling class and, not surprisingly, led to protests on their part. When Tzü-ch'an (d. 522 B.C.) promulgated the law of Chêng in 536 B.C. Shu-hsiang of Chin wrote him: 'The ancient kings deliberated on |all the circumstances| and determined |on the punishment of crimes|; they did not make |general| laws of punishment, fearing lest it should give rise to a contentious spirit among the people... When the people know what the exact laws are, they do not stand in awe of their superiors. They also come to have a contentious spirit, and make their appeal to the express words, hoping preadventure to be successful in their argument. They can no longer be managed.' When in 513 B.C. the state of Chin cast penal tripods on which the penal laws were inscribed, Confucius criticized, saying, 'Chin is going to ruin. It has lost its |proper| rules |of administration| ... People will study the tripods, and not care to know their men of rank. And what profession can the superior keep?'" T'ung-Tsu, pp. 170f.

19 According to the story of the origins of the *Laws of Twelve Tables*, the plebeians of the mid-5th century B.C. were exposed not only to the ruthlessness of custom in their impoverished and indebted situation, but also to the caprice of the patrician judges because of the uncertainties of the law in its unconsolidated state. A struggle under the leadership of their tribunes began in order to limit the power of the consuls, to sum up the law, and to commit it to writing. The patricians forced the plebeian movement to accept a compromise in the form of a written law which

would serve the liberties of both parties. After studying Greek legislation, a committee first compiled legal material that filled ten tables, and then added two more, and these were given statutory effect. The only trouble is that the story is based exclusively on the work of Livy |III, 9-57|, which cannot be accepted either as historically authentic or even probable. But the lesson of Livy's story is not altered by the possibility that the text, preserving the Laws, was written later and under different circumstances, or that it might have been a book of the pontifical school of rhetoric; still less since it says more about the conceivable motives of its birth than the mass of documents that survived dealing with later codifications in Rome. Cf. Horvat, p. 289.

20 See Weber *RS*, p. 251.

21 Legal reform in provinces belonging to different areas of custom began during the era of the principate by way of the *leges datae* which constituted an example of "the planned re-creation of the ties with a new territory". Weber *RS*, p. 251.

22 J.H. Wigmore *A Panorama of the World's Legal Systems* Library ed. (Washington: Washington Law Book Company 1936) p. 422.

23 Two private works, the *Codex Gregorianus* (291 A.D.) which collected ordinances of about 150 years in several volumes, and the *Codex Hermogenianus* (294 A.D.), its continuation, were both pure collections. The *Codex Theodosianus* (438 A.D.) was the systematic compilation of the mass of decrees issued during the next 150 years.

24 Justinian appointed a commission of ten in 528 A.D. for the compilation, systematization and completion of the necessary omissions, changes, corrections of the mass of decrees accumulated in the three previous codes, as well as of the *constitutiones* which had been built up since. The *Codex Justinianus* with its nearly 5000 acts was published as a result of the work of the commission in 529 and was followed in 534 by the *Codex repetitae praelectionis* which included the changes that occurred with the introduction of the *Digesta*. Diehl, pp. 249f and 261.

25 When the *Codex Justinianus* was completed, a committee of sixteen appointed by the Emperor attempted the systematic compilation of the opinions of 39 authors to be found in 3,000,000 lines of about 2000 books. The aim of the commission was to provide a summary of the opinions freed from any inner contradiction. In order to achieve this, the commission was empowered to deal with the texts in respect of omissions, divisions, linkages, stylistic corrections and material modifications as it deemed necessary. The vast work managed to abbreviate the original texts by a factor

of nearly twenty (150,000 lines of 20 volumes) and was completed in 533. Diehl, pp. 252-254 and 262.

26 Weber *RS*, p. 254

27 In *China*, the early codification movement evolved as a clash between the Legalists, fighting for equal rights in penal laws, and the Confucianists who stood for the *li* system which discriminated according to social status, and which wanted only moral sanctions. The struggle eventually ended in a draw; the ensuing duality, owing to the consolidation of static family and class structures, resulted in the parallel existence of the *fa* and *li* systems, until at least 1911. T'ung-tsu, pp. 226ff, especially at 279-281.

28 Horvat, pp. 296-299; F. Schultz *Geschichte der römischen Rechtswissenschaft* (Weimar: Böhlau 1961) pp. 353-378; Pringsheim, p. 306.

29 Such as the variant of the Jewisch Code of the Old Testament, conserved in the lines of Exodus |2 Moses 21:1-22:17|, which modified the ancient Code of the Hebrew Kingdom, and supplemented it with the practice of post-exodus times (written about 400 B.C.). Diamond, p. 153. But the Roman codes, the *Edictum perpetuum*, the *Codex Theodosianus*, the *Codex Justiniaus*, and not least the *Digesta*, were similar.

30 Even the "Reforms" of Urukagina begin by stating that Urukagina "abolished the previous laws" |B-C, 6-8|. Szlechter, pp. 5f.

31 Reference is made to this in the text of the Laws of Hammurabi by the covert request in the Epilogue: "Let the oppressed man who has a cause go before my statue |called| 'King of Justice' and then have the inscription on my monument read out and hear my precious words, that my monument may make clear |his| cause to him, let him see the law which applies to him, |and| let his heart be set at ease" |XXV, 2-19|. So far 33 copies of the text of the Laws of Hammurabi have been found. Many of these were not for official use in the strict sense, but (so it is supposed) for information purposes. E. Ferenczy 'A Codex Hammurabi megtalálásának 60. évfordulóján. Jog és könyvtár az ókori Közel-Keleten' |On the 60th Anniversary of the Discovery of the Code of Hammurabi. Law and Library in the Middle-East in Ancient Times| *Magyar Könyvszemle* LXXVIII (1962) 4, p. 320. In relation to the Jewish Code of the Old Testament, the connection between the Decalogue and the tablets of stone is to be mentioned |2 Moses 31:18, 32:15-16 and 19, and 34:1|. Aristotle recounts a similar publication at the turn of the 7th and 6th centuries B.C.: "And |Solon| established a constitution and made other laws... They wrote up the laws on the Boards and set them in the Royal Colonnade, and all swore to observe them..." Aristotle *The Athenian Constitution* |Athenaion politeia VII, 1| with an English translation by H. Rackham (Cambridge |Mass.| and London: Harvard

University Press and Heinemann 1952) p. 25. As mentioned above, the Chinese codes were publicized on tripods. There is also data that the law adopted in the state of Chêng in 501 B.C. were promulgated by being inscribed on bamboo tablets. T'ung-tsu, p. 171, note 4. Finally, similar organized publicity was also given to the ancient collection of Roman law. That is why we read: "The consuls had the decemviral laws, which are known as the Twelve Tables, engraved in bronze, and set them up in a public place." Livy |III, 57| p. 195.

32 Diamond, p. 61 and Pákozdy, p. 145.

33 "To the end of time, yea for evermore, may the king who shall be |raised up| in the land observe the just words which I have inscribed on my monument; may he not alter the judgement of the land, which I have decided" |XXV, 59-72|. Driver and Miles, II.

34 "The centuriate comitia met and adopted the laws of the Ten Tables, which even now, in this great welter of statutes piled one upon another, are the fountain-head of all public and private law. Afterwards the opinion was general that there lacked two tables, by the addition of which a corpus, so to speak, of all the Roman law could be rounded out." Livy |III, 34| p. 113.

35 Maine, p. 21.

36 Cf. the examples of the Laws of Hammurabi and the Jewish Code of the Old Testament. David, pp. 4ff, 14ff, and 22ff; Diamond, pp. 147f.

37 Cf. Diamond, p. 45; B. Meltzl 'Hammurabi törvénykönyve jogi szempontból' |The Code of Hammurabi from a Legal Point of View| in *1909/10. évi felolvasások és előadások* az Erdélyi Múzeum-Egyesület Jog- és Társadalomtudományi Szakosztályán (Kolozsvár: Ajtai 1910) p. 50.

III. EARLY FORMS OF CODIFICATION: THE MIDDLE AGES

1. CODES OF THE MEDIAEVAL EMPIRES

The first products of codification in the Middle Ages were the compendia of laws of the *Germanic principalities* built on the ruins of the Roman Empire. The Germanic tribes, which organized themselves into independent states while they were demolishing the Empire, preserved their "barbaric" tribal laws. They also acknowledged the adherence of rights to personal status, and maintained Roman law for their Roman subjects. This circumstance led to a duality from the very start: the coexistence of the *leges barbarorum* and the *leges Romanorum*.[1]

Early codifications attest to the *survival of Roman law*, partly because barbaric laws were themselves influenced by Roman law and partly because the distinction of the subjects by their Germanic and Roman origin gradually faded, which resulted, first, in the intermingling and, then, in the codificational unification of their laws.[2] But the Roman law embodied by these codes was wholly *primitivized*. However, codification was still the response to a compelling challenge. The task was indeed dualistic: to have a new compendium of law at the level of socio-economic regression and to adapt the law inherited from the preceding formation to the rudimentary needs of a new formation.

The *legal nature* of the early Germanic-Roman codes is not clear, however. We know of a number of codes that they invalidated previous legal sources and later suffered modifications

themselves.[3] There were codes which aspired to become the exclusive source of the law, even reinforcing their exclusivity with sanctions.[4] Indeed, the formal emphasis on modifications, as well as the demand for completeness and exclusivity demonstrate a longing for the positivistic recognition as the source of law. Nevertheless, some of these codes survived for periods of up to 500 years and were applied even under changing conditions.[5] This seems to suggest a less rigid enforcement, one almost relying on the support of traditions.

A similar tendency characterized the codification of *Byzantium* a few centuries later. There, too, the first compendia of law were of a primitivizing character: they reestablished Roman law as adapted to the image of Eastern Christendom, yet also laying down feudal privileges. Technically, they not only inherited, but also directly utilized the experience accumulated by the Roman Empire. This came to be expressed in recodifications: in the issue of imperial edicts to answer questions of law and to solve given cases, and, then, in the incorporation of such edicts in code form and, finally, in the comprehensively codified compendia containing a huge amount of changes and modifications.[6]

Just as Germanic and the Byzantine codifications formed distinct types in their relation to Roman law, codes which frequently came into being largely as original drafts of the *common laws of various tribes* |*Volksrecht*| also formed a distinct type of mediaeval books of law.

These primitive codes (although some were developed after the 10th century) often provided the first records of the laws of feudal states at a developing stage in the process of just assuming their distinctive features. Most of them were rather primitive, yet they were nevertheless expressions of real statehood. The majority were proofs of barbaric, but autochthonous legal development. It is interesting to note that, contrary to Maine's generalizing comment,[7] they did not contain procedural norms. The sphere of regulation they covered was significantly narrow: They provided only prohibitive-penal solutions to basic conflicts, able to cause an acute crisis of

the prevailing order. These concerned above all safety of life and limb, sexual relations and property.[8]

While codes arose as sources of law with an emphasis on their positivity in Byzantine law with strong traces of the Roman heritage, the feature of positivity was supplemented by the force of traditions in the subsequent validation of codes in Germanic-Roman law. Such a duality characterized the codes of the third type as well. It seems to be a general characteristic including the Byzantine type (with the long survival of the *Basilica*) as well. One of its components is the emphasis on *positive validity* expressed partly in the chain of formally marked modifications of the law it had enacted[9] and partly in the special function of the code to put in order (arrange, systematize, compile, etc.) a given source of law.[10] The other component acts as a counterweight to it, rendering its value relative. This is the *survival* of codes *for extremely long periods*, sometimes spanning half a millennium. This is due to the force of tradition, on the one hand, and to their having been copied by hand, on the other. Copying is an occasion of tempting to make hidden changes which are insignificant in themselves, but turn to be considerable when taken together. Thereby they provide continuous adaptation while adhering to tradition.[11]

If we consider the types of codification in the Middle Ages in a broader context, we find the problems the *emerging feudal states* were expected to face with everywhere. Not only did the passing of the society based on slave labour play a role in their development, i.e. the necessary change from the old to a new formation, but also the migration of various barbaric tribes and the socio-historic situation where they were capable now of founding a state after their earlier subjugation. It soon became a fundamental need for them to lend a clear, written form to their laws. This was particularly the case where several systems of law had to coexist. And where there was no such coexistence, the code in question was the first putting into writing of primitive tribal law.

Thus, the development of feudal statehood made the proclamation of its laws as inevitable as in the slave state, once it

had reached a certain level of development. There, a certain level of development *dynamism* became the specific trigger of the reform and/or consolidation of customary laws, which had until then dominated to the exclusion of all else. Here, what became decisive was that, in the majority of cases, it was not a question of an original state in a particular territory: the laws of a new socio-economic formation and, at the same time, of a new nation were promulgated in these codes.

Looking at the need for putting down into writing, and consolidating, the laws does not give us any answer to the question of *why* it happened *the way* it did. As to the Byzantine type of codification, we have had no problems, since Byzantium was not only the successor but also the continuer of the Roman Empire and its organization. Therefore the bare fact that Byzantium made use of the means of codification was a matter of course. As already mentioned, making the law codified was also quite natural in Germanic tribes with subjected Roman population. What is worthy of interest is that there are indications that the *Roman influence* was a *universal motive* in codification in the early Middle Ages. Accordingly, there could be cases of autochthonous legal development little affected by foreign influence, yet Roman law still acted as a glaring model when they were put into a codified form. In other words, emulation of the Roman experience was manifest not only in the direct effect of the migrations of the Germanic tribes.[12] Of more importance is that Roman codification became the abstract ideal of any recording of the laws in the early Middle Ages. The *exempla Romanorum* served as a radiating pattern even though it did not affect the contents; indeed, it was neither seen nor studied. It became a model of non-barbaric, non-customary law; it meant that "in the century that witnessed the issue of the Codex Theodosianus and the Code of Justinian, law and statutory law were the fashion of the day".[13]

The fact that the Roman ideal determined the pattern of codification in the early Middle Ages indicates not only that these codes bore numerous common features despite their basic heterogeneity, but also that the shaping of their form was largely defined by their proximity to this ideal. Codifications

which took place in areas close to the Roman legal traditions had a positional advantage. In consequence, the stage of development in any one particular field certainly does not depend exclusively on the level of development of any other particular (e.g. economic) field. To a most considerable degree it also depends on the accessible intellectual heritage it is familiar with, on the type and level of *legal culture*, on experience (underlying assumptions, prejudices, conceptualizations of the events of past successes and failures) in social engineering, which are rather neglected, though sometimes decisive factors in social development. This explains the creation of codes which were strikingly developed, although the degree of development of the compilation of barbaric tribal laws lies basically in techniques they utilized.[14] The same explains the fact that some codes owed their remarkably developed technicality principally to their having been *borrowed* from alien codes.[15] Their conspicuous variations in standard shows that assessing the evolution of law is a rather complex issue, being the function of its own traditions as well as of the whole range of intellectual and material development.

Even though the powers of the ruler were almost limitless in those days, these works appeared *not as legiferation* in the strict sense; they were hardly more than a *consolidation* of the law. The dual nature of the codes in the early Middle Ages was reflected by the fact that the customary law they incorporated continued to draw its validity from inherited traditions. Its written record, sanctioned by the ruler, could lend it *a new authority*, but this was *of more importance as provability of the custom than the re-definition of its validity*. Nevertheless, the element of change also arose. Some modification of the barbaric tribal laws was required by the embracing of Christianity and, at the same time, the social imperatives of feudalism were reflected under the cloak of the religion.[16] And this brought a certain change in the development of the sources of law as well. A number of edicts and capitaluries left the validity of some customary law traditions in abeyance, while they introduced others, although they had no precedence.[17]

Thus the consolidation of law remained uniform to an extent: although it gave a hitherto unknown form to customary law, it did not aim at changing the customary nature of this law.

Preservation of the customary nature of law while adding the seal of *formal validity* to it represented a duality that resulted from the conditions of the age. It was transitional. The mere fact of organizing statehood made the incorporation of law, i.e. a most rudimentary codification, a primary need even for tribes that had no written legal traditions. This statehood was still developing: its primitive production conditions and scanty transport facilities did not require (and the social structure prevailing did not make it possible) that the ruler should become the sole authority in legal development. These codes evolved in conditions (as demonstrated by the *Pseudo-Isidorian Decretals*) when, together with the increasing Church interests, "forgery was an important source of law", when collections of law, apparently, often emerged from the mists of turbulent and mysterious interactions and became traditional on the strength of their own virtues and survived without extraneous support. This time, indeed, "the law commonly grew and changed of itself without the aid of legislation. The scribe copying a code attributed to a past legislator often alters and expands it to embody rules current in his own time and attributed to the same author".[18] In other words, the contradiction which spans *formal enactment* (in spite of survival as custom) and *survival of custom* (in spite of formal enactment) gave expression to the ambivalence of the slow transition from the customary to the enacted, as dictated by the times.

2. CODIFICATIONS OF FEUDAL DIVISION

The power of the ruler could not survive as an exclusively dominant political factor when the chain of feudal dependences developed. In line with the conditions of a natural economy, the feudal estates became economic units of enormous size, self-sufficient formations, which were accompanied by an extra-

ordinary strengthening of the political power of their owners. This form of economy was also accompanied by a loosening of the state framework, political disintegration and a division of feudal sovereignty. A situation arose in which the ruler, at the top of the feudal hierarchy, could only fulfil the role of *primus inter pares*, at the very best. This state of division greatly increased the sense of self-sufficiency of the feudal landlords. Only conceit germinated by the practically uncurbed possession of feudal estates could give rise to the words: "*Roy ne suis, ne prince, ne duc, ne comte aussy, je suis sire de Coucy*"; indeed, this is the same conceit that could become transformed onto the political plane on the pattern of "*prince ne daigne, roi ne puis, Rohan je suis*".

In the conditions of feudal division, the lords opposed to centralization became strong enough not to tolerate, to reduce to a minimum, and to make ineffective, any legislation on a country-wide scale; indeed, they even prevented the incorporation of particular customary laws, since they saw these as a threat to their own jurisdictional authority, to the integrity of their arbitrariness, and with good reason. Consequently, local customs that varied from one feudal estate to the other became the fundamental sources of law in the age of feudal division, negating the very idea of codification.

Following on the development of feudal division, we encounter codification efforts mostly as *private works*. Just as the books of *formulae*, evolved in the service of rhetorical education, had the function of substituting, for a transitional period, sources of law from as early as the 6th century,[19] the various *capitularies* were able to simply assume the function of substitutes for codes.[20] Yet it was not merely that the power of feudal lords broke up an existing unity of the law, for there had been no such unity: *regional division* took the place of division by subjects which arose from the system of personal laws. There was, however, the decisive difference that the division arising from the personal laws did not render a comprehensive, official codification impossible; but the regional division cut short any such attempt. The books of formulae and the capitularies could only evolve as products of crisis.

This was the reason behind the general spread of private collections during the 13th century, known as *coutumiers*, as instances of codification under feudal division. They did not endanger the jurisdiction of feudal lords; their direct purpose was only to serve as *memory-props*. Yet, by the unofficial incorporation of regional customs they still made inner organization and the spreading of this organization to other regions possible.

The practice of coutumiers was mainly characteristic of France, and there particularly of the *Pays du coutumes*, a territory cut up by nearly three hundred different customs and sixty regional units.[21] In Germany, particularism was also clearly reflected in the principle of *"Willkür bricht Stadtrecht, Stadtrecht Landrecht, Landrecht Reichsrecht"*. This era witnessed the flowering of the creative spirit of Germanic tribal laws, with the rich harvest of coutumiers.[22] A weakening of the power of the rulers brought about similar examples of codification in Eastern Europe as well;[23] indeed, there was a decline in codification in Byzantium, even though no territorial division was apparent there.[24]

The ideology and practice of the slogan of *"Chascuns barons est souverains en sa baronie"*[25] were appropriately expressed in the coutumiers. These compilations of regional customs by no means became substitutes for customs, they did not limit the almost boundless jurisdiction of feudal landlords. At the same time, although they did not have any legal validity in themselves, they were utilized as sources, due to their quasi-code forms. Accordingly, it did happen that they were used in practice as sources of law[26] and were received as model sources of law,[27] or after having been received, were actually confirmed as enacted sources of law.

The *coutumiers*, however, were not the only forms of codification in the age of feudal division; the diversity of feudal estates was not the only manifestation of diversity, either. It also showed in the increasing independence of *civic communities*. As is known, the rise of trade and commerce and economic growth in the 12th century took place primarily in the cities. Assisted by communal movements, the development of civic econ-

omies, the increased importance of their markets and the growth of their population resulted in a steady growth of the power of the towns vis-à-vis the feudal landlords. Like the agricultural feudal estates, the towns became independent economic units, but unlike the former, their existence, based as it was on trade and industrial activity and a more or less democratic, collective form of government, also demanded a written and comprehensive statement of the law. It was no accident, therefore, that the first official codification in the developed phase of feudalism came about in towns, and took the form of *collections of local customs and magisterial statutes.*

In France, the first examples of municipal statutes to function as codes had a legislative character and aspired to completeness. They came into being simultaneously with the oldest *coutumiers.*[29] Such official codes also appeared in German towns in the 13th century.[30] The consolidation of municipal laws in Belgium preceded the national collection, revision and sanctioning of local customs there by three centuries.[31] This accounted for the elaboration of the *theory of municipal statutes* in Italy, which made the legislative power of the community acknowledged as doctrine,[32] in the process shifting the emphasis from the *ius commune*, characteristic of the Roman law, to the *formally enacted law.*

Besides the *coutumiers*, the municipal books of law were accurate reflections of the age: they came about as by-products, necessary but atypical exceptions to feudal division. Their atypical nature lies precisely in their progressive trend compared to the collections of customs of feudal estates: they were not private works, but were *de jure* created as codes. Their distinguishing features were due to the way the structure of administration of municipal communities differed from that of feudal estates. This explains why they became *forerunners of the official, comprehensive, national collection and incorporation of customs* when the growth of royal power brought an end to the state of divison.

However, the municipal books of law were still typical manifestations of feudal division. Even though they came about

as officially enacted codes, the law they codified still aimed at the autonomy of a local community.

At the same time, however, *comprehensive nation-wide codes* came also into being. It is a strange paradox that these aspired not to transcend, but to strengthen the state of division. These codes were not made in opposition to, but as the direct will of feudal lords in their attempt to limit the power of the king, who embodied centralizing endeavours. In a form that points beyond particularism, they served the maintenance of particularization. Some codes of the estates nobility exemplify this.

For the barons not only fought the king but fought with each other as well, in order to achieve and reinforce their independence (at the expense of others). This took on a clearer form, when other orders of the nobility joined in the struggle to have the privileges associated with their particular autonomy accepted. And although they were able to prevent the collection and incorporation of their customs individually, one by one, the recognition of the necessity of a *general* ensuring of their *particular* interests in maintaining division spurred the privileged nobility into united, coordinated action. The practice of *omnium contra omnes* thus resulted in *united action*, which was reflected in code-like compilations of a general validity.

Those codes, whose contents were determined by the perpetuation of feudal privileges and the guarantee of their inviolability, therefore form a separate stratum.[33] The fact that the guarantees of the privileges were formally enacted and had the authority of the law, was in sharp contradiction with the private character of the collections of customary laws which – for lack of political consolidation – were meant for private use in the feudal estates.[34]

The collections of customary laws of the feudal estates were akin to the municipal codes in that they incorporated laws of *local* validity; but they differed in that the municipal codes were enacted and applied as *official* compilations. Properly speaking, they had common features only in that they were, under the prevailing conditions, the most general and compre-

hensive sources of the law. Thus, they really did function as codification within their social context. The purpose of restating the nobility's privileges was clearly to reinforce the state of division, despite the unifying manner of its approach.

The very form which was technically consolidating acted against uniformity with its contents.

The codes of feudal division represented a *cul-de-sac* in the development of codification. However, in their *own* media, they constituted the primary factors of the *unity* and *security* of the law. Therefore, when the breakdown of particularism began with the strengthening of royal power, these particular works became the foundation stones of legal integration.

3. EXPERIMENTS IN SUBSTITUTING CUSTOMARY LAW BY STATUTORY LAW IN THE AGE OF CENTRALIZATION

Transcending feudal division in the field of law presupposed a twofold step. One was to transcend its customary foundations, i.e. its *replacement* by statutory law, and the other was to transcend its division, i.e. its statutory *unification*. These two tasks were closely linked in so far as replacement by statutory law was the logical precondition of statutory unification.

The two tasks were performed, however, at different times. Three to four hundred years of endeavour was required before the division of customary laws was superseded by central legislation.

As seen from the events, any *central recording and collection of customs* ultimately means a step towards the *supremacy of the enacted law*. The very fact that custom itself may become law by its incorporation,[35] prepares the way for its subordination. Incorporation means not only that the custom can be replaced, but also that it can henceforth be modified, indeed revoked, just like any other act.

The development of feudal society went beyond the stage of stagnation as early as the 15th century. With the ending of dynastic struggles, the central power of the kings grew, and increased production and exchange activities also demanded the

supersession of division. The territorial customs proved to have a retarding effect by virtue of their loose forms and anomalies. The expanding administration under the royal power faced the task of developing and, then, harmonizing the realm's customs.

We agree with the statement that "in the development of customary law, putting in writing is the equivalent of the phase of maturity and often the phase of old age and calcification",[36] but with the proviso that while putting in writing preserved the territorial customs, it also perverted their traditionality. Although particular local orders were confirmed, it was done on its own terms. So the central shoring-up of regional division was a provisional step: it provided a necessary step in the transition to legal unification.

The turning point lies in their becoming *ius scriptum*. In spite of the temporary maintenance of division by regulatory contents, particularism was still formally abolished by making them dependent on the declaration of a royal will. *"Ex que les coustumes sont rédigées par authorité du roy censentur eodem jure que les ordonnances"*, – wrote the chronicler with justification,[37] for "editing... made real laws of the customs, which derived their binding force thereafter... from the royal power which declared them".[38]

In *France*, the official editing of customs viewed *consolidation* together with certain *unifying* efforts in its very first programme.[39] This was soon followed by the desire for their codified unification on the pattern of weights and measures.[40] The editing of customs of various regions was completed by the end of the 16th century, and the *revision*, i.e. the amended and enlarged new edition of consolidated customs, began in the middle of the same century. These collections called *Réformations* doubled the compiled material of customary law and replaced the body of the *ancienne coutume* with that of the *nouvelle coutume*.[41] By making the fate of customs subject to royal acts, they illustrated that customs became mere empty shells with official editing: the king's law-making act became the decisive factor in legal development. A similar process also began in Belgium a century later: comprehensive code-like collections

were edited as the outcome of the process called homologation.[42]

The replacement of customary law by central enactment was in itself an epoch-making achievement in the overcoming of feudal division. The examples demonstrating an overt change to statutory law and the rational unification in *one act* were, therefore, rather exceptional in these times. Apart from a few early forerunners,[43] they were only possible where regional particularization had not divided the country's law too deeply,[44] or where absolute power had been able to develop a lot sooner and with less resistance.[45]

The first thing to undermine the law of regional division was the *change in the basis of the validity* of the sources of law. This was not only a first, but also an inevitable precondition: regionally divided customs had to be divested of their traditional roots in order to become enacted by the sovereign and also increasingly shaped by him. The *royal enactment* was the *punctum saliens*, by which laws which until then had had their roots in their regionally traditional continuity, became the discontinuous products of the prevailing "mihi placet" of the king; they became standards freely shapable and revocable in their legal quality.

Pieces of codification proper of the age of absolutism were royal acts of harmonizing and systematizing legislation, which often put into one unit the mass of partial regulations of whole branches of the law, becoming more or less general in Western Europe during the 18th century. What they actually achieved was in fact no more than a spectacular culmination, a harvesting of the work that had begun centuries before. For a codification objective adequate for the needs and potential of the age existed in either of these periods. The objective which led to codification in the age of absolutism emerged earlier in the form of achieving the replacement of customary law. The replacement of customary laws with statutory law and unifying them in particular codes dependent on central enactment were the primary codification task to be reached at the time of overcoming feudal division. And legal development in Europe

completely conformed with this, even if it did not proceed any further.

4. GENERAL FEATURES OF MEDIAEVAL CODIFICATION

From the point of view of codification, mediaeval development was marked by efforts to stabilize the law. This is an age whose most important legal source was customary law, with Roman law being reconsidered and readjusted to the day's needs at universities and assuming forms reminiscent of the provisions of customary law. All this could be an adequate expression of the conditions pertaining to an economy of self-sufficiency.

"*Il n'y a ... rien plus pernicieux et dommageable à vn estat, et qui cause plus d'inuolutions, troubles et subuersion de toutes choses, que la confusion et incertitude desdites Loix, Edicts et Ordonnances...*", we read in a contemporary draft code,[46] and it can be said that feudal society did everything it could to remedy this.

The general feature of the mediaeval codes is that they are mostly not original works, but ones aimed at *quantitative* compilation, putting into writing existing sources of law. Their merit lies primarily in the fact that they preserved the codification idea in an anti-codification age. Of course, all this could not have taken place without some compromises. The special character of mediaeval codification lies in the circumstance that its function became overwhelmingly a mere *reproductive* function. No matter how much this limited and impoverished its possibilities, it did not negate them either in principle or even, in some exceptional cases, in practice.

Over nearly a thousand years, the mediaeval code had had so many facets that it tended to be almost featureless, with the only exception of its becoming enacted.[47] As a matter of fact, its original function of arranging and consolidating the sources of law could sometimes be performed by alternative means, even the actual application of provisions as genuine sources of law could bridge the lack of their formal enactment for a while[48] – but all this did not and could not result in

solutions of a distinctively legal character. The law's formal enactment had to be established and consolidated in the course of the socio-political development, in order that it becomes the law's *sine qua non* element.

Attaching legal validity to its formal enactment was, in fact, the result of a long development. Even the principle of *lex posterior derogat priori* is only accepted by the commentators around the 14th and 15th centuries.[49] Transitional forms, which attest to a definite demand for formal (though possibly short-lived) validity are frequent.[50] Apart from rather incidental instances,[51] codes with a claim to legal exclusivity only developed, therefore, during the 16th century.[52]

It is a strange phenomenon that the actual orientation of feudal codification is marked not only by completed works, but also by *attempts* which were *doomed to failure* from the very start and just because of their clearer and/or deeper representation of the tendencies in question. They stand as examples of how much feudal codification was the momentary expression of the struggles of the nobility among themselves and against the ruler[53] and of the political battle the central power had to win in order to make its will dominant, and in order to implement this will through the emerging state machinery.

5. CONCLUSION

In the final analysis, the concept of codification was reinforced in the Middle Ages. With the spread of Roman law, the codification form becomes general and a commonly used means of developing the law and the basic method of putting the law into writing. The reason why this nevertheless constitutes an unheard-of achievement is that mediaeval legal development ran indeed counter to the very idea of codification. The codification phenomenon that developed in these conditions adapted quite well to the social context in question.

As to the earliest manifestations, it is the new empires arising from the ruins of the Roman Empire, i.e. the *barbaric* tribes that resort to codification. Its function hardly goes

beyond the conservation of the law. In contrast, a feudalized repetition of Justinian's codification is to be found in *Byzantium*. Byzantium preserved the concepts of Roman rule for a long time. However, this is far from being characteristic of the whole of Europe. The law of contemporary Europe was made up of a multitude of regional-tribal customs, impregnated by elements of the Roman law. Consolidating it through its codification made sense as an effort at its preservation. It was customary law upon which the ruler could rely in the administration of justice. The fact of its becoming codified did not change the sources of its validity in most cases: this lay primarily in traditions, in the *"good, old"* customs.[54]

Legislative power emanating from the sovereign was only reborn around the 13th century. Aided by growing municipal movements, the towns began to give their customs and laws some shape and form. The same tendency was, of course, also apparent at the level of royal law-making. There were, in addition, openly innovative enactments, which gave expression to underlying endeavours,[55] but they remained bound to customs and hence transitory in nature. They could transcend their traditional carriers only step by step, in the guise of a sequence of false ideologies. The ruler bowed to customs in principle, and thought he was being true to this principle by weeding out the "wrong" ones. Revocation of the "wrong" customs in its turn gave the ruler the excuse to appoint himself as a sovereign law-maker under the guise of a profound fidelity to traditions.[56]

The enacted nature and formal validity of the codificatory work could only appear to the wishful thinking of the day, as the social framework of feudal division did not make its practical realization possible. For the time being, mostly various *code substitutes*, i.e. local collections that resulted from private efforts, could have consolidating and unifying functions among the customary laws. Despite their private nature (most of them being *de facto* substitutes), they occasionally met with official approval and filled the codification gap by virtue of prevailing circumstances.

The first typical examples of codification with both an enacted nature and formal validity were the comprehensive, official *consolidations of customary laws*. Their transitory character is marked by their heterogeneity: they confirm the customs, thus promoting their enactment and formally reestablishing them, but they do not, as a rule, undertake their national unification. Their social significance, however, is vast. The codification of customary laws results in the fact that customs become the past antecedents of statutory law. The new element is that codification is accompanied by law-enforcement and this really renders the law objective. And just as in ancient times, in the full development of the dominate under Justinian, when we find the merciless reduction of the *ius* to the *lex* enacted by the ruler, we find code law as fully developed in the mediaeval absolutism following the pattern of Byzantium, notably, in the aspirations of Ivan IV.

The early forms of codification, as seen in the previous chapter, came into being as a result of the need for a reform that began to develop in the womb of customs, but soon became the means of consolidation. Mediaeval codes always stood in the service of conservation and comprehensive consolidation. They were aimed at the eradication of the customary nature of the laws in only some of their products, and, as in ancient times, mainly towards the end of the era. Yet the demand for reform was ever present. As such a demand, feudal development led to the adaptation of customs and the liquidation of their regional division. Formally, this latter task came closer to realization with the replacement of customary law with statutory law. But its substantive unification and the sovereign shaping of law could only be brought about by subsequent developments, namely the accomplishment of feudal absolutism.

NOTES

1 E.g., in addition to the *Codex Euricianus* of the Visigoths (around 475 A.D.), the rough compilation of Roman law was accomplished in the *Breviarium Alarici* (506 A.D.); in addition to the *Lex Gundobada* of Burgundy (around 502 A.D.), the

Lex Romana Burgundionum (506 A.D.) The latter was in want of accuracy even in the reproduction of the texts. Cf. Diamond, pp. 25-27; Hazeltine, pp. 722-727 and 745; Chénon, pp. 132-137.

2 The Visigoths changed their codes around 645 A.D. with the *Liber Judiciorum*, valid for all their subjects; the Ostrogoths issued a common code, the *Edictum Theodorici*, around 500 A.D., from the very start. It reflected the Roman vulgar law.

3 Of the several amendments of the *Lex Gundobada*, the first were carried out by Gundobad himself. The *Breviarium Alarici* was formally abrogated by Chindaswinth in Spain in the middle of the 7th century. He introduced the *Fuero Juzgo* in its place.

4 E.g., the *Breviarium Alarici* punished any external reference to Roman laws by death.

5 E.g., the *Lex Gundobada* remained in force for four centuries after the integration of the Kingdom of Burgundy into the Frankish Empire (534 A.D.). The *Breviarium Alarici* remained in force for six centuries.

6 The Laws of Justinian, amended by the addition of new customs, privileges, etc., was first adapted by the *Ecloge* (726 A.D.), later revised by the *Procheiron* (879 A.D.). The imperial novellas, which were intended to guide the administration of justice, were compiled in code form by the *Epanagoge* (885 A.D.). Finally, all these were followed by the *Basilica* (888 A.D.), published in sixty royal volumes and based on the conceptual framework of the Justinian Laws. At the same time they linked Roman law textual quotations with Byzantine "guidelines", in order to ensure uniformity of interpretation. Cf. Horváth, pp. 147-150; Hazeltine, pp. 717f.

7 H.S. Maine *Dissertations on Early Law and Custom* (London: Murray 1883) p. 389.

8 E.g., the most primitive of the known codes, *Leges inter Brettos et Scotos* of uncertain origin and valid mainly in the South-Western parts of Scotland, only contained norms relating to injury to life and limb. The *Laws of Aethelberht* (originated in Kent around the turn of the 6th and 7th centuries) also contained the same kind of prohibitions in 85 of its 90 clauses. The *Lex Salica* (around 511 A.D.) was similar. Homicide, bodily harm and theft were the subject of the first version of Jaroslav's *Pravda* (originated around 1030 A.D.) as well. 38 of the 46 prohibitions of the Laws of King George V of Georgia, which aimed at the consolidation of remote, anarchy-torn terrritories (in the first third of the 14th century), also dealt with these. Cf. Diamond, pp. 57-60, 28f, 31, 36, 37; Horváth, pp. 240f; F. Pollock and F.W. Maitland *The History of English Law before the Time of Edward I* I, 2nd ed. (Cambridge: Cambridge University Press 1968) pp. 11f.

9 E.g., the *Lex Salica* was already modified during the 6th century. Such modifications were carried out by separate legislative acts. The Lombardian *Edictus Rothari* (643 A.D.) was amended by means of a supplementary law in the first half of the 8th century; then the amendment was attached to the code and its clauses were modified five times within the same century. The *Laws of Aethelberht* were also amended in the same century as its completion. The tendency towards transformation into enacted laws is indicated by the fact that 16 of the clauses of the amendment (which comes at the end of the Laws, and is attached mechanically to the last sentence of the latter) are not genuine amendments, but were conceived to ensure greater accuracy; they only contain details and casuistic enumeration of exceptions. Later on, at the end of the 9th century, it was amalgamated with two other collections in the Code of Alfred (cf. H. Brunner 'The Sources of English Law' |Encyclopadie der Rechtswissenschaft, 3rd ed. Leipzig: 1877| in *Select Essays in Anglo-American Legal History* |1908| II |Frankfurt: Sauer and Auvermann 1968| pp. 9f), just as the Laws of King George V of Georgia were also followed by the *Codex Aghbougha* as the revised compilation of four earlier codes.

10 The Laws of Hywel Dda in Wales (in the middle of the 10th century), the Scottish *Assise Regis David* collection of laws (from the first half of the 13th century), which was created in order to eliminate false sources of the law, or the Armenian Book of laws (in the 12th century), whose immediate aim was to consolidate the acts of the Eastern Christian administration of justice, were of a similar type. Diamond, pp. 32f and 36f.

11 Thus, the manuscript variations of the Laws of Hywel Dda survived up to the 15th century. Some 70 copies of the *Lex Salica* survived, in 8 versions (cf. Chénon, pp. 139-142). As to Jaroslav's *Pravda*, historians work on the basis of 106 different copies of 3 main variations. But perhaps the most remarkable fact is that the *Leges inter Brettos et Scotos* should have remained so religiously observed among the population of the Galloway peninsula that after a number of unsuccessful attempts King Edward I had to prohibit its further use by his act *Ordinacio facta per Dominium Regem super stabilitate Terre Scotie* (1305 A.D.) (Diamond, p. 32).

12 The effect may have been superficial as well. For example the compilation of the tribal laws of the Visigoths and the Burgundians assumed the name of a *codex*, and that of the Ostrogoths and the Lombards, the form of an *edictum*, i.e. pure titles borrowed from the Romans.

13 Diamond, p. 43. The ecclesiastic historian, Bede, wrote about the *exempla Romanorum* in connection with the *Laws of Aethelberht* (around 731 A.D.), although this had nothing in common with Roman law, and Bede himself was only able to read about Roman codes, but was unlikely to have studied

any code directly. "King Ethelbert," wrote Bede, "Among the many benefits that his wisdom conferred on the nation, he introduced with the consent of his counsellors a code of law inspired by the example of the Romans, which was written in English, and remains in force to this day." *Hist. Eccl.* II, 5 trans. L. Sherley-Price in Bede *A History of the English Church and People* (Harmondsworth: Penguin 1968) p. 108.

14 According to historians, "perhaps the finest of all codes of barbarian law" was the *Edictus Rothari*, since it formed a well structured, rationally divided, clearly formulated body of the Lombard people's laws. Diamond, p. 28. Cf. Mitteis, pp. 63f.

15 The first compilation in Bulgarian legal development, *Zakon sudnyi lyudm* (from about the turn of the 9th and the 10th centuries), relied on the material of the *Ecloge* by having borrowed complete portions from it. Horváth, pp. 158f.

16 The *Laws of Hywel Dda* is a collective work, the fruit of the labours of a committee of twelve. The participation of the clergy in its preparation was deemed necessary to ensure that the code agreed with the teachings of the Bible.

17 See, e.g., G. Seeliger 'Legislation and Administration of Charles the Great' in *CMH* p. 672 and C. Pfister 'Gaul under the Merovingian Franks' Institutions' in *CMH* p. 134.

18 Diamond, pp. 50 and 41.

19 Bónis, pp. 28-30.

20 The Franks' *Recueil d'Anségise* (827 A.D.), and, then, the *Recueil de Benedictus Levita* (around 850 A.D.) were private works, but were soon referred to as official ones. Chénon, pp. 150-153.

21 Such early collections were the *Statuta et consuetudines Normannie* (around 1200 A.D.), the *Summa de legibus Normannie* (around 1254 A.D.), and the *Tres-Ancienne Coutume de Bretagne* (around 1315 A.D.). Other collections, such as the *Conseil a un ami* (around 1254 A.D.) and the *Li livres de Jostice et de Plet* (around 1259 A.D.), also attempted the structural imitation of Roman codes. Finally, some collections, above all the *Les Livres des coustumes et des usages de Beauvoisins* (1283 A.D.), had, in addition, purely doctrinal objectives and tried to reveal the core of the ideas inherent in the customs in question, to define their meaning and to sketch their system. Chénon, pp. 553-562; Esmein, pp. 692-703; Declareuil, pp. 860-866.

22 Of these, primary mention should be given to the *Sachsenspiegel* (around 1200 A.D.) and the *Schwabenspiegel* (around 1275 A.D.). Conrad, pp. 477f; Mitteis, pp. 163-165; Hazeltine, pp. 753-755.

23 Horváth, pp. 237 and 225.

24 The Byzantine Empire no longer made it possible to consolidate the law through codification. Nearly five-hundred years passed before Harmenopulos undertook the incorporation of the mass of the novellae supplementing and amending the *Basilica*, in order to temporarily overcome the contradictions within Byzantine law. His private work, *Hexabiblos* (1345), was though qualified "the miserable epitome of the epitomes of epitomes". Horváth, pp. 289f; Hazeltine, p. 719.

25 Beaumanoir *Coutumes de Beauvaisis* ed. Salmon No. 1043, cf. Chénon, p. 517.

26 This was the destiny of the *Hexabiblos* in Byzantium. The *Summa de legibus Normanniae*, and the *Tres-Ancienne Coutume de Bretagne* was referred to and applied as the source of regional law by many kings; thus "they assumed a quasi-official character". Chénon, p. 495.

27 This became particularly characteristic of the destiny of the *Coutumes de Beauvaisis* on French soil, and of the *Sachsenspiegel* in German territories. The latter served as a basic or subsidiary source of law even in remote towns (e.g. at Lőcse |Leutschau, now Levoča, Slovakia|, in the County of Szepes in historical Hungary).

28 Byzantine law was adopted, among others, by Moldavia and Greece. The civil code of Moldavia (1817) used the *Basilica* as its subsidiary source of law, while Greece introduced it *in extenso* as its own law (1822). Not much later it was replaced by enacting the private work of Harmenopulos (1835). V.A. Georgesco 'La réception du droit romano-byzantin dans les Principautés roumaines (Moldavie et Valachie)' in *Droits de l'antiquité et Sociologie juridique* Mélanges Henri Lévy-Bruhl (Paris: Sirey 1959) p. 388; Hazeltine, p. 719.

29 E.g. in the city of Arles, around 1202. Chénon, p. 516.

30 The official book of law of Ottonianum (Braunschweig, 1227), and Hildesheim (1249), etc., chronologically followed the private collections of the *Mühlhauser Reichsrechtsbuch*, the *Stadtrechtsbuch der Stadt Freiburg*, etc. Conrad, p. 482.

31 E.g. the *Registre aux bans municipaux* (around 1250) compiled the laws of Saint-Omer in more than five hundred clauses. Gilissen, p. 17.

32 See, e.g., Bónis, pp. 45f.

33 The Swedish *Codex Christophorianus* (1442) was of a similar type. It was promulgated by Christopher the Bavarian, when he accepted the throne of the three Scandinavian kingdoms

under the condition requested by the Swedish nobility that he also adopted the imperial laws decreed by Magnus Ericson and modified by the nobility to its own advantage. The *Sudnaia Gramota* of Novgorod and Pskov (14th and 15th centuries) provided the legal framework of the special rights of the privileged boyars. The extension of the nobility's privileges and the acknowledgment of several demands of the landed gentry was the essential content of the Code of Casimir the Great in Poland (1468), while the *Commune incliti regni Poloniae privilegium* (1505) represented the last comprehensive consolidation of the laws of the nobility. Vanderlinden, pp. 276f; Horváth, pp. 245 and 235.

34 E.g., the Bohemian *Constitutiones terrae* (1500) was subject to express modification three times within 125 years. Horváth, p. 215.

35 "Cele costume qui est mise en escrit est apelée lois ou constitutions...; cele qui n'est pas mise en escrit retient son nom, et est apelée costume." 'Texte anonyme' published in appendix to P. de Fontaines *Conseil a un ami* ed. Marnier, p. 492. See Chénon, p. 492, note 1.

36 R. Filhol 'La rédaction des coutumes en France aux XVe et XVIe siècles' in *La rédaction* p. 63.

37 Fontanon *Edits et ordonnances des rois de France* IV, I, tome 1, quoted by Declareuil, p. 879, note 383.

38 Esmein, p. 715.

39 Charles VII wrote in the *Ordonnance de Montil-les-Tours* (1454): "Desiring to abridge court proceedings and litigation among our subjects..., and to establish certainty in the judgments..., and to eliminate all manner of variations and contradictions, we order... that the customs, usages, and styles of every region of our realm be edited and put into writing...". Vanderlinden, p. 279.

40 It was Louis XI who "désiroit fort que en ce royalme l'on usa d'une coustume, et d'un pois et d'une mesure, et que toutes ces coustumes fussent mises en françoys en ung beau livre." Ph. de Commines, VI, 5, ed. Chantelauze, p. 449, quoted by Declareuil, p. 878, note 376.

41 Following the *Ordonnance de Montil-les-Tours*, the customs of Bourgogne (1459), Touraine (1460) and Anjou (1463) were collected first. Of the regions whose customs were published in an amended and enlarged form a few decades after the first official editing, Artois (1509; 1544), Melun (1506; 1560), Bretagne (1543; 1580), Orléans (1509; 1583), and Paris (1510; 1580) were the first. Declareuil, pp. 877-882; Esmein, pp. 709-721.

42 Nearly one hundred systems of customary law were put into writing in Belgium between 1531 and 1731. They averaged be-

tween 100 and 300 sections each, with some exceptions. Thus, the customary law of Furnes (1615) was edited as a collection of 821 sections, and that of Anvers (the revised edition in 1607 of the original version of 1582), of 3832 sections. Gilissen, pp. 20f.

43 In *Iceland*, after the centuries-old practice of having the complete material of prevailing customary law recited to a national gathering held every third year by the only paid official, the "living voice of the law", the *lagsaga*, it was edited in the *Haflida Skra* (1118). In *Norway*, Magnus Hakonarson (i.e. the *Lagaböter*, "he who improves the law") unified the systems of customary law (1274-1276). In Poland, Casimir III attempted the change to a unified system of customary law. He was only able to half overcome domestic opposition, so he carried out his objective separately for different parts of the country in the *Statutum of Wislica* and the *Statutum of Piotrkow* (1346-1347). Orfield, pp. 89f. Vanderlinden, p. 263; Horváth, p. 227.

44 At the beginning of the 15th century, having had a single precedent in the regional collection of the *Rechtsbuch* (1346), the laws of the Bavarian principalities were unified and enacted in a single step. The products of this were the *Reformacion* (1518) concerning customary laws, the *Gerichtsordnung* (1520), which dealt with the procedures of justice, as well as the *Buech* (1516), summing up the developing material of the administrative regulations. Vanderlinden, pp. 292f.

45 Following the growth in power of the principality of Moscow, a codification took place in *Russia* similar to the one that Byzantium had seen during the 8th and 9th centuries (see ch. III, section 1). Namely, the consolidation of power was accompanied by the *Sudebnik* (1497), which was a uniform revision of the unwritten and written sources of the law. The second *Sudebnik* (1550) legislated on the reforms necessitated by subsequent developments. In this efficiently controlled centralized system, Ivan IV reserved the right to effect alterations of any sort in the *Sudebnik*. Thus the special *ukases* became, of necessity, the means of legal development, and the series of the *ukaznye knigi*, in which they were collected, became veritable code substitutes, not only further developing, but also filling the system of *Sudebnik* with contradictions. This was the chaos out of which first the private collection of the *Code of Czar Fyodor Ivanovich* (1589), then the *Svodnyi Sudebnik* (1606-1607), and finally, the *Sobornoe Ulozhenie* (1649) attempted to make order. Horváth, pp. 247f and 309-403.

46 *Code du roy Henry III* (Paris 1587) p. ij, quoted from Vanderlinden, pp. 324f.

47 Cf., e.g., I. Kovács, 'A törvénykoncepció alakulása' |The Formation of the Concept of Statute| *A Magyar Tudományos*

Akadémia Gazdaság- és Jogtudományok Osztályának közleményei I (1966) 1-2, pp. 77ff.

48 See, e.g., the examples of the *Recueil de Benedictus Levita* (note 20), those mentioned in note 26, the Castilian *Ordenanzas reales de Castilla de Montalvo*, the Hungarian *Tripartitum*, or the *Code of Czar Fyodor Ivanovich* (note 45). The *Ordenanzas reales de Castilla de Montalvo* (1484), though never enacted, was reprinted 28 times in eight decades. Vanderlinden, pp. 290f. The most striking example of social and professional acceptance as a source of law, in spite of not being enacted, is nevertheless provided by the *Tripartitum opus juris consuetudinarii inclyti regni Hungariae* (1514). Although its enactment, in spite of royal approval, was prevented by the nobility fearing its privileges, its publication in 1517, the subsequent reference to several of its sections by royal acts, the feudal anarchy and, later on, the division of the country and its miserable condition (due to the Turkish occupation), still rendered I. Werbőczy's work, the *Tripartitum*, a sovereign code substitute. It became such a Bible of the nation's law, that "with its almost unnatural reputation over several centuries" it heavily contributed to the anachronistic ossification of the feudal pattern in Hungarian legal development. Bónis *Középkori jogunk*, p. 280.

49 See, e.g., Bónis p. 49.

50 Such as the institutionalization of the *clausula perpetuae sanctionis* in the royal legislation of the age; in Hungary, in the first more serious codification attempt, in the text of the *Decretum Majus* (1486) that survived only six years. Bónis *Középkori jogunk*, pp. 77-80.

51 Such as the denomination of the work of the *Decreta seu Statuta vetera* of Savoy (1430) in its prologue as a *compendium unicum*. Vanderlinden, p. 272.

52 According to the desire described in article 125 of the *Ordonnance de Montil-les-Tours*, "et jugeront les juges... selon iceux usages, coustumes et stiles... sans en faire autre preuve que ce qui sera escript audit livre"; and, according to the prologue of the *Privileges et Libertez octroyees à la cité et ville d'Orange* (1607), "et sauf ce que dessus, tous instrumens et titres precedans... demeureront nuls et inualables." Vanderlinden, pp. 279 and 339.

53 Promulgation of the *Siete Partidas* of Castilia already prompted so much resistance that its introductory act (1272) had to change its character from an expressly valid and exclusively authoritative *Libro de leyes* to being a merely doctrinal collection. It was formally revoked in 1284 and was only able to exert a purely doctrinal influence, until the *Ordenamiento de Alcala* (1348) specified it as an ancient source of law, but one of only subsidiary

applicability. Hazeltine, pp. 747f and Vanderlinden, p. 261.

54 F. Kern 'Recht und Verfassung im Mittelalter' *Historische Zeitschrift* CXX (1919), pp. 1ff termed the adherence to customary traditions in the foundation of legal validity the theory of "good, old law" *("gutes altes Recht")*, which was likely to have been general in Europe until the 12th century.

55 Such as the Danish *Jydske Lov* (1241) which expressly declares to be law-making, or the *Etablissements de St. Louis* (1272-1273), in which the King of France addresses his people in his own right, in order to demand obedience to the laws of the country. Jørgensen, p. 67, resp. Bónis, p. 80.

56 Taking a Polish example, cf. K. Grzybowski 'La loi et la coutume en Pologne (Depuis le Xème siècle jusqu'à 1795)' in *Rapports polonais*, p. 49.

IV. CODIFICATION TRENDS IN THE AGE OF ENLIGHTENED ABSOLUTISM

1. EMERGENCE OF THE CONCEPT OF CODIFICATION QUALITATIVELY RESHAPING THE LAW

A decisive change occurred in the history of codification in the 18th century, the period which saw the culmination and, in many cases, the downfall of feudal absolutism.

When we explore the substance of these changes, we must remember that until then every manifestation of codification had been linked to transcending customary law in one way or another. This linkage was mostly two-directional. On the one hand, codification was based on customary law, and on the other, it invariably presented former laws in a condensed and more orderly form. In other words, till then one of the main aims and inevitable by-effects of codifying was the *reduction of the volume of the sources of law*. This was the constant motif, and it was accompanied on occasions by other functions: alterations in substance or changes in the foundations of its validity. To put this quantitative reduction in a generalized manner, codification aimed at integrating the prevailing source(s) of law in one and the same *corpus*.

The emphasis on the quantitative element gave the whole concept of codification a fundamentally *extensive* aspect. Any effort aimed at merely reducing the body of law texts without their rewording could be successful only before law as a means and the social philosophy underlying it underwent a radical change. This transformation was not sudden and radical, but just a gradual, continuous sequence of quantitative changes.

I refer to the development of feudal absolutisms, that is to say, in general terms, to the situation when truly centralized powers evolved over considerable areas, bringing with them the necessity for the ruler to comprehensively regulate the fundamental relations uniformly, with the requirement of exclusivity, and in hitherto unknown details. As far as the politico-economic basis of the process is concerned, the rise of industrial activity, the increasingly general establishment of exchange relations, and the development of a middle class demanded a regulation more advanced than the existing one. Events immediately preceding this, which brought fiscal matters under royal control as state finances, the organization of standing armies, as well as the mercantilist development of industry, presupposed the establishment of an extensive administration with an efficient, uniform operation which, for that matter, also needed the elaboration of a detailed body of regulations. This was the time when the full-range integration of society into one body took place through political centralization: when, in Hegel's characterization, private law changed into public law in the administration of the various areas of one country and the lordly rights of the liegemen were turned into obligations towards the state.[1]

A codification with a merely quantitative reprocessing of the law could no longer cope with this task for two reasons. First, the extension of the spheres to be brought under regulation demanded the creation of new laws. Second, with such a mass of regulatory material, a merely quantitative reduction could simply no longer result in clarity. Reprocessing into a new quality was needed here: one that by embracing a wider sphere of life's situations in greater detail is still suitable for providing a lucid and manageable body of regulations. The new conception of codification intended to forge the law into a *logically inspired system* and, thereby, basic principles, provisions and sub-provisions of varying generality and subordination were to transform masses of competing and unrelated regulations into *one logically ordered, coherent body*.

2. PARTIAL CODIFICATIONS IN FRANCE

French law was first transformed by the compilation of particular customs, the practice of *coutumiers*. As Montesquieu put it, it became written law, more general, and won the seal of royal authority,[2] yet the making of its validity a function of royal enactment only achieved the centralization of a formal aspect as it left the contents as disparate as they were before. A peculiar duality prevailed in legal practice during the centuries which represented a transition between the policentrism of feudal division and its transcendence by the emerging absolutism. The old had not *yet* disappeared, and the new was *already* present, and in this peculiar symbiosis of particularism and uniformization[3] most efforts at enacted uniform laws were ambiguous. The practice of enacting royal *ordonnances* had gradually been established and this had a double effect. It brought the reformation of the law "by piecemeal means" in a quasi-codification form,[4] and even though in the beginning its authority only extended to the royal districts, it was still instrumental in superseding customs by unified law in the domains under its control. A paradoxical situation arose when, with the idea of law-unifying codification taking decisive shape,[5] actual practice still failed to achieve the compilation of the acts of royal legiferation.[6]

The break-through occurred when the centralizing ambition, well-founded economically and politically, coincided with adequate legal expertise. Favourable conditions for legislation combining unification and reform encountered legal expertise and the necessary determination of the ruler under the realm of Louis XIV and Louis XV. Systematic regulations adequately covering whole branches of the law were created, replacing the earlier sources of the law.[7]

Yet even the termination of the practice of the *Grandes ordonnances* did not fundamentally change the ambiguous situation. On the one hand, the Sun King ideology (having suited the power of divine right) of royal power developed to the full and showed the royal legislation as the exclusive source of the law[8] by reason not only of power, but also of intelligence.[9]

On the other hand, the earthly misery of this ideology was demonstrated in practice, since the existing factors of regional division successfully hindered further codification during the life of Louis XV,[10] and then distorted its most developed manifestations into mere phantasmagoria;[11] and the final result could be nothing but a long stagnation, in the still waters of which only some private codifications constituted relative movement.[12]

Eventually, all these works could only be "magnificent preludes to a general codification".[13] Magnificent in their quality, since they introduced the codification of certain branches of the law, aspiring to relative completeness and a systematic character. Their pioneering work, however, came to a halt; they remained so partial that they did not accomplish legal unity, this latter being left to the Revolution. Political, economic and administrative centralization was left unfinished. To a considerable extent, the historical value of partial codifications is due to a negative factor. In having failed to create legal unity, they deepened the crisis of absolutism, and thereby paved the way for law-unification during the Revolution. In the rest of Europe, legal unification was accompanied by the preservation of the feudal arrangement.

3. SUCCESSFUL CODIFICATIONS UNIFYING THE LAW

a) *CODIFICATION OF BUREAUCRATIC PATRONAGE IN PRUSSIA*

The most decisive factors in modern Germany's development were those which resulted in the country's backwardness by hindering her bourgeois development. During the 16th century, the shifting of the trade routes towards the West as well as the failure of the Peasant War had fateful consequences, which were considerably worsened by the catastrophic outcome of the Thirty Years' War in the following century. From the point of view of codification, we have first to remember the Peace of Westphalia that concluded the war. The peace treaty inevitably resulted in circumstances that, by the perpetuation of "perfect

particularism", "the private law determination of all relations", as well as the "organized anarchy",[14] brought about not the unity, but the irrevocable disintegration of the country. Preservation of the framework of the Holy Roman Empire was of no consequence in the tangle of several hundreds of principalities, many of them no bigger or more populous than a small township. The unity of law became utopian. And yet, a realistic opportunity arose for realizing the new foundations of the law, at least in these small but well-centralized monarchic formations.

In the 18th century, Prussia became a strong country having a major role in European power politics. The rise of Prussia as a European power originated from factors which also contributed to its legal development. Only to name but few, these include the organization of *state machinery*, the creation of an extensive *bureaucratic network*, and the subordination of all these as purely executive means to a far-reaching central power.

There had been no traditions of unifying codification in Germany,[15] and the regional law of Prussia could hardly pride itself in having them either.[16] Therefore, when Frederick William I began a centralized state economic policy, the organization of state finances and the army, and when Frederick II added a huge bureaucratic-administrative structure to it, completing thereby the work of his father, both the development desired by royal policy and the making of the bureaucratic superstructure a subservient means of it required uniform regulation.

Even though Hegel was deeply involved in the fate of Prussia, I do not think his characterization of Frederick II as a ruler with whom the new era enters reality, where the actual interest of the state receives its generality and supreme legitimacy, to have been exaggerated. As a matter of fact, Frederick II was indeed the character who embodied the rule which only acknowledged the "general", the "idea", and rejected the "particular" and everything that existed only in its "private law" form whatever tradition and establishment supported it; since he completely subjected the latter to the former.[17] This preference for *Staatsräson* with its merciless logic did not,

however, receive a voluntaristic undertone, as it arose, even in its most minute manifestations, as a dictate of *reason*. The Enlightenment suggested to Hegel that the source of the *ius* can only be the *lex* and that, as science confirms, the guiding role is played by common sense; this is what natural law means when embodied in law.[18] But *natural law* became a specifically "Prussian natural law"[19] in the hands of Frederick. This was evident above all in the concept of natural law as a set of exhaustive premises which resulted in an extreme break-up, that had grown into some gigantic ogre in the endless sequence of syllogisms.[20] It also meant the bureaucratic treatment of the whole state machinery, which degraded even the judge to be one of the bureaucrats, transforming any administration of justice into mere administration.[21] And it was shown in "passion for directing and regulating", "a restless and insatiable longing to dictate, to intermeddle",[22] in other words, the continuous inner pressure of to be ubiquitous and to regulate everything. These features are not only glosses to the characterization of an administrative style. A bureaucratic structure was created in Prussia, which, together with the subsequent codification, completely conformed with these characteristics.[23]

Following the experiment carried out by Frederick II's Grandchancellor, the work was eventually finished posthumously.[24] After lengthy preparations, when human rights were established only a few hundred kilometers to the West, this written system of obligations of paternalistic absolutism was nevertheless announced. But the ruler was scared of promulgating it. He only enacted his code after a delay of two years. In order to deny any common features with the events in France, he deleted from it all those civil rights that he had intended to grant to his people before the threat of the French Revolution.[25]

The system of the *Allgemeines Landrecht für die preussischen Staaten* was just as formidable as its sheer size. In principle, it regarded every aspect of life to be subject to regulation, and proceeded to do so in detail. On the one hand, it consisted of a horribly depressing mass of regulations stuffed with provisions conceived in a *casuistic* spirit,[26] and on the other, it formulated the demand for its direct implementation by the es-

tablishment of an institution which only allowed of the *direct application* of these provisions, reserving their interpretation to the legislator.[27] The legislative narrow-mindedness was also evident in the practical implementation of the law. The "despotism which could only be called boundless and extravagant, and which entered into everything, the smallest as well as the greatest field, and deprived the work of others of all dignity"[28] was thus accomplished in the rule of law, and so became "proof of the Frederickian art of state building, that is of the special Prussian art of late European enlightened absolutism".[29]

The *Allgemeines Landrecht* was the first in the line of far-reaching attempts not only at overall planning for codifying a social order, but also at projecting and enforcing in practice a minutiously elaborated system of provisions set for a state-organized society and its all-encompassing bureaucratic machinery.[30] And we have also to consider that all this was a contemporary of the French *Code civil* only chronologically, albeit in fact it was hardly more than a "legal code of an enlightened patriarchal despotism which... with its moral glosses, its juristic vagueness and inconsistency... belongs entirely to the pre-revolutionary epoch".[31]

The historic event associated with the publication of the *Allgemeines Landrecht* therefore only relates to a *formal* development. Namely, it was among the first to make a grandiose attempt to implement a new *quality* treatment of the law in codification. It meant an unheard-of break-through in codification techniques: the setting forth of a mass of normative provisions organized into a *consistent whole* while aiming at regulatory *comprehensiveness and completeness*, attempting to achieve all this by their *logically treated systematic organization*, *by defining their mutual logical relationships through their extremely consequent, classifying conceptualization*. Yet this grand-scale pioneering effort could only produce value in a rather ambiguous way. That is, the very area in which it broke new ground became its own caricature, by taking its inner potentialities *ad absurdum*. It turned the systematic character of the code into a burden for the code.

When we enquire into the reasons for this, we have to come to the conclusion that the code formulated the longing for comprehensiveness at the level of mere *quantitative* completeness, and that the longing for comprehensiveness clashed with the *casuistic* concept of bureaucratic pettiness and had a catastrophic result. The code necessarily became a hypertrophic monument in the attempt to meet this dual requirement. Even what might achieve intensive comprehensiveness in it eventually deviated towards an *extensive* achievement. Consequently, its systematic character could not play the role it otherwise deserved. Every aspect of it was in fact ambiguous and of a contradictory effect. While it was able to organize the mass of regulations into a coherent and well-ordered body, it failed to introduce a quality change in the treatment of the law. Incorporation of the *casi* in more general rules, relating rules to principles and making efforts to build up therefrom a quasi-axiomatic system just did not take place. The gigantic presence of an apparent system did not ease the pressure of the regulation Moloch it stood for. It became a part of the Frederickian "special art".

The youthful dream of *tout serait prévu*[32] thus came true. The code was still rather clumsy, confused, and unsuitable for purposefully rigid application. It proved to be an ambiguity disguising a fundamental *cul-de-sac*,[33] which lay at the root of the "special Prussian art", the requirement of patriarchal over-regulation. The patronizing bureaucracy, its casuistry, the prohibition of interpretation in law application originated from the artificial preservation of all what was obsolete.[34] This is why the credo of the nascent bourgeois era brought a new style and by patronizing absolutism denied absolutism itself: "On gouverne mal, quand on gouverne trop," as Portalis, the French codifier once said.[35]

b) *SYSTEMATIC CODIFICATION IN AUSTRIA*

The War of Succession started by Frederick II against Maria Theresa was conditioned by, and resulted in, codification development in both countries. As to Prussia, the superior con-

duct of war in essence demonstrated the success of Frederick's bureaucratic state organization. On the Austrian side, the course of the war attested to the bankruptcy of the inner organization of the Empire, which had swollen as a result of conquest and inheritance, but hardly deserved the status of a state. It had no united government, not even a general name. The privileges of the various provinces and countries were generally preserved, and so was the whole administrative-legal division: the Empire was characterized even by tariff barriers between the various provinces. The cohesion of the provinces was so weak and state finances so unsettled that they inevitably led to a spectacular failure under the shock of a war. Having suffered defeat in the fight for European power, Austria was forced to introduce a *uniform administration* by way of a series of institutional reforms and a *uniform system of regulations*.

The end-result of the administrative reforms, as part of the uniform and efficient organization of the Empire, was the creation of a uniform law for the Empire by way of codification. Strangely enough, one of the main features of this was that its birth took more than half a century, and this protraction characterized criminal[36] as well as civil law[37] codification.

Now, as far as the *Allgemeines Bürgerliches Gesetzbuch* is concerned, it is a fact that by virtue of the natural law stimulus it provided,[38] by making a new law on the basis of regional and common traditions,[39] it attempted to mould the law into a system of a new quality with a claim to comprehensiveness. Before the *Allgemeines Landrecht* was completed in Prussia, the basic principles of the *Allgemeines Bürgerliches Gesetzbuch*, which avoided the pitfalls that sealed the fate of the *Landrecht* in Prussia, were outlined in Austria.[40] As a result, they created complete systems of norms in certain branches of the law,[41] based on principles logically related and coherently broken down to an all-comprehensive system, that became one of the first successful ventures of the new type of codification. But it is also a fact that, as to its contents and underlying conception, the code was basically feudalistic. The circumstance that it was largely divested of contents by

which Joseph II looked for the rational strengthening of the unity of the absolutist Empire demonstrates its roots in the past.

The situation is contradictory: the code, although pioneering in formation and unique in the new technique, only began to live up to the requirements of bourgeois society after 1848, and even then only under the pressure of economic and commercial needs, with the help of "creative law-application". In short, it could not exert any great influence in the shadow of the French *Code civil*. By the time it came to be realized, the *Code civil*, making use of similar solutions but turning them into supports of a new bourgeois order, had already been enacted for years, and had also begun its triumphal march as the herald of the bourgeois establishment in and beyond Europe.

Surely, it was not the difference in creative contribution that mattered (and we could say in this sense that Zeiller was of no smaller stature than Portalis);[42] the decisive difference was in the underlying social conditions. The need for codification arose in Austria as part of the effort to create unity within the Empire. In contrast, the main task of codification was the legislative setting of the new order achieved through the Revolution in France, where no matter how much the national unification of law was needed and expected for a long time, it could only play an additional role. The *Allgemeines Bürgerliches Gesetzbuch* was primarily a *legal* affair: it had brought changes within the *status quo* of a particular society and in the legal techniques of organizing an empire; this had also limited its possibilities.

4. CONSOLIDATION OF LAW AS A SUBSTITUTE FOR CODIFICATION IN RUSSIA

Russia's power grew steadily during the 16th and 17th centuries. The reforms of Peter the Great were the decisive steps in the secularization of the state, the development of its administration, the organization of a standing army, and, in general, an opening of the country towards Europe. The despotic

absolutism under Peter the Great gradually declined into reaction under Catherine II. Nevertheless, Russia had become an influence in European politics; owing to territorial conquests, the country had a greatly enlarged Empire by the early 19th century.

In these years, Russia suffered from intense political, social and economic contradictions. On the one hand, it had a feudal structure, in which the institution of serfdom was preserved with the same ruthless and unlimited absolutism of the ruler, that knew only the arbitrary actions of the czar (or his assassination, as the exclusive alternative possibility of a political change). On the other hand, Russia had an economic structure adhering completely to the feudal structure, yet seeking opportunities for further development in capitalism. A vast bureaucratic organization supported czarist rule, just as economic progress also required an adequately organized system of regulations. The czarist Empire could not, however, supply this. For almost 200 years,[43] laws and decrees had not been collected. As a result laws were in a chaotic disorder and also so unfamiliar to everyone that their very existence was doubtful.[44]

Thus, an immense contradiction developed between economic needs and the political framework, which soon endangered Russia's status as a great power. It was the consideration of all this that laid the foundations for the reform struggles at the beginning of the 19th century. The moving spirit and symbolic head, as it were, was a subject elevated by the czar, M.M. Speransky. Speransky "believed he could reach his goal with a single, well-prepared code",[45] but his attempt to transform the despotic absolutism into a constitutional monarchy and to codify its law failed because of the nobility's vested interests in the maintenance of feudal conditions.[46] I should add that Speransky could by no means reach his goal merely by codification, since most of the institutions were lacking; and the legal profession as much as its working conditions were still only in the stage of formation.

The result could only be minimal under such circumstances. There was nothing but the organization of a *codification de-*

partment as a section in the czar's cabinet office, the *chronological compilation* of nearly two centuries' legislation, and a *thematic catalogue* of statutes in force.[47] Paradoxically, this minimum result satisfied the actual demand for codification, because the monarchy had liquidated regional division centuries earlier, so *no demand for law-unification* could arise in the guise of a requirement of codification. At the same time, conditions for a bourgeois transformation did not yet exist. So code-substitutes proved to be enough to stabilize, systematize and make available central regulations. They also expressed the compromise of Russian development: by a minimum rationalization of chinovnik-administration, they *reinforced* feudal conditions. In the end, Speransky was ironically only able to codify a basic law which led to the *Svod zakonov*, sanctioning the unlimited autocratic power of the czar.

5. CONCLUSION

The 18th century saw vast changes in Europe. With feudal absolutisms becoming enlightened absolutisms, the framework of the nation-state was given more substance. The establishment of absolutist empires had, of necessity, been accompanied by systematic building-up of the economic and institutional bases of power, by the organization of royal finances as state finances, and by the establishment of standing armies. This process had both assumed and aided economic growth; this was shown in the sudden advance of industrial production and trade. In order to cope with the problems that had emerged, the exercise of absolutist power required the operation of a *modern bureaucracy*.

Central policy with state finances and standing armies, the interventionist state protection of trade and industry, as well as the bureaucracy established to organize all this, required partly *uniform laws*, partly the extension of the sphere of legal regulation, and partly a rational control based on laws and regulations. The coincidence of the *quantitative growth* of regulatory material and the requirement for its ensuing *rationalization* necessarily led to the advance of the classical

type of codification: to the forging of law into a logically organized system.

The *ancien régime* in *France* inherited such an extreme state of division that it had to concentrate all its administrative efforts at overcoming it in the field of law. It therefore prevented the central power from achieving more than partial systematizing codifications. *Prussia*, with its smaller but already unified area, set itself the aim, within the framework of a militarist despotism, of turning the country into a recognized power by securing its hegemony in Central Europe. The reforms of Frederick were conceived in this light and transformed provincial patriarchalism into a bureaucratic despotism which required in turn the transformation of its laws into bureaucratic laws, aiming at casuistic comprehensiveness. Prussia's rival, *Austria*, this very divided and unsettled empire, under-developed both in its administration and in its laws, came to realize the importance of truly imperial policies as a result of its defeat. The Austrian codification of some given branches of the law was aimed principally at the unity of law, but also attained a high degree of system-creation owing to traditions in enlightened natural law. Finally, in *Russia*, where the unity of law had been secured for centuries by the stubborn exercise of despotic power, but where the law had been in a state of chaotic disorder as a result of the Asiatic character of her development, the process of Europeanization required, both politically and economically, a general consolidation of the law. The systematic collection of laws, which achieved only a minimum of codification, still expressed the needs of the age and came into being fundamentally as a compromise with the past.

These variations represented the most influential manifestations of codification during the age of enlightened absolutism,[48] yet they were not those which occurred most frequently. There were numerous states at that time in Europe with small territories and populations. These *mini-absolutisms* lived independent lives, and carried out the unification of their laws and their rationalizing codifications separately. Owing to their modest size and their patriarchal regimes which were in

inverse proportion, neither the unification nor the reform of their laws took great energy, so they could save energy to issue new-quality codes.

By virtue of their variety and the positive or negative example they set, these codifications also served as forerunners of the classical type of codification. In spite of their lack of originality, they elaborated technical solutions which seemed to reappear ready-made in the classical type of bourgeois codification. Yet it was still impossible for them to exert an influence to be felt all over Europe, mostly because of their diversity. Their marked feature is their transitoriness, linking them to the past with a technical-structural future anticipated.

NOTES

1 Hegel, part IV, section III, 2a.

2 Montesquieu, part VI, book 28, ch. 45.

3 The economic, administrative and legal heterogeneity of the various parts of the country existed right up to the second half of the 17th century, even though the power of the king as the sole sovereign was accepted. The country was divided by tariff barriers, regional laws were operative in most areas of life, and the local high courts, called *parlements*, as well as autonomous governments of cities, equally saw it as their responsibility to preserve division. It was not by chance, therefore, that official state documents often used the term *pays* to refer to the various regions, even though nobody doubted the indivisible authority of royal supremacy.

4 The *ordonnances* on the laws of criminal procedure (1498; 1539), and the *Grande Ordonnance* with nearly 500 sections (1629) are thus described by Esmein, pp. 738-740.

5 E.g., in the 16th century, Du Moulin recommended the uniform editing of the customs, and in the 17th, Guillaume de Lamoignon, the first president of the Paris parliament submitted a plan for the acceptance of a *Projet de Code civil* (1702). Esmein, p. 721.

6 Following demands by the feudal assembly (1560; 1576), the *Ordonnance de Blois* (1579) gave the first promise of action. However, the *Code Henry III* (1587) issuing from it remained only a private compilation. No official compilation fol-

lowed. The lack of these were temporarily made good by various private collections. Declareuil, pp. 819-821.

7 In the wake of the *Mémoire sur la Réformation de la Justice* submitted by Colbert to Louis XIV in 1665, *ordonnances* on the reform of civil jurisdiction (1667), on waters and forests (1669), on criminal procedure (1670), on commerce (1673), on marine trade (1681), and on proceedings in American colonial policy (*Code noir*, 1685) were issued one after the other. This process continued under Louis XV under the direction of d'Aguesseau, when codification *ordonnances* were brought in on gifts (1731), on testamentary disposition (1735), as well as on the substitution of entailed properties (1747). Esmein, pp. 741-747.

8 "Not to follow the example of the order of 1629, which confirms every preceding one, if they were not revoked by some other contrary order, or not invalidated by some contrary custom, but conversely, to create the whole and perfect body of each order by revoking all the preceding ones. When it is published, to prohibit the citation of any law or order other than the new one; to prohibit the making of any note, commentary or collection of decisions, even holding out the prospect of punishment" — wrote Pussort in his 'Mémoire...' |1655|. In Colbert, J.-B. *Lettres, instructions et mémoires* VI (Paris 1861-1882) pp. 21f, quoted from Vanderlinden, p. 360.

9 The formula of *ordonnance perpétuelle... pour tenir à toujours*, used customarily by Louis XV, no longer acted as a rhetorical counterweight to the impotence of power. Instead of being a clause of perpetual validity, it was rooted in that "philosophical" concept of "righteous" measures, which, trusting in reason, believed itself universal and permanent, the same way as this eventually found full expression in the natural law character of the normative setting down of the achievements of the Revolution. Van Kaan, pp. 370f.

10 In the wake of the great success of the *ordonnance de commerce*, d'Aguesseau had in mind a uniform and comprehensive codification of private law (Declareuil, p. 822), but the provincial *parlements* frustrated all further work (Tunc, p. 21).

11 After the death of d'Aguesseau, Lavardy and Langlois were content with a compromise solution: they recommended the issuing of *une loi générale et des exceptions*, i.e. codification of the concordant provisions of the collected material of the law of the realm as general laws, and leaving the plainly contradicting ones as regional exceptions. But these recommendations were not even published. J. Van Kaan 'Une seconde tentative de codification sous Louis XV' *TRG* V (1923) 1, pp. 77-79.

12 Code-substituting roles were played by, e.g., the *Code militaire* (by Chevalier de Sparre, Paris 1708), the *Code de la*

Librairie et Imprimerie de Paris (by Saugrain, Paris 1744), the *Code des Terriers ou Principes sur les matieres féodales* (Paris 1761), the *Code de la Police* (by Duchesne, Paris 1757), the *Code matrimonial* (I-II, by Camus, Paris 1770), etc. I should add that "code" was a proper name to call them, as it had been used for a long time to define any collection of laws, whether the collection itself formed a source of law or not. This is why we can see that "the term code is given only to those collections of statutes which were collected either on the public authority of the legislator, or by the private enthusiasm of some jurisprudents" (J.N. Guyot *Répertoire universel et raisonné de jurisprudence* II |Paris 1784-1785| p. 611). This explains too why such private codes were also created even during the Revolution for the purpose of informing legal practitioners of changes in the law, e.g. the *Code de successions* (by Vermeil, Paris An III) or the *Code criminel de la République française* (by Saguier, Paris An VII). Cf. Vanderlinden, quotation at p. 424.

3 Malapert, p. 9.

4 Hegel, part IV, section III, 1c.

5 Although the Holy Roman Empire issued the *Constitutio Criminalis Carolina* (1532) as its last act, its territorial validity depended on the will of the various princes, therefore it could not play a role of any consequence in law-unification.

6 The *Landrecht des Herzogthums Preussen* (1618) and its two revisions (1684; 1721) were a reformed compilation of existing laws, but they soon became obsolete.

17 Hegel, part IV, section III, 2c.

18 Friedrich, pp. 12f.

19 Dilthey *Ges. Schriften* XII (Leipzig, Berlin 1936) pp. 131ff, quoted by Wieacker, p. 331.

20 After Leibniz, this trend was most consequentially represented by Christian Wolff, who became philosophical consultant to Frederick the Great. Cf. A. Brimo *Les grands courants de la philosophie du droit et de l'État* 2nd ed. (Paris: Pedone 1968) p. 92.

21 H. Thieme 'Die preussische Kodifikation (Privatrechtsgeschichtliche Studien II)' *ZSS* LVII (1937), p. 398.

22 T.B. Macaulay 'Frederick the Great' |1842| in his *Essays* |popular ed.| (London: Longmans 1895) pp. 808 and 805.

23 The administrative reform of Frederick II is, as a matter of course, considered a codification component by Tarello, pp. 216ff.

24 The earlier revision of the *Landrecht* (cf. note 16) and, later, the idea to carry out judicial reform on the inspiration taken from the *Danske Lov* (1683), an attempt that had met a failure in Denmark too, were similar. Jørgensen, p. 69, note 9. The procedural (*Project eines Codicis Fridericiani Pomeranici*, 1747) and substantive (*Project des Corporis Juris Fridericiani*, 1749) private law drafts of Cocceji were condemned to failure partly because of their Roman law orientation and partly by the full involvement of the country in the Seven Years' War. Wieacker, p. 328. For Frederick II declared in his decree of May 9, 1746, that codification was to be carried out "mainly by the eradication of Roman law, relying merely on natural reason and on the traditions of the area, by developing a German territorial law on a Prussian basis". *Jahrbücher für die preussische Gesetzgebung, Rechtswissenschaft und Rechtsverwaltung* LIX (1862), pp. 75f, quoted by Tarello, pp. 224f, note 20.

25 It was proclaimed on March 30, 1791, but came into force (contrary to the original intention) on June 1, 1794, and not 1792.

26 A mass of regulations stuffed into some 19,000 sections and 2,500 pages in four volumes were designed to settle the legal relations in Prussia. They included orders that "whatever was said about paling fences, is valid in respect of lattice fences as well" (I, 8: Section 158); and a total of 115 sections were dedicated to infanticide in appropriate depth.

27 Under a royal cabinet order (1780), operative until 1798, a *Gesetzkommission*, established for the purpose, had the authority to deal with any problems arising from the code; any interpretation of the code by judges, commentaries, or "learned hair-splitting" (*"gelehrte Spitzfindigkeiten"*) was definitely forbidden.

28 Th. Mann 'Frederick the Great and the Grand Coalition: An Abstract for the Day and the Hour' |Friedrich und die große Koalition. Ein Abriß für den Tag und die Stunde, 1914| trans. H.T. Lowe-Porter in his *Three Essays* (London: Secker 1932) pp. 156-157.

29 Wieacker, p. 331.

30 Wieacker sees this as the prime feature, p. 333.

31 Engels, p. 139.

32 "Everything would be foreseen", as Frederick said in his 'Dissertation sur les raisons d'établir ou d'abroger les lois' in *Oeuvres de Frédéric le Grand* IX (Berlin: Decker 1846-57), pp. 11f, quoted by Tarello, p. 226.

33 "The Prussian code became a cross between what a law should be and what might be called a handbook", states J.D. Meijer *De la codification en général, et de celle de l'Angleterre particulier* en une série de lettres addressées à Mr. C.P. Cooper, avocat anglais (Amsterdam: Diederichs 1830) pp. 148f.

34 Cf., e.g., Eörsi, pp. 161ff.

35 Portalis in his famous *Discours préliminaires* introducing the *Code civil*, quoted by Fenet, I, p. 514.

36 The first finished product of the reform was the rather cruel *Constitutio Criminalis Theresiana* (1768), which provided for its analogical application as well. This was changed by the General Law of Crimes and Punishments (1787) under Joseph II, after he had abolished both the death penalty and the analogy, meting out equal justice to nobles in the true spirit of the enlightenment, and also by an appropriate Code of Procedure (1788). They were followed eventually by a Criminal Code (1803).

37 The *Codex Theresianus* (1766) came to life as the revision of a draft completed earlier (1755). Kaunitz prevented its enactment, partly because of its sheer volume (it was divided into eight big volumes). Only the part covering family law was enacted under Joseph II (*Josephinisches Gesetzbuch*, 1786). Martini carried out its complete revision (1796) under Francis I. This was the work which gained eventual assent (1811), and was completely reworded by Zeiller, as the *Allgemeines Bürgerliches Gesetzbuch*.

38 Of the *Codex Theresianus*, the Queen wrote on August 4, 1772, that "one must not be bound to the Roman law in the acts themselves, but natural equity |*"natürliche Billigkeit"*| must be the basis of everything". Harrasowsky, p. 12. Cf. also K. Ebert 'Gesetzgebung und Rechtswissenschaft: Ein Beitrag zur Zeit des späten Naturrechts in Österreich' *ZSS* LXXXV (1968) p. 110.

39 Azzoni emphasized in the *Kompilations-Kommission* that his aim is between the preservation of something already existing and the creation of something "rational" and new, to build a special middle way. Quoted by Korkisch, p. 269.

40 According to the Basic propositions drafted by Horten and Binder in 1771, a code cannot be like a textbook. It has to strive for brevity in principles, and for the avoidance of any ambiguity and obscurity. Harrasowsky, referred to by Korkisch, pp. 276f.

41 Literature attributes the creation of "comprehensiveness in a higher sense", and "the exploration of principles instead of endless variations", of the mass of provisions to the redrafting by Zeiller, and, therein, to the acceptance of

the Kantian concept of system. See E. Swoboda *Das Allgemeine Bürgerliche Gesetzbuch im Lichte der Lehren Kants* (Graz: Mosers 1926) pp. 145ff, especially at 149.

42 Krystufek, p. 73.

43 Even in the period between the publishing of the *Sobornoe Ulozhenie* (1649) and the accession of Peter the Great (1689), some 1500 supreme acts were issued with partial contradiction of the provisions of the code. Peter appointed codification commissions three times. Owing to her flirtation with the intellects of enlightened Europe, Catherine II also set up a codification commission, and charged it with extremely detailed terms (*Nakaz*, 1767). These concepts, unfortunately, ran contrary to the interests of the nobility. The result of the confrontation was that the ruler retreated, and no codification came to life.

44 Only a few of the czar's acts saw daylight in print. There was no systematic form for publishing them, indeed, not even institution that would have taken care of them. The majority of them existed in the form of ordinances addressed directly to courts or to a variety of offices, therefore they had to be dug up from numerous archives in order to make them available for statutes-compiling-researches. M.M. Speranski *Précis des notions historiques sur la formation du corps des lois russes* (Saint-Petersbourg 1833); H.J. Berman *Justice in Russia* (Cambridge: Harvard University Press 1950) pp. 140ff.

45 I. Dolmányos *A Szovjetunió története* |The History of the Soviet Union| (Budapest: Kossuth 1971) p. 48.

46 Speransky submitted his recommendations for drafts of civil, criminal and commercial codes in 1804, but the nobility saw the reflection of the French Revolution in the very idea of codification; thus their fate was undiluted failure. *Istoriia gossudarstva i prava SSSR* |The History of the State and Law in the USSR| I, ed. G.S. Kalinina and A.J. Gontsharova (Moscow: Iuridicheskaia Literatura 1972) p. 317.

47 "The Second Department of the Personal Office of His Imperial Majesty" was established in 1826. The *Polnoe sobranie zakonov* (1830, 45 volumes) compiled 31,000 statutes collected from 1649 to 1825, and the lucidly arranged collection of statutes in force, the *Svod zakonov Rossiiskii imperii* (1832, 15 volumes) was also formed on that basis. See N.P. Eroshkin, Ju.V. Kulikov and A.V. Tshenov *Istoriia gossudarstvennykh tshreshdenii Rossii do Velikoi Oktiabr'skoi Sotsialistitsheskoi Revolutsii* |The History of the State Institutions in Russia up to the Great Socialist October Revolution| (Moscow: no publisher 1965) p. 146.

48 I have neglected here Scandinavian codifications which, after the establishment of hereditary absolute monarchies, unified the respective laws on the basis of the general codes inherited from the Middle Ages, and preserved also Teutonic traditions. Owing to this, the *Danske Lov* (1683) soon fell into disuse, though it still became the basis of the *Norske Lov* (1687) and, then, one of the inspirations of the *Sveriges Rikes Lag* (1736). Jørgensen, pp. 68-71.

49 Law-unifying role was played, as subsidiary sources by, e.g., the Bavarian codes of some branches of the law: the *Codex iuris Bavarici criminalis* (1751), the *Codex iuris Bavarici iuridicarii* (1753), and the *Codex Maximilaneus Bavaricus civilis* (1756). The *Corpus Carolum* of Savoy (1770) was famous for its logically related coherent organization, and the *Leggi e constituzioni di Sua Maesta* of Piedmont-Sardinia (1770) for the prohibition of interpretation. See Vanderlinden, pp. 399 and 417; Tarello, pp. 193ff, 246ff.

V. CLASSICAL TYPE OF CODIFICATION: CONTINENTAL CODES IN THE SERVICE OF BOURGEOIS TRANSFORMATION

1. INADEQUACY OF CODIFICATION UNDER ENLIGHTENED ABSOLUTISM

Extraordinary attention followed the attempts at codification by the enlightened monarchs in Western Europe, particularly in France: reaction to them was quick to come. Catherine the Great's codification instructions, the *Corpus Juris Fridericianum*, as well as the *Allgemeines Landrecht* were soon published in French too.[1] The *Corpus Juris Fridericianum* had a particularly explosive effect, since it was among the first in Europe to attempt to unify sources of law, so long awaited in France. This was in the middle of the 18th century. Diderot did not miss the opportunity to sing its praises, dedicating a separate entry to it in his *Encyclopédie*.[2]

It is necessary, however, to point out something which demonstrates not only the dialectic intertwinement of ends and means, but also its historically conditioned dimension. The requirement of the *unity of law* arises here exclusively as the *technical* aspect of exercising the power of absolutist regimes that characterizes modern times: it is intent on developing the rationalized functioning of the bureaucratic machinery. In contrast, unity of law becomes a *revolutionary* vehicle in the anti-feudalistic ideology of the Enlightenment, since it forms one of the conditions of equality before the law, a condition aimed at the liquidation of territorial division.[3] The first case, therefore, involves merely the rationalization of the bureaucratic management and control of the subjects, while the second

is concerned with something different in principle: the establishment of "equal treatment of beings who are essentially alike",[4] ultimately with the natural law inspired premise of promoting human rights and also guaranteed as such by the Declaration of the Rights of Man and of the Citizen.[5]

This explains why the *Allgemeines Landrecht* played hardly any role in the countries that took the path of bourgeois development. Its publication found France in a fever of codification, yet it had no effect; indeed, it prompted French codifiers to common demarcation.[6] Although it had antecedents in conservative law unification, its new quality could still only lead to a *cul-de-sac*. The degree to which it embraced natural law was soon overtaken by French legislation, which was most consequential in the realization of the tenets of the Enlightenment. And its most conspicuous feature, i.e. its technical novelty, was peripheral and it was due to the specific factors forming bureaucratism in Prussian despotism and to the intellectual stamp of Frederick II. In consequence, it prompted the French to consider only its technical aspects and, grasping this fatal weakness, to reject it with a barely concealed contempt.

National unification of law, which was the prime achievement of these codes, was a scarce commodity in the era of bourgeois revolutions: it was merely the completion of a task left unfinished by preceding régimes. What was the imperative of *natural law* in these codes showed up in revolutionary practice as being antiquated, or even as the freak growth of the inner contradictions of enlightened despotism. The allusions to natural law by enlightened despotisms were inside out anyhow, because instead of declaring human rights, they only materialized in the minute codification of a bureaucratic Moloch permeating everything, interfering with all life relations and, by reducing any *ius* to codified *lex*, binding the law hand and foot.

And this was again something that could no longer be viable outside feudal despotism. Bourgeois transformation from the outset aimed at shaking off feudal shackles, guaranteeing dynamic social development and, to this end, a more lively legal

structure. A codification technique was necessary to assist social transformation more flexibly.

The codes of enlightened absolutisms could therefore be watersheds, but only from a past perspective: they *closed*, rather than opened an in any way poorly beaten track. Bourgeois development needed to *overcome* this anachronism: it needed a completely new type of codification.

2. THE FRENCH REVOLUTION AND THE EVOLUTION OF THE CLASSICAL TYPE OF CODIFICATION

a) *PRE-REVOLUTIONARY ROOTS*

Conditions were ripe for codification in the early stages of the bourgeois revolution. The labour of experimenting and preparing over several centuries helped to give birth to the new type of codification.

Parallel with putting customary laws in writing in the 16th century, the possibility of standardizing customs had already arisen in France. The feudal diets already expressly urged codification. Inspired by some early *ordonnances*, the *Grandes ordonnances*, which probe the possibilities of systematically covering comprehensive areas of law, were published one after the other in the 17th and 18th centuries, following the work of Colbert and d'Aguesseau. These *partial codifications* provided valuable experience, while they made the will for codification natural. They demonstrated that codification was the *only* way to construct a new legal system, the only negotiable road after the completion of national law-unification during the maturing of feudal despotism and in the political evolution preparing a political revolution.

Yet, all this formed but a motif in the ideological and practical preparation. Because "the legislator of the *ancien régime* played a comparatively modest role..., the whole body of the law was then in the hands of the doctrine".[7] The basic works of the doctrinal analysis of the law in the 16th century were followed by their systematic restatement in the 17th and

18th centuries: a kind of *doctrinal* polishing, which led to the development of *jurists' law*, imposing in sophistication and based on the adapted Roman law.[8] By the last third of the 18th century, "France was ready to harvest a general codification".[9]

The ideological driving force of the codification movement in late feudalism, which foreshadowed the development of bourgeois mentality, was the *axiomatic conception of natural law rationalism*, which established schools in France and in Germany as early as the century of Cartesianism.[10] Its general tenet was that human reason was a panacea that cured all social disorders. A return to the natural state is one such magic device in the field of socio-political relations. And this is where the axiomatic idea comes in. Deduction from the premises of a natural state makes it possible to build up logically a system enlisting the *rights of man* and his legal statuses in the entirety of their complexity. Handling the principles of natural law following the pattern of mathematics and treating them as an *a priori* category gave rise also to the idea of a doctrinal codification. It was backed by the philosophy of Enlightenment regarding the assertion of rights not as a creation, but as a *restoration* opposed to the perversions of the present, as the reconstruction of something once existed. This restitutional approach characterized the views of Grotius, Montesquieu and Voltaire equally.[11]

Jansenism, for instance, with its sceptical and antirationalist undertones, became the principal factor of tradition and took its place, consequently, among the conservative counter-ideologies.[12] By denying the very existence of natural law, *Pascal* made the concept of justice itself relative and thus elevated the fact that customs were historically given and statutes voluntarily enacted into the role of measure as a powerful herald of legal positivism.[13] And since the given nature of customs looks back to a past lived through, and the enacted nature of statutes looks forward to a willed future, champions of conservatism as well as of reform could turn to Pascal for inspiration.

Quoting another example, I could mention *Montesquieu*. So broad is his range that his work, with all its ambiguity, could

become the source of trends contradicting one another for centuries to come. His oeuvre was totally the product of the Enlightenment and, as such, his endorsement of the French kings' efforts at consolidating customary law influenced the legislation in the direction of codification.[14] Yet, as a matter of fact, Montesquieu was against codification.[15] His view was formed by rationalism, but his stopping short was caused by his political scepticism. Unifying codification may become a danger under despotism, while divergencies, surviving without codification, could still be balanced by their common origin in natural law.

The deductive approach to social conceptualization, the exclusive belief in the primacy of axiomatic inference, the idea of a *mathesis universalis* were basically rooted in the sciences becoming a force of production. Yet, it became combative Enlightenment only *in France*. It is *philosophers* that had a leading role in the ideological preparation of codification in France. It was they who pushed ahead the idea of codification as a means of reforming society, concentrating on the complete outdistancing of the feudal order. Contrasting with this, the standard-bearers of the natural law movement were *lawyers in Germany*, who soon drowned the possibilities of revolutionary ideology, inherent to the foundations of natural law, in doctrinal questions. This is the reason why the codification achievements of the German natural law movement manifest themselves mainly in more or less autotelic legislative technicism, in a wanton chase of exhaustive comprehensiveness.

Voltaire's role is the most outstanding in the radicalization of the ideology of codification. He was the philosopher who most effectively moulded public opinion towards accepting codification. He ridiculed feudal division,[16] pillorying the anachronistic character of dismemberment, and advocated the need to unify legislation.[17] Though the combative will for legal unity ran contrary to the practice in the France of his day, floundering as it was in impotence, yet expressing a desire conceived in the spirit of the representatives of feudal despotism. And the personal influence of Voltaire, combatant, touchy and conceited all at once, his relations with Frederick

the Great and Catherine II, his many-faceted aspirations would make us believe that his often disguised constructive ideas, veiled in sarcasm, mainly enriched the absolute monarchs. However, this is not the case. His verbal struggle against the despotism of feudalism was also aimed at the feudal system itself; his sarcasm hit his princely patrons, too. But what is most important: his social criticism linked the codification concept increasingly exclusively with the concept of a new social and legal beginning. Though he did not mention revolution, he talked of making a clean sweep of everything established, and of creating something in their stead, that would no longer carry the burden of the past.[18]

Voltaire's activity resulted in a codification propaganda, which was law-reformist to the roots. But this propaganda (since the question, *against what*, had a more prominent role in it than the question of *why, in the interest of what*) had to be given substance in *Rousseau*'s works. It was Rousseau who anointed the legislator the demiurge of social order. In his concept, the legislator was the great creator who could transform people's innermost nature, i.e. change them from natural beings into ethical ones, and create society by this act.[19]

Summing up the above, it was, in the first place, three centuries' *partial codification* towards the end of the *ancien régime* that made the willing of codification natural, and also ensured a certain routine in its techniques. In the second place, it was three centuries' *doctrinal work* that not only forged a significant part of the laws of France into a systematic body, but also matured its terminology, conceptual coherence and institutional framework. And in the third place, there was the combatant *philosophy of the Enlightenment* to open up the road towards a codification pointing beyond feudal order.

I should, however, tone down this conclusion straightaway. The roots in question certainly determined the genus of the would-be outcome, but did not specify its species and its characteristics within the species. Let me just recall that Voltaire and Rousseau, who were without doubt the most outstanding procreators of the revolutionary ideas (also by virtue of the considerable publicity, fairly large number of copies, out-

standing distribution and inexpensive availability of their published papers),[20] only had a rather obscure idea of future codification of law and of its ways of realization. They took it for granted only that society, having liquidated the irrationalism of feudalism, would renew and unify its laws by using codification techniques; that a new legal system would be worked out systematically; and tha
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b) *FORMATION OF THE* CODE CIVIL

Even though our conclusion regarding the pre-revolutionary roots of French codification appears to be well-founded, it must be taken with certain reservations. While the logic of events almost proved the inevitability of such a chain of determination, it took place outside the consciousness of participators, almost against their will. In other words, the birth of the classical type of codification was not a play in which everybody knew their role: how to achieve perfection by mutual assistance. The code characteristic of the bourgeois era was born in *revolution*, in a struggle of the classes: in an *incessant confrontation* of revolutionary inspirations, emerging ideas and ideologies, and the opportunities of reality.

Immediately preceding the revolution, the Estates of the Realm merely expected a code capable of ensuring the level of "democratism" with everybody being able to know their obligations.[21] Nothing more was decided during the years 1790-91 either, only the preparation of a code to serve the common *knowledge* and *unity* of the law.[22] New ideas only saw the light of day by the debates of the Legislative Assembly and of the Convention.

The common feature of all these ideas was that they advocated the cult of laicization, clarity, "the most perfect simplicity",[23] and that they paved the way for the "realizaton of

the philosophers' dream".[24] This arose, as a first attempt, in the draft of *Cambacérès* |early August, 1793|, which wanted to transform all parts of society at once.[25] It was not the radicalism of "everything has to be started anew" that became finally unacceptable in the draft, but its "practical" flavour and "overdone" empirism – a paradox feature so characteristic of the heat of revolutionary optimism. Cambacérès even had to suffer the appointment of a committee of philosophers being recommended to ensure that the code "soar" higher.[26] Cambacérès' second draft, bearing the flame of the natural law concept, followed thirteen months later. It was brief, unambiguous, and ardent; it consisted of "the Code of Nature, sanctioned by reason, and guaranteed by freedom".[27]

The road from the modest hope of the mere opportunity of getting acquainted with feudal rural obligations right up to the codification of society-moulding dreams offered by ardent natural law ideas, was a long one. It was long despite five dynamic years, where the events "storm swiftly from success to success; their dramatic effects outdo each other; men and things seem set up in sparkling brilliants; ecstasy is the everyday spirit".[28]

The bourgeois revolution succeeded. It laid down its achievements in laws and the Constitution. It also attempted to institutionalize its achievements in, through individualizing, while implementing them, into everyday practice. Even if this proved to be utopian, this drive is not simply revolutionary self-delusion. It was supported by the fact that *natural law* which was a *counter-ideology* up to the moment of the revolution's victory and a means of the struggle against feudalism, became almost without transition a programme of *positive action*. In the focus of natural law as a counter-ideology discontinuity was emphasized: it did not strive at continuation, preservation, or adaption, but wanted to break radically with the existing order. The carrying out of the revolution required that the revolutionary class should give the "form of universality" to its ideas. In other words, this meant that it should stand up as the representative of the whole of society.[29] Cambacérès' drafts rested on a rather broad class basis; they went

substantially beyond strictly bourgeois interests which subsequently arose as the major beneficiaries of the Revolution.

All this explains the basically *ideological* character of the codification attempts of the first phase, notably the fact that its champions could be philosophers undertaking to create a new world out of the void. In order to put a special emphasis of their fresh new start, nothing was accepted from the legacy of the past. Consequently, the philosophers recognized nothing but their own natural law traditions; they rejected as corrupt their own forerunners in the reform-legislation of the feudal age alongside with customary law, Roman law and even doctrine.

However, the glory of revolutionary illusions proved to be transient. *Consolidation* demanded the stabilization of the rule of the bourgeoisie, the forcing-back of the *sans-culotte*. At the same time, narrowing back of the class basis, which ensued, resulted in the withdrawal of universality of the revolutionary idea. Consequently, *natural law* was increasingly reduced to being a mere *ideological framework* instead of a programme of action. With the very same hypocrisy the philosophers used for justifying government by the wealthy as the only possible social order,[30] they discovered now that "the legislation which gives priority to the general interest of society and the development of the public morality" is the best.[31] Hardly one month after the liquidation of Babeuf and his communist movement, Cambacérès' draft submitted in 1796 attests to this very conversion: to a linkage of codification ideals to the values of the national legacy of the past[32] instead of the starry heaven of natural law. Finally, the bourgeois reaction consolidated the achievement of the Revolution which, with Bonaparte's *coup d'état* on the 18th brumaire of the VIIIth year, only gave participation to the "illustrious" in the bourgeoisie. By now, the bourgeoisie's own codification interests, keeping to the traditions of the past, required a more definite break with the near past of the Revolution. And the draft of *Jacqueminot*, which originated from the authorization of the act that sanctioned the *coup d'état*, conformed with this requirement: it classed the revolution a necessary evil, an *infantile disorder*.[33]

The four years of the preparation of the *Code civil*, and particularly the *Discours préliminaire*, this philosophical summation presented by *Portalis*, were marked by a peculiar serenity, the shrouding of the infantile diseases of revolutionary behaviour in the waters of oblivion. It was demonstrated, like truth filtering through the fog of eternal validity, that law cannot be either voluntaristic, or partaking in the illusion of perfection, but is always determined by conditions;[34] that the requirement of laicization qualifies as utopian;[35] that any change can be considered and effectuated on the exclusive basis of preservation;[36] and that any negation of the national heritage is nothing but naked ignorance and arrogance.[37]

Thus, there were conceptual differences between the codification ideals of the various phases of the Revolution. "If we compare the fruit of the revolution with the considerations which provided its soil, what a contrast between plans and achievement that is! With the abolition of property they drafted the *Code de la nature* in its first clause; but in reality they laid the foundation of the *Code civil*."[38] The *Code civil* broke with the feudal past, which gained expression mainly in the codification of the Revolution's achievements and in the apprehension of the Code as a new beginning in the French law. Yet, by the negation of feudalism it did not reject the values developed in the womb of feudalism provided that they could be integrated into the new system;[39] indeed, it took the organizational and methodical patterns of the codification process mainly from past experiences.[40] One of the secrets of the *Code civil*, which established its modernity in spite of its doctrinal traditionalism, is to be found just in this dual concept, this two-sidedness by a dual determination. On the one hand, we see here *discontinuity* resulting in stunning effectiveness, on the other hand, this is counterveiled by the *continuity* of experience and tradition. The *Code civil* managed to sum up in a code form the "first really fought out" revolution[41] – in a way, nevertheless, not without antecedents.

Sagnac described the quality change in the development of codification idea as the winning of the *esprit juridique* over the *esprit philosophique*.[42] Strictly speaking, this is the vic-

tory of the legal positivism of the *Consolidation* over the natural law spirit of the *Révolution*. Indeed, natural law as an action programme in the "Code of Nature" led to a draft which was valuable "rather like a guide-book of practical morals",[43] that is in a philosophical rather than a legal field.

Nonetheless, the political tendencies of the two phases of the Revolution running on a head-on course can only be interpreted with reservations as the ideological reverberation of legal positivism in the counter-revolution devouring the fledgling of revolutionary natural law and holding a funeral party over it.

For within these poles, natural law itself is primarily to be considered not as an idea(l) *per se*, but as a counter-ideology. Natural law tendencies gave shape to the discordancies of an ideological evolution that knew balance only in its fluctuation to extremes. For revolutionary illusions spring partly from the nature of revolutionary movement itself. This explains why their denial is frequently (but not exclusively) the product of the policy of *hic et nunc:* events also go beyond them in their general utopianism.

The "Code of Nature" also had universalist message, pointing beyond its concrete political context: it provided the idealist attempt to translate a philosophical Utopia into the language of Law. Thus the confrontation of utopianism with reality grasped at Utopia as a Utopia, and not only as a political matter valid *hic et nunc*. That is to say, the second phase did not extend lending a hand to the feudal system; neither did it get closer to it. The new motives which arose during the second phase (apart from the narrowing of the class basis) were the disillusionment with the euphoric optimism of a radical beginning and the simultaneous turn towards the experience accumulated in the national past. On the final count, therefore, the code is "a masterly adaptation",[44] and not a restoration.

As to the dialectics of the intertwining of natural law and legal positivism, we can observe diametrically opposite tendencies between the extreme poles of natural law attitudes at the heyday of the Revolution and of exegetic positivism in its day-to-day realization. As a matter of fact, the transition from

the first into the second phase is accompanied by the gradual retreat of natural law attitudes. It is explainable only as an effect of general disillusionment. For it is a surplus demand on natural law to become the codified means of a radically new start as a programme of positive action that is in retreat; but *natural law as a general ideological framework* survives. And this fact indicates that natural law as a theoretical and/or ideological attitude is also multi-layered. Chronologically first, it was present in the doctrinal preparation. Therefore the Thermidor reaction did not crush the ideology of natural law itself. It only removed its outer shell. It rejected this as a part of its past, and threw it into the rubbish dump of its past. But it did not break with its own ego, it did not come to loggerheads with it. Indeed, it returned to its original ego.

This metamorphosis of natural law was in fact preceded by a phenomenon which ideologically adhered to an extremely rigid concept of legal positivism. A draft was born in the fifth week of the Revolution obliging the judges to refer back to the legislative body should the necessity of the interpretation of the law (because of gaps in the law) arise.[45] The act which was eventually issued in August 1790 defended the revolutionary order; it assumed that the judges' hands and feet should be bound in order to create a guarantee against judicial sabotage. However, it is worth noting that reduction of law to enacted statutes reached its zenith when the growth of natural law attitudes (assuming utopian forms in Cambacérès' first codification drafts) had not even begun, and all this was practically over when bourgeois reaction made its appearance in subsequent drafts. Just as there was no positivist ideology needed to destroy illusions emerging in the Revolution, argumentations of the debates of the second phase (such as, e.g., that "only positive law, and not natural law, can rule society"[46]) did not give the impression of the rise of legal positivism. They simply indicated the rejection of illusions as it was plainly declared that the law needs a *legal* (i.e. *positively enacted*) and not a *natural law* (i.e. *ideologically hypostatized*) substantiation, and this can only be achieved through codification.

Abandoning the natural law background of the codification drafts of the first phase, *Jacqueminot*'s draft pronounces only as an underlying truth that natural law exists. The main reason for his doing so is to lay the foundations of a new natural-law doctrine of filling gaps in the law.[47] *Portalis* preserves this as an underlying ideology, but he expels it (just by identifying it as an ideology) from the sphere of a *legal* code in order to relegate it into the text of his *Discours préliminaire* which is to introduce his draft.[48] Therefore, the change which took place meant the complete change of the components. Whereas during the upsurge of revolutionary progress the code was regarded purely as the embodiment of natural law (even if only enforcible after having been enacted by the legislative body), the code became, with the transition to consolidated social construction, a merely legal product freely issued by the legislative body. However, it remained ideologically based on natural law and this assumed that gaps in it could be filled by natural law.

The anachronism of feudal disunity was the paramount reason for legal codification. However, the unification of law was not carried out on the basis of feudalism, but by its eradication: coupled with a radically new start of the law.[49]

In addition to the basic acts of revolutionary legislation, both the partial codifications of absolutism and the customary law heritage, as well as the whole body of doctrinal preparations could be used. The lessons learnt from the practice of customary law and doctrinal works were reflected in the partial codifications themselves. The late editions of customary laws reflected Roman law influence, and the doctrine attempted to utilize natural law tenets – as a result, the diverse traditions of the age appeared to be intertwined in the utilization of past values. And it was the attachment to *traditions* that stabilized the work of codification: it made codification (however revolutionary it might have been) the heir, and acting steward, of the national past. Thus the discontinuity of the revolutionary change did not jar *national consciousness*. Indeed, in all walks of society it strengthened the truly popular awareness of a common motherland. The shared ecstasy over the

destruction of feudal order, the community-forming power of the revolutionary movement also led to nationalism with an emancipating, liberating effect, the common seal of which was fixed, at the level of legal bonds, precisely by the *Code Napoléon*.[50]

The personal participation of the Consul in the preparation of the *Code civil des Français* is a matter of fact; but the extent of the role he could play is almost immaterial from the point of view of codification development. What matters is that Napoleon's *desire for prestige*[51] had become a contributory factor in the materialization of the old dream of an overall codification. Of course, this desire for prestige was not backed up by mere gimmickry alone; it was also based on political considerations. For codification was the tool which corresponded the best to the tendencies of a *rational centralization*.[52] And codification was also one of the foundation stones on which Napoleon could base, consolidate and perpetuate his *own rule* and the whole socio-political order which was established during his rule.[53]

The new features of the classical type of codification include, among others, *unification* of the law through the radical *renewal* of the law, the association of revolutionary *change* with *traditionalism*, as well as the *nation-creating* effect of codification reflected in the *consolidation* of revolutionary achievements. Another new feature is the *system-creating* nature of the *Code civil*. This is expressed in its self-differentiation as a definite branch of the system of law,[54] and in its structure combining the logic of the particular field with specially systemic requirements[55] – all these resulting in the balanced nature of the *Code civil*. Issuing from its construction combining general principles and rules, all this resulted in an almost *all-comprehensive* regulation,[56] making it also possible to strike a balance between the conflicting and, notwithstanding, complementary requirements of closedness and relative openness.[57]

3. LATE BOURGEOIS CODES

a) *CODIFICATION OF THE ABORTED REVOLUTION IN GERMANY*

National unification of the law was not solely characteristic of the French Revolution. Political unification did not fail to exert an influence on the law in the Prussian-Austrian states of enlightened despotism either. Their law was unified, set in a codification framework which conserved the *status quo*. It stemmed from the bureaucratic tendencies in these systems. The codes in question were born of the *mihi placet* of feudal rulers, and their natural law approach at the same time provided legitimacy for feudal subordination. It would therefore be no more tenable to classify the Prussian, the Austrian and the French codes as being within the same group and to consider them uniformly as tending towards natural law,[58] than to label Müntzer's Peasants' Revolt and the German princes who quelled it equally as Christians. The novel quality of the *Code civil* is affirmed by its great impact on German conditions.[59]

The *Code Napoléon* came in the conquered countries together with his armed might. French arms brought equality before the law, the liquidation of feudal bonds, and the underlying revolutionary ideology West of the Rhine, principally to the duchies of Baden and Berg and to Westphalia, as "imports... from France".[60] The introduction of the *Code Napoléon* transformed their life so radically after just a decade that those who conquered the territory back considered any attempt to re-Prussianizing quite hopeless and, reluctantly, left French law intact.[61]

The impact of the *Code civil* West of the Rhine is instructive for two reasons. First, it demonstrates the revolutionary supremacy of the *Code Napoléon* over Prussian-Austrian codifications and, secondly, it points to the malaise of German conditions, worse even than those of Prussia and Austria. Political unity was only a dream in most German regions, and what they actually had was nothing but a heterogeneous mass of petty, inward-looking, highly particularized and narrow-minded small

sovereign states. They were neighbours but rivals as well and waged minor and major wars against each other. It was merely the feat of the French Revolution and their counter-revolutionary zeal that really united them, and this was chiefly rooted in the past. Their impotency is indicated by the fact that they responded to the mere idea of social progress (concurrent with the expansion of French nationalism) with such "boiling dragon's blood", "grim patriot" counter-nationalism,[62] that amounted to the practical negation of the Revolution and led to complete restoration after the war of liberation. The national drive for unity was directed all along against Prussia, and Prussia frustrated them. Finally, however, *Germany got Prussianized* and national unity was achieved under Prussian leadership.

The contradictory nature of German development led to a distorted form of *nationalism*, *historism*, and *romanticism*, which (in search for inspiration from national development in the Prussian-German feudal past and in the image of the historical school of law) tried to legitimize today's dishonour by that of yesterday.[63] This atmosphere also decided the 1814 debate, supposedly about the desirability of codification in Germany, but in fact actually about how German law should react to the revolutionary changes in socio-economic conditions.[64] The pamphlet of the Heidelberg professor of law, *Thibaut* (who was of French extraction and was equally well known for his friendship with Goethe and Schiller), emphasized the necessity for renewal, codified unification, and the radical and systematic re-establishment of the law. This call was responded to by *Savigny*, the great German Romanist, later leading Prussian state official, who gained a sweeping philological victory for the false consciousness of the Prussian malaise.[65] Philological studies convincingly demonstrate even today that Thibaut's codification concept was not properly worked out, thus he could not really be the actual father of any codification idea. Yet Savigny, who opposed codification, through his teachings became the moving spirit behind codification (precisely by virtue of his opposition).[66]

The correctness of this concept is beyond doubt, yet the opposition between Thibaut and Savigny was not really based on such airy-fairy differences. Savigny also stressed this point, since he regarded the *Allgemeines Landrecht* as the least deviation from the doctrine of *Volksgeist*, which is the apotheosis of the organic, customary legal development; and he saw the *Code civil*, the only obstacle to the survival of feudalism, as verging on blasphemy and being totally unacceptable.[67] Neither did Thibaut make any secret of his opinion that Savigny's attitudes were due to "his dread of the revolution" and to his "pietistic frame of mind".[68] Savigny's anti-revolutionary stand also explains why he is cool towards natural law, the then ideological vehicle of the revolutionary spirit. He opposed the rationalism and apriorism of natural law with the irrational glorification of traditions and of the organic roots of law, seen as a nationalist-historical attitude.[69] It was due to these and similarly distorted, partial truths that "it was he who reflected miserable Prussian conditions", since "measured on a historical scale Thibaut was right, but in vain, because in Germany time stood on Savigny's side".[70] But all of this, we should realize, was nothing but one layer of false consciousness in followance of another one. Once we accept that Thibaut was not the actual father of the codification idea, we must conclude that Savigny's anti-codification stand too was merely incidental, nothing but the expression of his anti-revolutionary feelings.

The debate between Thibaut and Savigny was not ultimately decided by Savigny. He only provided an ideological expression of the social necessity prevailing then and there. That is to say, only provincial particularism had traditions in Germany; central political power was completely absent, or rather, the one which was being forged then had been conceived by the shock of the French Revolution, against liberty, and, by grasping for the past, it eventually led to the antidemocratic, Prussian creation of unity, from the top down. The failed revolutions of 1848 which were characterized by the peculiar symbiosis of the victory of feudal reaction and "progress in the objective sense",[71] were but a link in this ill-matched feature of devel-

opment: Germany sank into "a police-guarded military despotism, embellished with parliamentary forms, alloyed with a feudal admixture, ... and bureaucratically carpentered",[72] yet it gave room to the strengthening of capitalist economic conditions. These were the factors that called to life the unified Commercial Code in the wake of a degree of local initiative,[73] and then, following the achievement of political unity (1871), other codes,[74] until the *Bürgerliches Gesetzbuch* was born after twenty-two years labour once imperial authorization was given (1873).

German private law codification was the off-spring of imperial unity. Its effect may be characterized by the fact that the disunity of the regulation of private law relations was only liquidated (the Reich was tragically backward in political development, yet competed with the European powers in the economic dash forward) with the *Bürgerliches Gesetzbuch* coming into force on January 1, 1900.[75] It is also striking that in contrast to the *Code civil*, which was the *ouverture* to French codification, the *Bürgerliches Gesetzbuch* was the finale to the codification process. The most urgent requirements of German economic progress were already given temporary satisfaction by the unified Commercial Code. This was enough for the work of doctrinal preparation to be completed by the contest between Romanists and Germanists, relying on the experience of capitalist development.

It is in its tardiness that the *Bürgerliches Gesetzbuch* became a code noteworthy principally for its elaborateness, the high standard of its interior workings. As a matter of fact, it was not only the culmination, the final act in a wave of codification, but also the termination of a complex socio-economic and political development. It ended the economic expansion of a liberal capitalist regime crippled by political compromises in Germany's process of becoming a Prussianized, militarized, antidemocratic empire. In other words, it sanctioned the present without having been revolutionary; it preserved the past for the present, without looking forward. This is the historical justification of Savigny's stand and, at the same time, the irony of history. In the cosmopolitan ethos of the formation of

modern bourgeoisie, Goethe thought of the Germans as the appearance of the universal in the particular;[76] yet the impossibility of reaching the universal, the narcissistic, retrogressive historical school of law, its narrow counter-nationalism produced in the Germans the rejection of the universal as perverse, the *promotion of the particular into the universal*. And yet, the mythicizing of the past and of the nation did not bring real satisfaction. They could rejoice over the fervently yearned-for German spirit of codification,[77] but that was merely a Pyrrhic victory, similar to human ambition which fails through the disproportionate meagerness of the means for reaching the goal. This is the case when "We are all running after luck / And luck is running last."[78] Since the more they desired to be only German, the poorer, emptier their German spirit became. It is thus the irony of history that just as the 18th century movement was late with the development of the *Deutsches Privatrecht*, so, a century later, Savigny "was looking for German law but found Roman law instead",[79] and the *Bürgerliches Gesetzbuch* could not grasp what was German. What was German was so entangled with the Roman in the field of law that even the *Code civil*, that emphatic embodiment of the nation's traditional values, ultimately became more Germanic than the *Bürgerliches Gesetzbuch* could.[80]

The tragedy of the *Bürgerliches Gesetzbuch* is that "it came both too early and too late".[81] Its purely conceptual approach, characteristic of German *Begriffsjurisprudenz*, meant a backward step methodologically, compared even to Savigny.[82] Its twenty-two years of preparation (which devoured hefty volumes) and the work of a whole generation of lawyers were proof of German scholarly qualities as well as of the active force of departmental bureaucracy. Out of this common effort, a lawyers' law (*Juristenrecht*) was finally born, written in a lawyers' language. It was, however, successful in winning the admiration of lawyers by virtue of its abstract logical structure, perfectionist system-creation and antidemocratic impracticability. Yet it could not endear itself.[83] Its creation left the broad strata of society almost indifferent. The parliamentary debate on it attested also to the degeneration of bourgeois virtues,

to the tragicomedy of its extreme pettiness, and it attracted attention only with regard to the psychology of *ersatz-action.*[84]

In this way, the *Bürgerliches Gesetzbuch* "is more the child of the 19th century than the mother of the 20th".[85] What it could not achieve with organized contents, it did with the *organization of contents.* It appears therefore that belatedness does not necessarily enhance the contents but rather impairs them; yet it can polish them into a conceptual masterpiece even in a crippled state. Only the practice of *general clauses* was a new, positive value looking forward, worthy of following in this reversal of the values of content and form, mutually displaying their reverse. The general principles bordering on the uncertain, which built a bridge for the assertion of the Code of provincial liberal-capitalism under the conditions of monopoly capitalism by the demand of good faith and by the prohibition of the abuses of rights, made possible the Code's adaptation through judicial practice. This is what principally added something to the organization experience classically condensed in the French *Code civil*, something that was to become a dilemma for all later codifications and worthy at least of consideration.

b) *THE LAW-UNIFYING CODE OF MONOPOLY CAPITALISM IN SWITZERLAND*

The Swiss Civil Code was only born a decade after the German one, yet there is a difference of a whole era between the two, even though both were the result of partially similar inspirations. They were both the outcome of an urgently felt necessity for unifying the civil law at a time when the acute need for unification had already been remedied by the codification of commercial law, bills of exchange, and bankruptcy. Both relied on pandectist traditions and were the result of the blossoming of domestic scholarly qualities. The Swiss code as "the most advanced example of German-speaking jurisprudence in the 20th century"[86] is considered by German jurisprudence to be the continuation of German ideas, attempting to compensate for

the historical consciousness of their own failure by erecting a memorial to their own reflection.

The proximity of Swiss codification to the German one belies this on two points. First, the content of the Swiss code was formed by democratic traditions, the demand for participation as well as the assertion of political and economic interests. German pandectism was in consequence only the vehicle for this content. Secondly, the novelty of the Swiss code lay exactly in those features differing from the German ones and critically surpassing them.

Swiss laws were also *divided* until the turn of the century. Unlike Germany, it was the peasantry in Switzerland (emancipated under democratic conditions) and the country's early developed bourgeoisie that helped the Federation to arrive in the 20th century while preserving medieval cantonal government. The sensitive independence of the cantons was therefore a positive charge as it emerged from the practice of democratism but, at the same time, this also became a handicap to progress with the accelerating development of industrial and commercial relations in the 19th century. Cantonal[87] and, later, federal[88] attempts to unify the law were sufficient at the end of the last century to lend a new, unified code-form to the civil law of Switzerland. It was based on past experience and was still forward-looking.

The progress of the Swiss law-unification, which demanded that the Swiss rise above cantonal independence, sensitivity and patriotism, explains why the *Zivilgesetzbuch* (1907) was not too late as was its German counterpart. It was not feudalism that played a part in delaying Swiss codification, therefore its long fermentation period did not cripple it but rather matured it and made it open to the future. To put it figuratively: the consolidated circumstances of its gestation period led to the birth of an off-spring healthy not only in body, but in spirit too.[89]

A comparison with the *Zivilgesetzbuch* makes it obvious why the German *Bürgerliches Gesetzbuch* is in fact an attempt to return to the codification concept which came into practice in the codes of enlightened absolutism (particularly in the *Allgemeines Landrecht*) which we earlier described as a historical

cul-de-sac. What arose from the *mihi placet* of the enlightened feudal ruler became the fruit of the conceptual analysis and unrelenting logic of pandectist jurisprudence in Germany. The axiomatism of regulating everything, the assertion of theoretical rigour and comprehensiveness, the resolute will to solve everything instead of those responsible for the law's practical implementation were first superseded by the French *Code civil*. The reason why the *Code civil* became a model was its innovative force. Namely, it did not ossify legal relationships into the Procrustean bed of an *a priori* contrived axiomatism, but advanced their conceptual-orientative definition grasping some of their essential features in their most typical manifestations.

Swiss codification had to renew a number of separate legal systems by putting a stop to divided cantonal legal development, not by depriving them of their traditions but synthetizing them, forging the basis of a unified Swiss tradition. This is why theoretical preparation, concentrated on a comparative analysis of cantonal development[90] and democratism, which permeated every element of the codification, had such an important role in leading to a code related to the *Code civil*, yet looser in technical realization, more pronounced in meeting the demand of developing law through judicial practice.

The three factors which put the *Zivilgesetzbuch* above the *Code civil* are its *democratic* orientation and concentration on the *typical* relationships of the present, together with its *logically closed practical openness*. The attempt to issue a *popular* code, which was easy to understand,[91] was a new feature in the history of codification. It was also a new feature that the code admitted to being full of *gaps*, yet made its own system logically complete by having provided for methods of *gap-filling*.[92] Thus, the *Zivilgesetzbuch* answered anew in its own text the question of the comprehensiveness of codification, a question answered only in the ideological *Discours préliminaire* by the *Code civil*. It managed to make possible judicial development of law without rendering its system of regulation logically open. This stark, far-sighted solution saved it not only from the eroding effect of the free-law movement which was bent on disrupting all requirements of legality, but was also a re-

sponse to the law-dissolving effects of monopolistic development, not by becoming rigid, but by a solution of codification techniques which maintains the unconditional priority of statutory law, yet still puts the law into practice as the joint oeuvre of law-making and law-applying processes.

4. THE CONSUMMATION OF CONTINENTAL CODIFICATION

The French *Code civil*, the German *Bürgerliches Gesetzbuch*, and the Swiss *Zivilgesetzbuch* became basic models of classical codification in bourgeois society, which fundamentally determined not only the appearance, but also the contents of Continental Law. Their most general feature was to achieve the national unification of law through establishing the law in a series of logically patterned codes covering the main branches of a legal system. Yet, they differed from the similarly gigantic efforts of enlightened absolutism, particularly from the Prussian *Allgemeines Landrecht* and the Austrian *Allgemeines Bürgerliches Gesetzbuch*, in that they achieved their goal together with a radical renewal of the law. The *Code civil* became the unsurpassed representative of bourgeois codification to this very day, owing not so much to its 100 years advantage over its counterparts as to the typicality of its historical conditions.

The French, German, and Swiss codes were original works: they were aimed at the unification of domestic laws by their re-establishment in both contents and form. They emerged for domestic reasons, and were fed from inner sources. But the whole range of the actual historical function of a given phenomenon cannot of course be simply deduced from the abstract objectivity of the phenomenon in question. The *Code civil* fulfilled a different role in its motherland than it did when it served as an instrument of the Napoleonic imperial idea. It is well known that Napoleon simply introduced his code over a sizeable part of Central Europe,[93] and imposed it on other countries by political pressure.[94] As to the conceptual-ideological basis of all this, he left no doubt that the dream of

a "general European Code",[95] and the persistent desire for it[96] were merely the expressions of the expansion of French nationalism.[97] In other words, codification departed from its original definitions, and the unifying legal renewal was dissolved in the function of law-export.

This, in turn, is a significant feature of any code-making enterprise. Namely, code is an embodiment of normatively enacted rules, a summation of the law in force, bearing legal validity in itself, that provides a manageable basis for the export and import of law, more suitable than any other means (doctrinal consolidation, the export of judicial machinery, etc.). Thereby codification becomes the *exclusive vehicle* of any new legal initiative, closed to the past and open only to future. It is this reduction of the whole body of law to some enacted text, condensed in one systematic form and assuming exclusive validity, which was the optimum potential of exercising an influence. Codification was ready in France, and only appropriate political pressure was needed for effectuating law-export. (In the British colonial empire, as we shall see in the next chapter, the situation was exactly the opposite: political pressure was given, and only legal consolidation was needed to render British law exportable, and, finally, exported.)

From the very start, codification was an influential factor of the rivalry of various legal (sub)systems; already very early its aim was to expand the legally regulated fields. As a result, codification achieved world-historical significance in the 19th century. Under the shadow of Napoleonic arms, the *Code civil* was adopted in several parts of Europe, and this, in turn, triggered a further wave of codification. French revolutionary development was understood as the *normal course of the transition* into bourgeois society, and the Code developed in its womb, as an adequate expression of a *normal society's laws*. Therefore, a *model* by which other countries, not so fortunate in their socio-legal renewal, could accelerate their development, was available through French codification, which embodied the model, the pattern of normality, socially as well as legally.

In 1814, Napoleon fell, owing to military defeat, and his empire disintegrated. Undoubtedly, Napoleon's military strength, the threat posed by it, played the primary role in the dissemination of the *Code civil*. On the other hand, it is equally certain that, from the second third of the 19th century onwards, during the world-wide renaissance of the codification idea represented by the *Code civil*, this role was taken over by the values embodied by the *Code civil:* the *normality* of law and of the social concept behind it. The code, which ruled until then *ratione imperii*, now became the ruler *imperii rationis*.

The effect of the Code no longer depended on any nationalist expansionism after the fall of Napoleon. While the provider of the model was earlier primarily interested in its dissemination, the relationship was now reversed, and those who intended to embrace the model and utilize it in their own interest and for their own benefit were the only interested parties. This was how the *Code civil* became the *representative of the private law of bourgeois transition*, in itself worthy of preservation[98] throughout the former Empire; this was how it became beyond the former range of the Napoleonic threat, the basis of a European codification;[99] and this was how it reached remote countries and was employed everywhere as the embodiment, model and measure of European quality, bearing what was considered typical in the normality of bourgeois revolutionary transformation. It was not the former colonial territories, peopled by French emigrants, which were the main recipients (for their codification appeared as the continuation of their connection to the mother country).[100] What is more noteworthy is the effect which the *Code civil*, as the example of bourgeois progress and of the European spirit, could have among countries lagging behind the continental European development.[101] For this was by no means purely an effect due to codification; it arose above all as the realization of a *Europeanizing civilization function*.[102]

The original functions of codification could also appear in this *secondary codification*, but they did not relay the historical definitions of the *Code civil;* they displayed nothing but the future of France as projected in the *Code civil*. In other words, they anticipated the promise of the perspective of opti-

mum development. These codifications were secondary precisely because they were not produced by tense social forces: they carried within them those social tensions to produce and actualize which they had been adopted. Thus, secondary codification came *from without*. What they expressed was not their own past, but their embracing of a past alien to them, and the hope of a revolutionizing effect based on them. The *common form* thus became the organizer of heterogeneous contents, often differing considerably in their character and depending on the social conditions of their adaptation.[103]

The success of the *Code civil* was real not only from the point of view of a definite kind of juristic wording and formulation, but also from that of codification. The basis, indeed the fate, of the wave of codification was thus not independent of, nor was it determined by, the contents relayed by means of codification. It is true, though, that we have to attribute often contradictory significance to political and economic effects, to the ethnic or cultural communities where the transplantation is examined. The fact that we can talk of nothing but the single occurrence of the involuntary promulgation of the *Allgemeines Landrecht*;[104] that the limits of the legal effect of the *Allgemeines Bürgerliches Gesetzbuch* never went beyond the territory of the late Austrian monarchy;[105] that serious codification movement spread world-wide only through the classical European codes which affirmed bourgeois development and were unambiguous expressions of it – all this is to indicate a by and large inevitable tendency.

The *Bürgerliches Gesetzbuch* came to life a century after its French counterpart. This is why it had the opportunity (in spite of its contradictions in contents and its lameness) to meet the specific interests of a monopoly capitalist society, which the *Code civil* satisfied only through developing judicial practice, pointing thereby to the prospects of its own supersession. The lack of radicalism, the shrouding of social renewal into multiple abstract forms, and at the same time its fresher attitude to the process of monopolistic development, its doctrinal values and logically coherent conceptual structure could play a considerable role. These were the reasons for its not

exceptional spread in Europe, America and Asia, although *in extenso* its text was not adopted.[106] Though the *Bürgerliches Gesetzbuch* exercised a stronger effect than the Swiss code,[107] it could not dislodge the unchanged primacy of the *Code civil* in international influence.

Thus far, we have concentrated on the codification of civil (private) law. The reason for this was that the requirements of the unification and renewal of law arose with an emphasis in this branch of law during the era under discussion. Therefore, in the *world-wide spread of codification*, the *export and import of civil (private) law* played the cardinal role. The fact that the expansion of political domination finds decisive expression in economic expansion is not limited to capitalism only. The wave of codification in the 19th century was marked not only by the spread of codification, but also by the circumstance that the normative body of law was reduced to codes in an unprecedentedly short time. Civil and criminal laws, law of procedure as well as commercial law were equally affected by this transformation. The effort of often only one or two years or decades, i.e. the codification of the four to five basic branches of the law has determined or still determines the law of whole continents, their underlying assumptions and institutional set-up, indeed often even their ideologies.[108]

To the matchless codification achievements of the 19th century one has to add the codes of earlier eras, still effective today,[109] the pseudo-codes, expressing the fear of extreme reaction to law-renewing codification,[110] the efforts at limited modernization,[111] as well as some original codification attempts in the 20th century,[112] in order to perceive codification in its real dimensions.

Parallel with the process whereby codification drew away in time and space from its historically particular formation in French and German bourgeois transformation, the very concept of codification has itself also underwent transformation. From being a *particular instrument*, it became an almost *universal expression*. In the process of becoming one of the basic forms of appearance of law, it has suffered modifications which also changed the image of codification phenomenon.

As for the ideological aspect of the change, it was the world-wide spread of the code which contributed most to codification becoming a *sui generis* means and *form of appearance of law.* The requirements of the idea of bourgeois progress were drafted in terms of *natural law*, and pioneered a new path in the name of reason. The concept of law-making, according to which it is nothing but re-production through declaration, transplanting natural law into a series of positively enacted laws, became so much a general ideological framework that it was this that provided the basis for both the revolution-consolidating *Code civil* and the *Allgemeines Bürgerliches Gesetzbuch*, dissolving the new requirements in the surviving remnants of feudalism. What is displayed by French codification as the translation of natural law ideas into legal language, becomes a historically distant experience in other countries' eyes after the Napoleonic era, an example worth following or avoiding. And when these examples multiply, when transplanted codes themselves become examples worthy of imitation or avoidance, then such an abundance of models is available for a country contemplating taking them over that this by itself limits the universality of natural law ideas to historical particularity by emphasizing the genuinely creative role of law-making, which consciously shapes social development.[113]

Codification no longer requires primary reasons: once it comes to life, the code is sufficient and viable by virtue of its own values. Putting it another way, the creation of national unity and the renewal of legal contents have been linked with a *historical task:* the one of liquidating feudalism and establishing the bourgeois system. This challenge occurred but once. Once it was responded, also its factors became irrelevant.

5. THE NON-RECURRENT NATURE OF BOURGEOIS CODIFICATION

Codification movement grew world-wide. Events give testimony to an unprecedented dynamism, but this was not enough for self-renewal hardly anywhere. Whether it was revolutionary,

anticipating future development, or weary, merely reorganizing the *status quo ante*, codes everywhere became ossified. It seemed that the fever led to disillusionment and a lack of faith in codification.

In France, the birth of the *Code civil* was celebrated as the apotheosis of law, and it was used as an appropriately canonized sacred text in the exegetic judicial approach to the law.[114] Such law and such a practice supposed some sort of privileged, perfect *adequacy to social reality*. But the society of the wished-for equality had already been shaken by the workers' uprising of 1831 in Lyon; and later the workers' question as a burning social problem made the provisions of the *Code civil* vulnerable in an increasing number of points. The self-critical cry of *"La légalité nous tue!"* |rule of law kills us| is evidence not only of a break with the past; it also presages something of future events. This was the *disintegration of generality*, which had been assumed to be guaranteed at the consolidation of the Revolution. In other words, the monopolist development and the "socialization" of the law, demanded by the emergence of the proletariat, proceeded *without*, in fact, *in spite* of the Code, at the expense of its practical disintegration.

Voices urging its revision multiplied. And in the dazed atmosphere of the centenary celebrations, like an unsettlingly dissonant note, accompanying the list of supplementary laws and judicial practice, the bitter outburst is heard: "We no longer have our *Code civil!*".[115] Similarly to the debate between Thibaut and Savigny, the controversy proceeded based on mutually exclusive partial truths and the pros and cons did not really answer each other. The urge for the adequate re-drafting of the *Code* was rejected simply because of political fears and various considerations of legal policy, which neither supported nor refuted each other. Owing to the political advance of the left, recodification could have easily "degenerated" to become a tool in a coming class war. Fully aware of this, the conservative opposition emphasized the importance that codification was "impersonal, and free of any tendentious ideas", i.e. adjustable to various tendencies, adaptable to various conditions, for

"the laws are robes, made supple by wear, that only with the passing of time adapt to the shape of the body".[116]

The Code remained unchanged in France, just as it did in other countries. It was the judicial interpretation of law to become the holy shrine where the "mystery" of "transubstantiation" could take place. Until now, the code had been the source to provide ready-made patterns for judicial decision in cultures of Civil Law. Now *judicial practice* became an increasingly independent instrument of legal development and it brought in its train the acknowledgement of *precedents* as sources of law.[117] Little by little, it became topical to talk of legislation by the judiciary.[118] It also became topical to see whether, and to which extent, codified law was in harmony with the law as practiced.[119]

The holy Ark of the Covenant, once accorded an almost superstitious veneration, was transformed from the pillar of fire that shone far away along the path of bourgeois development into a modest trailer in legal development proceeding in the steps of tradition, in an environment where the codes themselves "are reminiscent not infrequently of dead river beds, because the everyday flow of legal life passes them by".[120] The struggle once exerted on behalf of the code was therefore largely replaced by the struggles of judicial practice. Codification lost its original *raison d'être*. In other words, from being master of establishing the law, the code became degraded primarily to a *conceptual-referential framework* of the everyday practice of shaping the law. It is no longer the embodiment, but rather a mere *reference-basis* of the living law.

We have to be wary of regarding this phenomenon simply as degeneration, the product of crisis. This would only be justified if we were to appreciate classical codification as being of an exclusively absolute value. But the situation is not that simple, since, historically, codification as well as its superseding by judicial practice could equally be inevitable and grounded. The logic of the development of bourgeois society brought with it the necessity of adapting the concepts of the earlier era, adequate in their own time, to the new requirements. Therefore, the idea of codification as well as the need

for rule of law, which took shape in the revolutionary phase of bourgeois development, were historically conditioned. Even in their general form, they provided the embodiment of a *historical particularity*.

"Where legality rules / That is where reasonableness is", as Peter Weiss lets Hegel say.[121] But what took place in the 19th century under the influence of the transformation of the bourgeois society, was not the abandonment of "reasonableness", in spite of the disintegration of the form of legality hitherto considered exclusive, but the forced admission of the circumstance that a strict adherence to the text of the code no longer served the interests of further development. The change therefore occurred in the realization of "reasonableness", in the very concept of legality and in the understanding of the rule of law; a change of function, which both presupposed and resulted in the *transformation of the classical function of codification*.

The code remains the Bible of bourgeois society, an *organizing centre of law*, despite being socially antiquated. It has remained the framework for legal movements as their formal initiating and precipitation point: "The section numbers of the Code are often only systematic places where one files and later finds the results of judge-made law."[122] Instead of providing a pattern for decision, its task is merely to indicate the *direction of finding* the solution, and to define its *conceptual-referential* place. Points, which were earlier the final outcomes of legal control by the force of the wording of the code, now appear to be the *points of initiation*.

The classical idea of codification was thereby transformed. But the intrusion of judicial practice into the framework of code-law did not eliminate the code itself. Indeed, what I have figuratively termed its biblical function, is precisely this: the presence of the code-law as a historical prerequisite in all legal processes. Legal practice is to flow through the conceptual structure and system of the code. The legal process may only take place within these limits: it is the alpha and the omega. The code maintains its organizing, orientating and methodological functions even when the re-assessment of judicial

practice actually runs against code-law. It is the conceptual system and institution of the code that invariably provide at least the *medium* of regulation by judicial practice: its *officially only referable* source of inspiration, components, methodological foundations, and form of expression.

The metamorphosis and, at the same time, everlasting quality of classical codification, the rigidity of the *neither with it, nor without it* condition, in short: its historical singularity, is best exemplified by the *immovability* of codification, and the fact that it withstands diverse political-legal cataclisms. Thus, its *raison d'être* has been doubted and shaken by reform attempts only where its historical continuity came into conflict with the requirement of a new social beginning: in Germany at the time of the national-socialist *Machtergreifung*, and later, in France, with the advance of the left after World War II.

The year National-Socialism came to power in *Germany*, the shackling of the inflamed dynamism of the people's consciousness with the handcuffs of static codes was debased as a scandal of the bourgeois order: codification of law could only be the aim of liberalism, much despised by the national-socialist order, since, behind the cloak of justice, it really wants the self-interested fixing of the limits to the liberty of the individual action, i.e. the formal calculation of possible consequences.[123] This was forged into a practical programme by Carl Schmitt and Ernst Rudolf Huber, whose dream formulated there and then was a *free judicial discretion* legitimized by *ad hoc* administrative decisions.[124] With the grafting of the *Volksgeist* onto racial ideology, the shades of Savigny were around, even if they could not win this time: the nazi system, requiring a steady legal background for the military economic boom, decided on the development of a *"Volksgesetzbuch"* (1939).[125] The thing which is of interest here and is characteristic of the deep-seated nature of the tradition of classical codification is that all this was abandoned like a bad dream when Hitler fell; with the partial repeal of the part-codification acts already issued, they carried on, with slight

modifications of the *Bürgerliches Gesetzbuch*.[126] After all, the practice of the old code, readapted with a further loosening, led from the semi-feudal Prussian militarist imperial regime to the welfare state of modern monopoly capitalism.

As to the attempt to recodify the *Code civil*, the time to carry out the long due change arrived (after the failure of the Committee formed for this purpose in 1904) with the new start that followed World War II. The survival brought with it a self-reappraisal too, influenced by the sudden advance of the communist left, as the most consequential power involved in the victory over fascism. Recodification was decided on under such circumstances. But by the time the preparations might have led to decisive results, the Cold War froze the power of the left, degraded the drafts to being only of doctrinal value, and permitted only reforms of ancillary problems, leaving the Code intact.[127]

Codification, which was the appropriate legal organizer of free enterprise capitalism, proved to be inadequate in the further stages of capitalism. As a result, the function of codification was *sublated*, being only preserved as a partial element in a synthesis. Since codification was not followed by recodification, its adaptation proceeded through its *continued reinterpretation by judicial practice*. The code was not actualized; it was converted by force into reality, and was thereby divested of its original character. The code that once had dominated judicial practice, became in turn dominated by it.

6. CONCLUSION

The codification attempts of enlightened absolutism were an end of a path rather than a beginning. They aimed almost exclusively at the linking of *national law-unification with a systematizing technique*. Even this was perverted in the Prussian *Allgemeines Landrecht* with its extreme casuistry, by putting the spirit of natural law at the service of a bureaucratic Moloch.

The efforts towards unification and reform in *France* were clearly directed toward codification by the partial codifications of three centuries, the doctrinal and conceptual elaboration of the law, and the axiomatic orientation of the natural law ideology. While, under prevailing backward conditions, natural law views were necessarily stifled in the narrow-minded doctrinal work of lawyers in Germany, the same views became anti-feudalistic political weapon in French philosophy. Even the requirement of the unity of law, which was merely a technical condition of absolutist rule under feudalism, became part of the overall revolutionary process in subordination to the principle of the equality before the law.

These roots may have determined the development of codification, yet they did not specify it concretely.

During the upsurge of Revolution, when in order to build defences against judicial sabotage, applicable law was reduced to written law with the institutionalization of the *référé législatif*, people strove to express an ardent natural law-ideology in a direct codification form. In contrast, *social consolidation* resulted in a *technical code of law*. The disillusionment which characterized the phase of consolidation did not turn against natural law, rather it went right to its essence. The classical type of codification realized a quality advance in France under these conditions: it coupled law-unification with a radical change in the law. It did so with a sense of underlying traditionalism and endowed all this with a directly nationalist effect by making use of its code as the agent creating a nation.

The radical law-renewal by the *Code civil* followed the normal path of bourgeois transformation. As a late expression, the German *Bürgerliches Gesetzbuch* did not fully measure up to it: it took its place on the margins of a bold guarding of the vestiges of the feudal order, of ensuring the economic requirements of *laissez-faire* capitalism and of opening the path to monopolization. On the other hand, the Swiss *Zivilgesetzbuch* was already in advance of the mark given by the *Code civil* as it unambiguously stood on the ground of a monopolistic structure. All these reflected the differences in the bourgeois

transformation in these countries. *French* codification was the work of the revolutionary renewal of the law. The *German* one that of the creation of political unity, allowing capitalism to work only in the economic field. *Swiss* codification represented a kind of forward-looking, unifying law-creation by a people with developed democratic traditions, proud of cantonal independence, and hindered in economic progress only by the lack of uniform laws. Similar features characterized the codes' inner structure, the conceptually rigorous clarity of the *French*, the methodological-doctrinal perfection of the *German*, and the practical openness of the *Swiss*, concentrating only on what was considered the most typical.

The universal acceptance of codification and individual code-products alienated these codes from their original historical functions. The *transplants* of laws through codification bear the promise of an *optimum bourgeois development* in the image of these codes. They are the media of modernization and capitalist development, indeed, *Europeanization* of the legal systems in question. Thus, their social success is also the success of *codification as a legal-technical instrument.*

The codification of the era of bourgeois transformation is, however, *historically unique:* it remains an unrepeatable and unrenewable act. The changed requirements of economic life are no longer reflected in re-codification, and adaptation is only performed by judicial practice. The free-law movement arose therefore as a result of the disintegration of the classical concepts of legality, rule of law, and codification. As a matter of fact, the free-law movement negated actually nothing but concepts and their *historically particular* understanding thereby leading to a new kind of historical particularity.

NOTES

1 The Instructions of Catherine the Great were published in their third edition in Amsterdam in 1775; the *Code Frédéric* (1749) in three volumes in 1751 |with no indication of the place of publication|; the *Allgemeines Landrecht* in five volumes in Paris in 1801 |by order of the Minister of Justice|.

2 The draft of *Frederick* "was built... on reason; arranged Roman law in natural order..., clearing up completely all those doubts and difficulties which the commentaries of this law introduced into the process; in short, this code laid the foundations of a secure and universal law... Therefore it would be desirable that other countries, which have not yet realized the reduction of the laws into one body, should do the same." D. Diderot 'Code' in *Encyclopédie méthodique*, ou par ordre de matières: par une société des gens de lettre, de savans et d'artistes, II, Jurisprudence (Paris and Liège: Panckoucke et Plompteux 1783) pp. 695f and 698.

3 The idea of *equality* was relayed for the French revolutionary ideology by Rousseau, differentiating between *inégalité naturelle ou physique*, and *inégalité morale ou politique*, and adding that everything that depends on some convention belongs to the sphere of the latter. J.J. Rousseau *Discours* Quelle est l'origine de l'inégalité parmi les hommes et si elle est autorisée par la loi naturelle |1753| (Paris: Éditions sociales 1971) p. 67.

4 According to Perelman, this is the formal minimum of all equality concepts and ideas of justice. Ch. Perelman 'Five lectures on justice' |1967| in his *Justice, Law, and Argument* Essays on Moral and Legal Reasoning (Dordrecht, Boston and London: Reidel 1980) p. 36.

5 The *Déclaration des Droits de l'Homme et du Citoyen* |Declaration of the Rights of Man and of the Citizen, 1789| proclaims in its Section 6 as the cardinal tenet of natural law that "The Law... should be the same for all, whether it protects or punishes; and all... is equal in its sight..."

6 "It was heralded as the product of the cumulative wisdom of Europe's most famous Philosophers and Legal Scholars. Yet, there is nothing in it that is really amazing, except the obscurity of construction and the art by which the clearest and simplest rules taken from the Roman law are successfully confounded... The reduction to general maxima arises from a geometrical dryness, and the understanding of this requires making undue use of the intellect... The definitions as well as the rules to be found here are practically always drowned in an over-abundance of words, and wrapped into such a metaphysical veil that is informed, no doubt, by the spirit of the German language, but which has the same effect on the ideas as fog when it settles on material things..." J.E.D. Bernardi *Nouvelle théorie des lois civiles* (Paris: 1801), preface, pp. Lf, quoted by Arnaud, p. 3.

7 Arnaud, p. 5.

8 Arnaud, passim, especially at pp. 61-120.

9 Van Kaan, p. 169.

10 Cf. Varga 'A kódex', pp. 277ff and Cs. Varga 'Leibniz und die Frage der rechtlichen Systembildung |1973|, in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, hrsg. K.A. Mollnau (Stuttgart: Steiner 1987) in particular section 3 |Archiv für Rechts- und Sozialphilosophie, Beiheft Nr. 31|. See also W. Röd *Geometrischer Geist und Naturrecht* Methodengeschichtliche Untersuchungen zur Staatsphilosophie im 17. und 18. Jahrhundert (Munich: Bayerische Akademie der Wissenschaften 1970) for the same, but concentrating on the development of German philosophy of the state.

11 Cf. E. Cassirer *The Philosophy of the Enlightenment* |Die Philosophie der Aufklärung, 1932| (Boston: Beacon 1955), ch. VI.

12 Cf. Arnaud, p. 217.

13 "Justice is what has been established; and in this way, all of our established laws are seen necessarily as just without further examination, just because they have been established." B. Pascal *Les Pensées* |1670| I (Paris: Larousse n.d.), section II, ch. III, para a, pp. 97f; or B. Pascal *Pensées et opuscules* publ. M.L. Brunschvicg (Paris: Hachette |1959|) section V, 312.

14 Cf. Tarello, pp. 252ff.

15 "There are certain ideas of uniformity, which sometimes strike great geniuses..., but infallibly make an impression on little souls. They discover therein a kind of perfection, which they recognize because it is impossible for them not to see it; the same authorized weights, the same measures in trade, the same laws in the state, the same religion in all its parts. But is this always right and without exception?... And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity of differences?... If the people observe the laws what signifies it whether these laws are the same?" Montesquieu, part VI, book XXIX, ch. 18. (For the translation, cf. Baron De Montesquieu *The Spirit of the Laws* trans. Th. Nugent |New York: Hafner; London: Macmillan 1949| II, p. 169-170.)

16 "They say there are 144 customs in France that have the force of a law; these laws are almost invariably different. Anyone travelling to that country changes laws almost as many times as he changes coach horses... And jurisprudence has become so perfect by now that there is hardly any custom without several commentaries; and all of these, as we can imagine, are of a different opinion." Voltaire, under the entry 'Coutume', vol. VII, p. 384. "Your Parisian customs have twenty-four differently interpreted commentaries; thus it has been proved twenty-four times that they have been wrongly understood. These customs contradict 140

others, which all have the force of a law in this same nation and yet are mutually opposed to one another. There are, therefore, more than 140 small nations in only one country of Europe between the Alps and the Pyrenees, who call themselves *compatriots*, but are in reality as alien to one another as Tonking to Cochin China." Voltaire, under the entry 'Lois', vol. VIII, p. 29, para. 1.

17 "There ought to be only one weight, measure, and custom... And all the laws ought to be clear, uniform, and accurate; since interpretation nearly always means adulteration." Voltaire, under the entry 'Lois civiles et ecclésiastiques', vol. VIII, p. 34.

18 "London only became worthy of being inhabited after it was incinerated. Since then, its streets have become wider and straighter: London was a city to be incinerated. Do you want good laws? Burn the existing ones and make new ones instead." Voltaire, under the entry 'Lois', vol. VIII, p. 28, para. 1.

19 "But if great princes are rare, how much more so are great legislators! The former have only to follow the pattern which the latter have to lay down. The legislator is the engineer who invents the machine, the prince merely the mechanic who sets it up and makes it go. 'At the birth of societies,' says Montesquieu |*The Greatness and Decadence of the Romans*, ch. 1|, 'the rulers of Republics establish institutions, and afterwards the institutions mould the rulers.'

He who dares to undertake the making of a people's institutions ought to feel himself capable, so to speak, of changing human nature, of transforming each individual, who is by himself a complete and solitary whole, into part of a greater whole from which he in a manner receives his life and being; of altering man's constitution for the purpose of strengthening it; and of substituting a partial and moral existence for the physical and independent existence nature has conferred on us all." J.J. Rousseau *Du contrat social* ou principes du droit politique |1762| book II, ch. 7 (Paris: Defer de Maisonneuve 1791), pp. 68f. (For the translation, cf. J.J. Rousseau *The Social Contract and Discourses* trans. Q.D.H. Cole |New York: Dutton; London: Dent 1950| p. 38.)

20 Cf. also J. Touchard *Historie des idées politiques* (Paris: Presses Universitaire de France 1967), p. 458.

21 The nobility of, e.g., Avreuil, Chessy, Courteranges, Les Croutes, Longeville, Rumilly-les-Vaudes demanded only "a field code, in which we can all learn of our obligations" as they formulated in their memorandum of grievances submitted to the feudal assembly opened on May 3, 1789; the exception was Vaudes, where they wanted a unifying code even if stuck to the level of compiling the law: "a new code of civil and penal laws, to which the whole Nation

would be subject without discrimination." J.J. Vernier *Cahiers de doléances du bailliage de Troyes et du bailliage de Bar sur Seine* (Troyes 1909-1911), vol. I, pp. 343, 617, 657 and vol. II, p. 223, as well as vol. III, p. 68 on the one hand, and vol. II, p. 642 on the other, quoted from Vanderlinden, pp. 438f.

22 According to the August 1790 resolution of the National Assembly, "The new code will consist of simple, clear laws, adapted to the Constitution," which was re-worded by Section 1 of the 1791 Constitution, ordering that "The code of civil laws common for the whole country shall be created."

23 The draft of Abbé Sièyes, 1790, section 32.

24 The expression of Barère.

25 "Our undertaking is directed at changing everything, in the schools as well as in morals, customs, intellect, in other words, in the laws of a great people." Quotation from Fenet, I, p. 11.

26 Cf. also J.A.L. Seidensticker *Einleitung in den Codex Napoleon* (Tübingen: Cottaischen Buchhandlung 1808), pp. 190 and 193.

27 See Fenet, I, p. 109.

28 Marx, p. 401.

29 K. Marx and F. Engels *The German Ideology* (Moscow: Progress 1976) p. 68.

30 As worded by Boissy D'Anglas, "A country governed by landowners is in the social order; a land where non-landowners govern is in the state of nature." Quoted from A. Soboul *The French Revolution 1787-1799* |La Révolution française 1789-1799 {Paris: Editions Sociales 1951} p. 294| trans. A. Jorrest, Colin Jones (New York: Vintage 1975) p. 454..

31 Fenet, I, p. 148.

32 References to Roman law, indeed to doctrines, developed during the *ancien régime*, relayed by Pothier's work, appear for the first time in the material of this draft. See Fenet, I, pp. 143, 150, 157, and 170.

33 Fenet, I, p. 329.

34 "Laws are not merely acts of power; ... |because| they were made for people, and not the people for the laws; and they have to adapt to the character, customs and situation of the people for whom they were made; ... and |therefore| it would be absurd to immerse ourselves in absolute ideals of perfection in affairs which are capable only of relatively good realization..." Quotation from Fenet, I, pp. 466f.

35 "Would the code really become accessible to every social class, even if as simple as possible? Would not passions incessantly strive to turn it away from its original meaning? Is not a certain experience needed for the wise application of the law?" Quotation from Fenet, I, p. 471.

36 "Change is needed, when the most perilous of changes would be if we did not make the change. Because we must not fall prey to blind prejudice. All that is old was once new. The essential thing is, therefore, to put the stamp of stability and permanence on our new institutions, which ensures them the right to grow old." Because, after all, "it is profitable to safeguard all that we do not have to destroy; the laws must spare habitudes, if they are not harmful". Quotations from Fenet, I, p. 481.

37 "The majority of authors, who criticized Roman law with as much ease as bitterness, blasphemed against what they did not know." Fenet, I, pp. 470ff, particularly at p. 480.

38 Espinas *La philosophie sociale du XVIIIe siècle et la Révolution* (Paris: 1898) p. 100. Quoted by Arnaud, p. 177.

39 "The *Code civil* is nothing but the forging together of the jurisprudence of Roman law, the practice of usage, according to the mores |*moeurs*|, traditions |*convenances*|, and life-conditions of the French people, and the application of all these to the Declaration of the Rights of Man." A. Sorel 'Introduction' to *Le Code civil* I, p. XIX. Accordingly, the *Code civil* "may be described, without great inaccuracy, as a compendium of the rules of Roman law then practised in France, cleared of all feudal admixture — such rules, however, being in all cases taken with the extensions given to them, and the interpretations put upon them by one or two eminent French jurists, and particularly by Pothier." H.S. Maine *Village-Communities* in the East and West (New York: Holt 1889) pp. 356-357. Portalis himself said that "a transaction... was executed between the written law and customs" (Fenet, I, p. 481), of which recent analysis proved that it meant a transaction practically exclusively among authors of doctrinal works (Arnaud, passim, especially at pp. 4f and 217). This is exemplified by the finding that "in reference to volume II, devoted to obligations..., we found almost nothing that could not be derived from our old doctrinal works, particularly from Pothier's." A. Valette *Mélanges de droit, de jurisprudence et de législation* ed. F.H. and C. Lyon-Caen, vol. I (Paris: Maresa et Delamotte 1880) p. 479, quoted by A. Vigié 'De la nécessité d'une édition du Code civil au point de vue historique' in *Le Code civil* I, p. 39. We have to add that everything that appeared in the *Code civil* under the guise of a contribution by the Revolution (status, marriage, family, property and inheritance) was, as a matter of fact, already doctrinally prepared during the *ancient régime*. This is why "the authors of the Code, the diligent workers involved in this immense task did not at all regard themselves as creators;

they were disciples and not prophets". Esmein 'L'originalité', pp. 14 and 5.

40 The use of the organization and programmes of the codification committees led by Colbert as a pattern is particularly emphasized by Esmein 'L'originalité', p. 18, and A. Levasseur 'Code Napoleon or Code Portalis?' *TLR* (June 1969) 4, p. 763.

41 Engels 'Socialism', p. 107.

42 Sagnac, passim.

43 Esmein 'L'originalité', p. 10.

44 Engels 'Socialism', p. 108.

45 The text of the August 17, 1789, and subsequent drafts are printed in the *Archives parlamentaires* 1re série, vol. VIII, p. 446; vol. X, p. 725; and vol. XVI, p. 704. Y.L. Hufteau *Le référé législatif et les pouvoirs de juge dans le silence de la loi* (Paris: Presses Universitaires de France 1965) pp. 29-35.

46 Sagnac, p. 326.

47 "There exists a universal and immutable law, the source of every positive law: this is merely the natural reason that governs man." (Section I, para. 1) "When there are no accurate laws in civil cases, the judge is the servant of fairness |*équité*|. Fairness is a return to natural law or to established practice |*usage reçus*| when the positive law is silent." (Section V, para. 11) 'Projet de la Commission du Gouvernement |présenté le 25 thermidor en VIII|, Livre préliminaire du droit et des lois' in Fenet, II.

48 *Portalis* goes beyond Jacqueminot's concept. He distinguishes between customs and fairness. The natural law which is revealed in fairness is the ideological source of the whole code, being the final and inexhaustible plug of its gaps. "When there is no law, custom |*usage*| or fairness |*équité*| has to be consulted. Fairness is a return to the law of nature where positive laws are silent, contradictory or unclear." "And when there is nothing enacted or known to give directions, when a completely new fact is brought in question, then we return to the principles of natural law; for even if the foresight of the law-maker is limited, nature is infinite, and it is applicable to everything that may concern man." Quoted from Fenet, I, pp. 474 and 471.

49 "The great revolution..., after the complete annihilation of both feudalism and absolutist police tyranny, translated the economic conditions of life of the newly created modern society into the juristic language of legal norms in its code proclaimed by Napoleon." F. Engels 'Die Rolle der Gewalt in der Geschichte' |1888| in *MEW* 21, p. 458. But, at

the same time, "the pure, consistent conception of right held by the revolutionary bourgeoisie of 1792-96 is already adulterated in many ways." Engels to Schmidt, p. 493.

50 The French Revolution and also *Napoleon*, who was the culmination of Jacobin nationalism and who, later on, degraded it to its own caricature, played a most important role in the development of nationalism. Cf. C.J.H. Hayes *The Historical Evolution of Modern Nationalism* (New York: Smith 1931) pp. 33-83; B.C. Shafer *Nationalism* Myth and Reality (New York: Harcourt Brace World 1955) ch. VI-VIII. Yet scholarly treaties on nationalism seldom refer to the effect of the *Code Napoléon*; indeed, they give the impression as if even the uniform promulgation of laws in French, as authorized from 1794 onwards, were of greater importance. To be sure, the *esprit de province* was only to be overcome after 1804. Portalis was right in saying: "France was nothing but the association of societies. The motherland was common, yet the states were particular and separate; the area was one and the nations were diverse." For "people, when they are under a single supreme authority, but not governed by identical laws, necessarily remain alien to each other; they depend on the same power without belonging to one state. They form as many separate nations as there are different customs; they cannot name a common motherland... We shall no longer be Provençals, Bretons, Alsatians, but Frenchmen!" Quoted from J.G. Locré *La législation civile, commerciale et criminelle de la France* I (Paris: 1827) pp. 252 and 348.

51 Apart from Rousseauism and its "active" form, Jacobinism, Napoleon could also be inspired to the pursuit of codification by the intellectual fellowship that tempted him to rival *Frederick the Great*. Friedrich, pp. 7-14. A *desire for prestige* is also expressed in his St. Helen's memoirs, wrapped as they are in the pacifism of the losing party: "My glory is not that I won forty battles and dictated the law to kings... Waterloo wipes out the memory of all my victories... But what will be wiped out by nothing and will live for ever, is my civil code..." Montholon *Récits de la captivité de l'empereur Napoléon à St. Helena* I, (Paris 1847) p. 401.

52 Cf. also Cauvière, p. 103.

53 "Together with the army, magistrature, university and administration, the Civil Code... formed the *corps intermédiaires*, the 'mass of granite', upon which Bonaparte built his regime." J. Godechot 'The Internal History of France during the Wars, 1793-1814' in *The New Cambridge Modern History* IX, ed. C.W. Crawley (Cambridge: Cambridge University Press 1965) p. 299. He himself also gave testimony of this in a letter to the King of Naples in 1806: "Establish a *Code civil* in Naples; then everything that is not linked to you will crumble in a few years' time, and all that you may wish to preserve will be strengthened.

This is the great advantage of a *Code civil*... It will strengthen your power, for all that is not feudal property will perish by it, and only those of the great buildings will remain, which you'll have erected from feudal tenure. This is what the *Code civil* taught me, and what inspired me to establish it." *Correspondence* XII, letter No. 10314, p. 588, quoted by Cauvière, p. 104.

54 The basic codification of French law was given, together with the *Code civil*, by the *Code de procédure civil* (1806), *Code de commerce* (1807), *Code pénal* (1811), and the *Code d'instruction criminelle* (1811).

55 A classical explanation is given by J. Ray in his *Essai sur la structure logique du Code civil français* (Paris: Alcan 1926).

56 2281 sections of the Code left no "serious gap". Mining was the only area the single paragraph regulation of which proved to be inadequate and required special arrangement done in 1810. Tunc, p. 23.

57 By now, 536 of the 2281 sections of the Code were amended or repealed, the majority of these concerning family law. Amos, pp. 19f. These figures do not by themselves characterize the reality of the Code. Notably, they do not indicate the blossoming of judicial practice in filling the gaps. Before the end of the century, it is only prohibiting divorce (1816) and easing mortgage loans (1855) that laws touching on the regulatory sphere of the *Code civil* were enacted. "The work of judicial practice, however, became far more significant after 1804... The courts, entrusted with the interpretation of the law, paid great attention to the letter of the law as well as the intention of the draftsmen even on the morrow of the *Code civil*'s completion; yet, urged on by practical necessities arising in everyday practice, they dared to create new law. The draftsmen of the *Code civil* themselves urged the courts to carry out a broadly conceived work of interpretation with their intent to propound only general principles." Mazeaud, pp. 72f.

58 As, e.g., Wieacker does this at p. 322.

59 See R. Chabanne 'L'Allemagne napoléonienne en face du problème de la codification' *Annales de la Faculté de Droit de l'Université Jean Moulin* |Lyon| III |1974|, pp. 9-34.

60 G. Lukács *The Historical Novel*, trans. H. and S. Mitchell (London: Merlin 1962) p. 22.

61 See, e.g., E. Müller 'Le Code civil en Allemagne: Son influence général sur le droit du pays, son adaptation dans les Pays rhénans' in *Le Code civil* II, pp. 630-638.

62 Mann, p. 184.

63 K. Marx 'Zur Kritik der Hegelschen Rechtsphilosophie: Einleitung' |1844| in *MEW* 1, p. 380. |"One school of thought, which justifies the infamy of today by the infamy of yesterday..." K. Marx *Critique of Hegel's 'Philosophy of Right'* trans. A. Jolin and J. O'Malley, ed. J. O'Malley {Cambridge: University Press 1970}, p. 132.|

64 Cf. Krystufek, p. 59.

65 A.F. Thibaut *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg 1814) and F.C. von Savigny *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg 1814).

66 Caroni, pp. 125-128, 142, and 172-175; P. Caroni 'Savignys "Beruf" und die heutige Krise der Kodifikation' *TRG* XXXIX (1971) 3, p. 456.

67 F.C. von Savigny *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* |1814| 3rd ed. (Heidelberg: Mohr 1840) ch. 7, especially at p. 57. |Cf. A. Hayward's translation, *The Vocation of our Age for Legislation and Jurisprudence* {London: Littlewood 1831} reprint ed. New York: Arno 1975.|

68 A.F. Thibaut in *Heidelberg Jb. d. Litt.* 1814, pp. 177 and 183, quoted by Wieacker, p. 391, note 48.

69 Cf. Caroni, pp. 133-137, especially at 134, note 223.

70 Eörsi, p. 164.

71 Lukács *Zerstörung*, p. 54.

72 K. Marx 'Marginal Notes to the Programme of the German Workers' Party' |1875| in *MESW* I, p. 328.

73 Following the decree on the bill of exchange, forced in 1848 by increased trade, the *Allgemeines Deutsches Handelsgesetzbuch* (1861) was the first act which was accepted separately by the states of the German Federation and brought about unification of the law.

74 The *Strafgesetzbuch* (1871), *Zivilprozessordnung* (1877) and *Strafprozessordnung* (1877) saw daylight then.

75 Until the turn of the century, more than twenty variations of four fundamental civil law systems (in German, Latin and French) were enforced over the territory of the *Second Empire*. By area distribution, the proportion of the rule of Roman law as *gemeines Recht*, i.e. a subsidiary law transformed into *usus modernus pandectarum*, was 33 per cent, that of the Prussian *Allgemeines Landrecht*, which also became subsidiary later on, was 43 per cent, while the French *Code civil* was used over 17 per cent, and the *Bürgerliches*

Gesetzbuch für das Königreich Sachsen over 7 per cent of the country. Riegert, pp. 49-52.

76 "The German, instead of confining him to himself, must take in the whole world in order to have an effect on the world," as T. Mann makes Goethe say. Mann, ch. V, p. 160.

77 E. von Wildenbruch celebrated the new Code in the first issue of the *Deutsche Juristenzeitung* with these words: "Nun wandelt durch das deutsche Vaterland / Gerechtigkeit im heimischen Gewandt" |Now moves through the German fatherland / Justice dressed in native garb|. Quoted from Seagle, p. 293.

78 B. Brecht *The Threepenny Opera* |Die Dreigroschenoper, 1929| trans. E. Bentley (New York: Grove 1964) Act III, Scene 1, p. 76.

79 Eörsi, p. 165.

80 "Wanting to eliminate Roman law from code-making meant creating a German code without German law." R. Saleilles *Introduction à l'étude du Code civil allemand* (1904) p. 8, quoted by David, p. 54.

81 A. Egger *Über die Rechtsethik des Schweizerischen Zivilgesetzbuches* 2nd ed. (Zürich: Schultess 1950) p. 79.

82 In it, "the organically dynamic unity of the law was transformed into a logically static unity", writes W. Wilhelm in his *Zur juristischen Methodenlehre im 19. Jahrhundert* Die Herkunft der Methode Paul Labands aus der Privatenrechtswissenschaft (Frankfurt am Main 1958) p. 81.

83 Conceptual economy was turned inside out in it. "The structure of the *Bürgerliches Gesetzbuch* had its origin in the pandectists' scholarly analysis of the Digests. However, the Code is not the place to publish a scholarly analysis. The price – namely, the Code's incomprehensibility to the neophyte – is too high." Riegert, p. 64.

84 The whole debate sank into fatigued boredom. The public discussion of one particular problem was the only exception, the one which put the responsibility for damages caused while hunting wild boars, stags, elks, "and hares", on the hunter. No less than thirty members of the Parliament rose to speak and protest against the deprivation of rights hidden in the "and hares" bit. Finally, the hares remained huntable without risk, and the draft of the Code was accepted with 222 votes against 48. Seagle, pp. 292f.

85 Böhmer *Einführung in das bürgerliche Recht* (Tübingen 1954) p. 78.

86 E.g. Wieacker, pp. 491f.

87 At cantonal level, law unification was finished in the middle of the 19th century, nearly everywhere in codification form, which gained most stimulating expression for future federal codification in the *Privatrechtliches Gesetzbuch für den Kanton Zürich* (1856). H. Legas-Herm *Grundriss der schweizerischen Rechtsgeschichte* (Zürich: Schultess, 1935) pp. 142ff.

88 Acknowledging the failure of the cantons' voluntary agreement, there were attempts at broading the law-making authority of the Confederation in the mid-19th century. These tendencies drifted towards the revision of the Constitution in 1872, with the demand for "one law, one army". The partial success of this made possible the unifying codification of the areas of law most exposed to the pressure of economic life (the law of commerce, bills of exchange, bankruptcy, and copyright) in the *Obligationenrecht* (1881), and later the broadening of the constitutional authority for the unifying codification of the whole body of private law (1898).

89 Tuor, pp. 4f.

90 E. Huber's vast work (*System und Geschichte des Schweizerischen Privatrechts* I-IV, 1886-1889), which later formed the basis of the various drafts, came to life as the first step towards sensing the possibilities of Swiss law-unification, at the request of the Swiss Lawyers' Association.

91 The fact that the code was calibrated to regulating *basic* cases only, assuming independent politico-social consideration and moral evaluation within their judicial qualification, and not to arrive at a strict break-down of a set of formally conceived provisions, indicates the directly practical and democratic intention of the *Zivilgesetzbuch*, which laid claim to being understood by those to whom it was addressed. Its *practical realism* asserts itself in many ways: in its volume, lacking a general part and amounting to about two-thirds of that of the previous French and German codes; in its structure, without references, kept to a low number of sections, containing one sentence per paragraph only; as well as in its clear drafting, avoiding complicated syntax as much as possible. The majority of its provisions is *permissive*, i.e. intervening only provided that the parties themselves have not settled their relationship. Tuor (pp. 14f) appraises this as the mark of regulatory liberalism. Its democratic intention was already manifest in the preparatory phase. For the approved text was distributed among the citizens in 1908 (i.e., years before its promulgation) in the official German, French and Italian versions, and also, revealingly, in Romansh translation.

92 Under Article 1, "The Code applies to all legal questions for which it contains a provision in its term or its exposition. If no command can be taken from the statute, then the judge shall pronounce in accordance with the customary

law, and failing that, according to the rule which he as a legislator would adopt |*nach der Regel..., die er als Gesetzgeber aufstellen würde*|. He should be guided therein by approved precept and tradition." |Cf. *The Swiss Civil Code* of December 10, 1907, trans. R.P. Shick {Boston: The Boston Book Co. 1905}.|

93 This was how the *Code civil* won introduction in (among other countries) Belgium, Luxemburg, the West-of-the-Rhine areas of Germany, Geneva, Savoy, Monaco, several Italian states, Holland, and the Papal States.

94 These included Westphalen, and Hannover, which united with the former, and several other German duchies, Danzig, the Grand-Duchy of Warsaw, several Swiss cantons and the Illyrian territories.

95 Las Cases, vol. III, p. 298; vol. IV, pp. 153 and 297.

96 It is characteristic of *Napoleon's determination* that the King of the Netherlands, Louis Bonaparte, after embarrassing procrastination with his brother, accepted only a modified version of the *Code civil* (1809). However, when his renitent kingdom was annexed to the Empire after his fall, the *Code Napoléon* was introduced in its original version (1811). T.M. Asser, 'Le Code civil dans les Pays-Bas' in *Le Code civil* II, p. 816. Napoleon's attitude showed similar determination regarding the establishment of the Grand Duchy of Warsaw, too. Albeit the Polish aristocracy and clergy were decidedly opposed to the anti-feudal French codification, and they also gave expression to this, Napoleon simply stated in the Warsaw Constitution (1807) that he foisted on it that "the *Code Napoléon* will be the civil law of the Grand-Duchy of Warsaw" (Section 69). K. Sojka-Zielinska 'La réception du Code Napoléon en Pologne' in *Rapports polonais présentés au huitième Congrès international de Droit comparé* (Warsaw: Comité des Sciences juridiques de l'Académie polonaise des Sciences 1970) pp. 212ff.

97 He wrote to Louis Bonaparte (1807) that "the Dutch bring up objections, since they are jealous of everything that comes from France. But a nation of one million eighthundred thousand people cannot have an independent code, anyhow. The Romans gave their own law to their allies, why should not France have its own accepted by the Dutch nation?" *Correspondence* vol. XVI, p. 190. Otherwise, he also voiced the *nationalism* hidden behind aspirations for a world-empire: "I want to raise the glory of the French name so high that it will be the object of every nation's envy. I wish to see the day when the Frenchman... even when travelling the breadth and width of Europe, will feel at home all the time." *Mémoires de la Duchesse d'Abrantes* 1831-1834, vol. IV, p. 146. Both quotations are from Limpens, pp. 94 and 107.

98 The *Code civil* remained in force in Belgium, Parma, Naples, Genoa and Lucca; in Geneva and the Jura of Bern, Baden, and several other Rhineland German states, they were satisfied with a few insignificant changes. There were also states where the Napoleonic codes were formally abrogated to demonstrate their independence. After such satisfaction of the national consciousness, however, they finally enacted statutes which were more of a copy of the *Code Napoléon* than the assertion of domestic talents (Holland, 1838; the two Sicilies, 1812; Parma, 1820; the Sardinian States, 1837; and Modena, 1842).

99 The *Code civil* gained introduction as an adapted translation of the original in Greece (1841), Italy (1865) and Romania (1865). Finally, it greatly inspired in the Portuguese (1867) and Spanish (1889) codification of civil law.

100 *Louisiana*, once the property of Louis XIV, got to know French law by way of the *Coutumes de Paris* and the doctrinal work of Claude De Ferrière (*Nouvelle Institution coutumière* I-III, Paris 1692-1702). The colony preserved French tradition in the field of private law as codified first in accordance with Cambacérès' draft (*Old Civil Code*, 1808) and, later on, of the final text of the *Code civil* (*Civil Code*, 1825). Cf. Cs. Varga 'A kodifikációs kísérletek alakulása az Egyesült Államokban' |Attempts at Codification in the United States| *ÁJ* XV (1972) 2, pp. 321-327. – *Québec* in Canada has been able to maintain its French laws from 1663 to this very day. Here too, the will to stay French served as the reason for codification. Codification began in 1866, just because the mother law of France was also codified. The precondition of keeping in touch with mother law was codification by copying the former. The preamble of the *Code civil de Québec* even states this by saying: "the Ancient Law still in use in Lower Canada is no longer printed or commented upon in France; consequently, it is becoming increasingly difficult to procure copies or commentaries." L. Baudouin 'Les apports de Code civil de Québec' in *Canadian Jurisprudence* The Civil Law and Common Law in Canada, ed. E. McWhinney (Toronto: Carswell 1958) pp. 71-89.

101 In the Republic of Dominica, the *Code civil* was received in French (1825), though the common language was always Spanish there; indeed, it was also administered in French until the publication of the Spanish translation (1884). Conducting conscious experiments in order to implant new form and content onto European legal methods and experience led to the Bolivian translation of the *Code civil* (1831). Chile succeeded in achieving this first (1855), and this inspired several countries (Ecuador, 1861; Columbia, 1873) to copy it, and others (Uruguay, 1867; the Argentine, 1869) to give themselves national codes by further developing it. Henry P. De Vries and J. Novás-Rodrigues *The law of the Americas* (Dobbs Ferry: Oceana 1965) passim, especially at p. 191. – The *Code civil* exerted a growing

influence in a similarly wide area of Asia. The principles of the *Code civil*, and later the French inspired draft code of Boissonade were voluntarily used as *ratio scripta* by the courts of Japan for over a quarter of a century (1870-1896). Turkey adopted all of the four French codes. The first codes of Egypt (1876; 1883) came about by the adaptation of the *Code Napoléon*, and its current code, which also inspired Syria to receive it, by a further developed version of the *Code Napoléon*. And finally, the civil codes of the Lebanon (1934) and Venezuela (1942) also have French roots.

102 The translation of the *Code civil* resulted in the complete renewal of legal terminology in *Japan*. The concept of right and obligation, unknown until then under the conditions of Japanese feudalism, were created and made a subject of first discussion at that time. Noda, pp. 43f.

103 The enstrangement of secondary codification products from the original ones was somehow necessary to support the individual image of the received codes by the artificial severance of links to the original. For instance, section 3 of the French-inspired code of Canton *Vaud* in Switzerland (1821) worded: "The judges are forbidden to quote foreign laws or authorities when giving reasons for their judgement, in order to interpret or supplement this code." Mazeaud, p. 88. I have to add that contrary tendencies also occurred, mainly where there was a need to reinforce Civil Law codes in a Common Law environment. In *Puerto Rico*, e.g., which inherited the Spanish *Codigo civil* (1899), former Spanish decisions are still used with "binding force" and all other Spanish matter with "persuasive force", even though it is a member of the United States now, and in spite of the fact that these court decisions were not used as precedents either in Spain or in pre-1898 Puerto Rico. Schlesinger, p. 289.

104 The *Allgemeines Landrecht* remained in force until the enactment of the *Bürgerliches Gesetzbuch* (1900), and, in respect of some of its parts, right up to the present (according to Wieacker, p. 331, e.g., in respect of the building and neighbour law of the German Democratic Republic). Outside the borders of Prussia, it was used only in the territories of Poland annexed by Prussia.

105 With the exception of Burgenland, Croatia, Slovenia, Dalmatia, Transylvania, and, temporarily, in Hungary and Poland, it was put in force only in Liechtenstein (1811). Wieacker, p. 337.

106 The *Bürgerliches Gesetzbuch* was made use of in Europe in the modernizing amendments to the *Allgemeines Bürgerliches Gesetzbuch* (1916), in the re-codification of Greek civil law (1940), and in the codification of the Polish laws of obligations (1933). It was taken into consideration at the preparation of the *Codigo civil* of Brazil (1928) and Peru

(1936), just as in the codification of the Japanese (1898), Siamese (1925), Chinese (1929) and Thai (1962) private law. Its formative influence was most significant where it was sublimated by pandectist traditions. I think in particular of the new Italian *Codice civile* (1942), which was the climax of doctrinal development and reform, ranging from the France patterned *Codice civile* (1865), formed on the basis of the old code of Italian unity, the Sardinian *Codice Albertino* (1837), to the adaptation of German pandectism. Wieacker, pp. 484-486 and 347.

107 The Swiss *Zivilgesetzbuch* exerted a direct influence only in Turkey, in the form of a complete transplantation (1925).

108 Holland introduced four of its basic codes in one year (1838), Romania in two (1864-1865), and Italy in twelve years (1930-1942), albeit original work was conceived here. Indonesia put in force its four codes in 1847, and Dominica, its five codes, in 1882. The series of codes in Haiti (1825-1835), Salvador (1857-1860), Uruguay (1868-1879) and Nicaragua (1885-1895) were introduced in similarly short periods.

109 The most telling examples of these are the *Jonsbok* of Iceland (1281), the *Danske Lov* of Denmark (1682), the Norwegian *Norske Lov* (1688), and the *Sveriges Rikes Lag* of Sweden (1736), still partly in force as the old compilations of domestic laws. Of course, various codes were created since then, but attempts to codify private law failed, indeed joint Scandinavian attempts aimed at a comprehensive codification of civil law (1890-1899) or general law code (*Nordisk Lovbog*, 1948) also failed, in spite of some limited success. Consequently, they have not been able to replace their old statute books with new ones, even today. Orfield, passim, especially at pp. XIII, 281 and 287; XVII; and 304-307.

110 See ch. IV, section 4.

111 See ch. VI, sections 2-4 and 6-8.

112 In *Estonia*, e.g., which achieved independent statehood in 1918, criminal law was codified within a decade (*Kriminaal seadustik*, 1929). I. Csekey A finn és észt jogrendszer |The Legal System of Finland and Estonia| (Budapest: Magyar Közigazgatás 1928) pp. 38-40.

113 *Japan* provides the best example of the consciously instrumental handling of possible codification patterns. The Europeanization of Japanese law began with the translation of the *Code civil*, almost immediately after the rise of the Meiji era, which opened the doors to modernization (1869). After the French-rooted codification of criminal law and procedure (1880), they also contemplated the codification of civil law on the French pattern. The draft,

however, never came into force, even though it was adopted (1889-1891): as soon as the *Bürgerliches Gesetzbuch* was put into shape, it offered a competitive alternative. Sympathy towards Prussian militarism proved stronger than the attraction of French liberalism, and the civil and commercial law and procedure were finally codified in followance of the German pattern (1898, 1899, 1891). Noda, pp. 43-55; Gorai 'Influence du Code civil français sur le Japon' in *Le Code civil* II, pp. 781 ff.

114 "C'est dans le Code Napoléon qu'il faut étudier le Code Napoléon." Proudhon, quoted by E. Gaudemet *L'interprétation du Code civil en France depuis 1804* (Basel and Paris: Helbing und Lichtenhahn and Sirey 1935), p. 24 |Basler Studien zur Rechtswissenschaft, Heft 8|. "The school of exegesis... had the principle that the *Code civil* embraces the entirety of civil law; that every legal solution must be derived either directly, or by way of deduction or induction from the text of the *Code civil;* that every legal problem is finally solved through the process of researching the expressed or implied will of the legislator." Z. Krystufek *Historické základy právniho pozitivismu* |The Historical Foundations of Legal Positivism| (Prague: Nakladatelsvi Československé Akademie Ved 1967) p. 24, note 18/a.

115 F. Larnaude 'Le Code civil et la nécessité de sa Révision' in *Le Code civil* II, p. 909.

116 M. Planiol 'Inutilité d'une Révision générale du Code civil' in *Le code civil* I, pp. 955-963, especially at 960 and 962.

117 Cf., e.g., Ch. N. Fragistas 'Les précedents judiciaires en Europe occidentale' in *Mélanges offerts à Jacques Maury* I (Paris: Dalloz and Sirey, no year) pp. 139ff, especially at 154f.

118 E.g., K. Zweigert and H.J. Puttfarken 'Statutory Interpretation: Civilian Style' *TLR* XLIV (1970) 4, pp. 715ff, demonstrates the metamorphosis of interpretations of code texts by judicial practice, sometimes amounting to formal negation of former meanings, in French and German pracice.

119 "It is a great delusion to suppose that the civil law of France is set forth in the *Code civil*. It is really contained in the *Jurisprudence Générale* of Dalloz, the great French repertory of decided cases," writes Seagle, p. 288.

120 Szabó 'Codification', p. 15.

121 P. Weiss *Hölderlin* (1971).

122 Weitnauer's statement about the *Bürgerliches Gesetzbuch* is quoted by Riegert, p. 70.

123 H. Lange *Liberalismus, Nationalsozialismus und bürgerliches Recht* Ein Vortrag (Tübingen: Beck 1933), p. 5 |Recht und Staat 102|.

124 Cf. L. Szlezák 'A német codifikációs törekvések története, eszméi és jelen állása' |The History of the German Attempts at Codification, their.Ideas and Present Situation| |reprint from| *Gazdasági jog* III (1942) 8, p. 7.

125 J.W. Hedemann *Das Volksgesetzbuch der Deutschen* Ein Bericht (Munich and Berlin: Beck 1941).

126 In the *Third Reich*, topics of declaring someone legally dead, of hereditary estates, of matrimonial and family law, and of the law of inheritance were arranged with intentions of partial codification; these were later invalidated by the American military government of occupation. E.J. Cohn *Manual of German Law* I (London and Dobbs Ferry: The British Institute of International and Comparative Law and Oceana 1968) p. 96. After this, the *Bürgerliches Gesetzbuch* was only amended in connection with the loan contract and the Family Law Act (1946), as well as with the provisions of the Bonn *Grundgesetz* declaring the equal rights of men and women. The latter had to be established by judicial practice alone, without any assistance by the legislature. Riegert, p. 55.

127 The proceedings of eleven years work of the Committee established in 1945 are given in *Travaux de la Commission de réforme du Code civil* I-IX (Paris: Sirey 1947-1957).

VI. ATTEMPTS AT CODIFICATION: COMMON LAW SYSTEMS

1. EARLY ENGLISH DEVELOPMENT

The problem of codification arose indirectly in England, in the form of compromises. The development of English law, its feudal evolution and adjustment to new conditions brought about by the bourgeois transformation, took place under circumstances which determined not only its characteristic contents but also the ideological and institutional framework of its administration and the very nature of codification.

At the time of the Norman Conquest, in 1066, England was not a united state. Its law was divided; it represented a mass of regional laws further differentiated according to the status of the subjects. This dividedness had already contributed once to the fall of the Kingdom, thus its elimination was a precondition of the survival of Norman rule. William the Conqueror created a strong, centralized state. The principal landowner was the King, who granted land only with great discrimination and in such a way as to avoid the development of rival regional power centres. Being the principal landowner also gave the King the status of lord seigneur, he was entitled to everybody's liege. Consequently the regions, i.e. the countries, were never freehold and could not be inherited; their lords were always dependent on the King.

Similar *centralizing aspirations* were also seen in the field of law. Because the King could not dispense with the courts, which administered justice under the local customary

laws, the jurisdiction developed by him (operating first in the royal court and later through sessions held all over the country by itinerant justices) was in principle only competent in cases involving the Crown. But the authority of the sessional courts gradually increased, and this was not diminished even by the Statute of Westminster (1285) which was exacted by the feudal lords. The new feature is that the formulae involving the Crown's interest, the writs, which were previously freely extended at need, were now limited, but only formally, since the practical broadening of the authority continued on the basis of the *fiction of analogies* with relevant writs.

The monarch's central power was so consolidated as a result of these struggles and compromises that it made possible the maintenance of the monarchical framework even during the upheavals of a bourgeois revolution. And the royal courts which, in principle, had exceptional competence up to the middle of the 19th century, "succeeded in moulding the manifold customs of the different shires and hundreds into one uniform law, *common* to all the land, the 'universal custom of the realm'",[1] by the second half of the 13th century, a unique feat in Europe.

Under such circumstances, neither the requirement of unification, nor that of consolidation emerged: the doctrinal works of Glanville (around 1187) and Bracton (around 1256) were sufficient for the arrangement and systematization (concentrating on the analysis of the writs' procedural formulae) of the evolving law.

The *differentiation of the law* only began at the end of the 13th century. Although legislation by parliament was not yet the practice (in 1297 only the imposition of taxes needed the consent of Parliament), the closure of the list of writs moved the royal courts towards a contrived legal development of a *processual approach*. Since the royal courts could only become competent when ready-defined writs could be issued, the circle of acceptable analogies was expanded. Following the principle of "Remedies precede Rights", the interpretation of the legal titles to competence as defined in the writs became the basis of procedure, indeed the core of legal development. This technique resulted in considereable development, but was not at all

resilient. Its limitations soon became obvious, and since no other remedy was available, parties lacking legal remedy were already petitioning the King as early as the 14th century to take measures over and beyond the limitations of the law. But the exceptions again became the rule and the individual consideration of the *aequum* was gradually replaced by another, similarly stifling system of rules, a kind of procedure built on the *common law* practice of the royal courts as the practice of Chancery *equity*. At first it coexisted and later competed with the former.

The evolution of the Court of Chancery in competition with traditional royal courts indicates in itself the tendency of the latter to become independent. The Parliament also played a legislative role distinct from the Crown (indeed opposed to it) from the 15th century onwards. The development of this sophisticated *checks and balances* mechanism made not only political processes highly complex; it also made the structure and development of the legal system more differentiated. We have to consider the role they were able to play when the continuity of English legal development was endangered by the rising middle class, if we are to properly appreciate their effect. On the European Continent, the reception of Roman law principally served the rejuvenation of Germanic laws and their adaptation to the new barter relations; also it was able to fulfil a certain unifying function as a general auxiliary source of law. This was the time when the *comune ley* was hammered out by the royal courts in England. It became ideologically established, having been built up from one decision to the next, like some *universal immemorial custom of the Realm*. As for legal unity, this law really arose as a *gemeines Recht*. Adaptation of law circumventing the rigidity of common law was achieved through establishing the law of equity as an independent system.

Although the elaboration of the possibilities of the reform of law was successful in meeting the satisfaction of socially felt needs without transplanting foreign models, it could not dispel the *necessity of arranging the law*.

At the peak of absolutism, when Archbishop Reginald *Pole* fled to Italy because of his disagreement with Henry VIII, he

drafted his views for the King, conveyed by Starkey (1534) thus: "our law and ordur thereof ys overconfuse... Therefor, to remedy thys mater groundly, hyt were necessary, in our law, to vse the same remedy that Justynyan dyd in the law of the Romaynys..." The fact that Pole is the first to put into words a demand for codification, but that he is also the last to visualize it by the Europeanization, i.e. the receptional romanization of the law, demonstrates the growing power of traditionalism. He still views codification as anti-Norman, since "the grete schame... to be gouernyd by the lawys gyuen to vs of such a barbarouse natyon as the Normannys be" is one of his considerations.[2]

Later, codification is uniformly regarded depending on the reinforcement of national law. The programme of *Discourse on the Reformation of Certain Abuses* (1551) also drafts a demand for consolidating the law: "the superflous and tediouse statutes were brought into one summe together, and made more plaine and short."

Finally, the draft of Attorney General *Bacon*, around 1616, the *Proposition Touching the Compiling and Amendment of the Laws of England* is a synthesis of all the points. In its present state, the laws "are worse than showers of hail or tempest upon cattle, for they fall upon men", and what he propounds as an urgent remedy, a call to be repeated often in the 19th and 20th centuries, "is not to the matter of the laws, but to the manner of their registry, expression, and tradition: so that it giveth them rather light than any new nature". Partly, he recommends the digesting of common law: the creation of a compendium of cases, "to be used for reverend precedents, but not for binding authorities". And on the other hand he recommends the recompilation of the statutory law, which would include the total sum of the laws in one body. Bacon did not promise changes in the sources of law, either. In his concept, *common law* and *statute law* would remain separate; he would only bring temporary order into the mass of the haphazard pile of material.[3]

Anyway, this recommendation, just like another prepared in 1620, having proposed the abrogation of nearly 600 statutes,[4]

remained a voice crying in the wilderness. Efforts reminiscent of codification are only encountered in two resolutions of the House of Commons in 1650, under *Cromwell's* government, ordering that the Acts of Parliament concerning jurisdiction "be bound up in one volume", and "all former Statutes and Ordinances now in force" be revised and compiled in an orderly manner.[5]

All that was achieved was a half-solution, namely, the system of *law reporting*, which began in the middle of the 16th century and which is associated with the names of Plowden, Coke and Saunders. The demand that the law be put in order was finally met when the growing mass of common law was entered in register; only up-to-date doctrinal works could be of assisance in surveying legislative products thereafter.

. THE DEVELOPMENT OF CODIFICATION IN 19TH-CENTURY ENGLAND

The *compromise* between bourgeois and feudal elements during the Restauration resulted in a number of concessions by the King, but not for the "lower" classes. Especially they were the ones to suffer right through to the 1820's because of the feudal remnants and the uncertainties of the un-codified common law's penal provisions. Within 200 years, 250 major crimes were legislated against, specifying punishments intolerable in the 19th century. These were only to alleviate in 1820. But this could not dispel the chaotic character of the penal provisions of common law.

A committee was ultimately set up in 1833 to study the *digesting* of penal laws. The task of the committee was to formulate the penal provisions of *common law* and *statutory law* separately and in comprehensive acts, and then to unify them. Twenty years later, the Lord Chancellor was still dropping hints with a conspicuous lack of comprehension: "collect a set of bad treatises and give them a binding effect". Some sixty judges and lawyers showed similar incomprehension; indeed, one of them almost visualized certain failure, since the concept was "much more fertile in raising doubts, than happy in resolving them".[6] In 1863, the new Lord Chancellor, Lord Westbury,

proposed the digesting of the complete material of the law, with the prospect of unifying judge-made law and statutory law. Three years later a committee decision was made that the code should fulfil the role of a manual, and that the common law should continue to be the exclusive authority. The initiative fails even this way, indeed, much faster than the preceding one.[7] An Oxford professor wrote a pamphlet in 1867, recommending the separate digesting of case law and statute law, their consolidation and, eventually, their final unification "into a single Code".[8] At last, the codifier of India, Sir James Stephen, returned in 1877, and his work was an unqualified success at home as well. Yet his proposal to compile a code of evidence first, and then penal, substantive and procedural, codes, also ended in failure. Whenever the requirement of democratism comes into collision with the imperative of efficiency, the latter suffers. Innumerable people of responsibility emphasized: it would take years of sittings in the House of Commons to debate in detail the draft of an Act of the extent of a code. Even though any bill could be passed on the recommendation of the leading legal bodies, the House of Commons would see such a move as the surrender of its traditional position.[9]

Lacking the urgency that would have made codification an economy-grounded requirement, the very idea of codification was regarded as *doctrinaire* in England right to the end. Nevertheless, the development of English law was marked by fragmentary modifications and amendments. It was like an old pair of trousers, patched so many times that the original cloth was invisible under the multitude of the patches.

Instead of codification, various *substitutes* for codes came into being: consolidation acts, repealing invalid acts, and consolidating the effective ones. More than 100 such Acts were passed in 60 years around the turn of the century in England alone.[10] However, industrial and commercial progress brought in its wake codification in the field of barter relations, which endeavoured to unite statute law and case law and thus the substitution (at least in respect of the past) of the latter in the respective field of regulation, such as the Bills of Exchange Act (1882), the Partnership Act (1890), the Sale of

Goods Act (1893) and, finally, the Marine Insurance Act (1906). But the other acts passed around that time only meant clearing a path that became momentarily passable in the jungle of statutory law.

Thus, codification movement hardly brought anything worthwhile in England in 80 years, apart from a few partial codes, even though Jeremy *Bentham*, who was perhaps the greatest stimulator of codification and whose passionate appeals and letters on codification were studied by dozens of monarchs and state presidents from Spain to Greece, from America to Russia, lived and worked in England. Even so, he was unable to see a single draft of his worked out in viable form and put in practice. By far not by chance, his actual achievements remained substantially more modest than his memory, perpetuated as it was by his ardour.

3. UNIFYING CODIFICATION IN BRITISH INDIA

The idea of codification was received with more understanding in British oversees possessions, where English law was naturally intruded, but where the traditions of English law, historically produced and reproduced by British society, could not be embraced.

An example of this is British India, where British arrangements were imported, but where domestic conditions were more reminiscent of mediaeval European continental law. Just one year after the East India Company secured the right to govern Bengal (1771), Warren Hastings' proposal to lay down the principle of non-intervention to the law was accepted. The law that the English intended to support was divided by castes and religions and it was absolutely irreconcilable with European concepts in respect of its penal provisions. With the introduction of the uniform system of higher courts, it was essential to carry out certain modifications. All this required decisions in *justice, equity and good conscience*, which in turn resulted in the assertion of *English principles of law*, if for no other reason than the legal culture of the English judges. The neces-

sity of employing indigenous experts who were at home in the local languages and legal customs (and this did not favour even the minimal guarantee of uniform administration of law) added to the difficulties. Thus a reorganization of the law became acutely necessary, and Parliament acknowledged this when the charter of the East India Company was renewed (1833).

The task was manifold and full of contradictions: the aim was partly law-unification and partly the *preservation of the indigenous, traditional legal systems*, and partly the assertion of basic English legal principles.

At first, they considered the separate codification of Islamic law, of Hindu law, and of *lex loci* (of English origin) which was to be administered distinctly. Later they concentrated on evolving a uniform series of codes.

The draft of a penal code based on Indian, English, French and even Louisianan sources was ready as early as 1837, but those which were eventually passed, the Code of Civil Procedure (1859), the Penal Code (1860), and the Code of Criminal Procedure (1861) were only completed after nearly three decades. The codification of civil law also began in 1861. Several dozen part-codifying Acts were passed before 1881 in the field of civil law. Then the movement gradually petered out. Objections were raised in England on the pretext of "overdoing legislation". There were also doubts about the benefits of codification. Faced with the English attack, the Indians were forced to demonstrate that they were never anti-codificationists, since their 1000 year old legal traditions were code-like thanks to the influence of Manu; but the change eventually came for much more fundamental reasons. Having codified the important fields of procedural law, penal and civil law (which were pushed upon most by the lack of codification) and having thus attained "one of the most remarkable, and... perhaps the most lasting, of all the achievements of British rule in India",[11] and finally, having encompassed the English and Indian laws effective in India in a fifteen volume collection, they had solved the urgent problem of arranging the law; and neither the indigenous nor the colonial laws proved mature enough to achieve more than this.[12]

"In India it was necessary to make new law on a large scale to meet the needs of the new civilization which British rule was introducing; and, since much of this law was administered by unprofessional magistrates to comparatively primitive peoples, and sometimes to barbarian tribes, it was necessary that it should be stated shortly and simply. Conditions were far otherwise in England. It was much more difficult to codify an elaborate body of law which had had a long and a continuous history. And since this body of law was... regarded by very many as a possession of which the nation was proud..., it was politically very difficult to carry any measure of codification."[13] Or, in other words, British set-up and British law were in an endangered position in India to such an extent that codification imposed as the only solution. The consideration that the most effective factor in the national unity of India was the unification of law, and that codification was the best way to achieve this, became increasingly clearly understood.[14] The codes became means adapted to Common Law techniques of administering and developing the law. They were a clean *start for modern legal development*, yet they did not influence the system of case law, which was introduced in India too. The Penal Code, for instance, lay down abstract *legal principles* although it did include *riders on borderline cases*, a practice adopted in the United States during the 19th century and still used in today's restatement efforts.

4. CODIFICATION AND BRITISH LAW EXPORT TO THE COLONIES

British Indian codification was followed by a codification movement that embraced practically the whole of the British colonial empire.

Comprehensive codification was only considered in Victoria, in the form of a General Code (1885) comprising 3244 sections (until its impracticability became obvious after a few years),[15] but Criminal Codes were enacted in Canada and New South Wales (1883), a Crimes Act in Victoria (1890), a Criminal Code Act in

New Zealand (1893), and yet another Criminal Code in Queensland (1900). The Indian codes of civil law and procedure, in addition to an Evidence Ordinance were adopted by Ceylon and the Straits Settlements; St. Lucia, St. Vincent, British Honduras and the Gold Coast adopted a Criminal Code prepared for Jamaica in 1877, but not enacted there; Grenada received an Evidence Code (1897), a Criminal Code and a Code of Criminal Procedure; while Mauritius and the Seychelles introduced a British inspired Penal Code to supplement four already enacted French codes.[16] There is, in consequence, a genuine analogy to codification in British India, yet similarities in concrete terms are rather insubstantial.

The decisive factors in the case of India were the preponderance of the indigenous population over the colonists and the fact that the masses which came under English rule possessed extraordinarily strong legal-cum-religious traditions. Therefore unifying reform of the law was one of the primary aims of codification in India. Beside this, the importation of English principles of law and the possible preservation of traditions only played a subsidiary role. In the other colonies, however, the Britons did not have to reckon with such vast masses of indigenous people. The natives' aboriginal law did not have so much significant tradition and was not deep-rooted. Thus codification served the *transplantation of deliberately primitivized English law.* The majority of colonies were made to enact more or less identically worded penal codes and the three Acts partially codifying English civil law. With the exception of India, colonial codification did not aimed at reforming the law; it got its incidentally reforming character through the adaptation of the Indian codes and/or the adapted primitivization of English law. Moreover, it did not serve the deliberate unification of law.

5. PRIMITIVIZED LAW ADAPTATION IN THE AMERICAN COLONIES

The thirteen English colonies established during the early 17th century, which later formed the United States, were not

only remote, but also weak links in the English colonial empire. Their inhabitants were made up in no small part of members of religious minorities and others who did not follow the guidance of the case with undivided enthusiasm: wherever he settled, the English subject took with him the law of his motherland, and applied it, if his circumstances allowed.[17]

The colonies formed in North America adopted in principle the laws of their mother country, but they not only adapted them to their own specific circumstances, but also further primitivized them whether they wanted to or not, owing to the lack of collections of cases and text-books, and to the prevalence of lay judges. Under such circumstances, English law was weakened not only because it needed to be adapted and because of legal amateurism, moreover, "ignorance",[18] but also because of the peculiar insistence of the religious minorities on basing decisions on biblical norms wherever there were gaps in the law.

The voyagers of the Mayflower were led by fear of judicial despotism when they gave a code to their colony (acknowledged in 1629 under the name of *Massachusetts* by royal charter) fourteen years after their arrival. The early initiative of the *General Court* (1634) was not successful. After the rejection of *Moses his Judicialls* (1636) and the introduction of *The Bodye of Liberties*, the compilation by another preacher (1641), they finally accepted the *Book of the General Laws and Libertyes*, a code profane in contents (1648). This became the source of the American colonial codification wave, which resulted in the enactment of codes in 13 colonies within half a century.

These could not be mature codifications: they were created as a temporary remedy to a legal emergency. They did not last long, either. They were modified or replaced by new codes three or four times by the 1680s (e.g. the *General Fundamentals* |1636|, enacted in New Plymouth). But they represented a new social and legal start, adopting the organizational experience accumulated in those colonial laws. This is also indicated by the fact that the Middle Colonies (New York, New Jersey and Pennsylvania) introduced codes in the year of the establishment of English rule (*Duke of York's Laws*, 1664). As soon as they had fulfilled

their primary function, they were superseded by independent colonial legislation. They soon sank into oblivion.[19]

6. CODES AS A MEANS OF FOUNDING A NEW STATE

The Declaration of Independence (1776) and other documents of the Federation kept silent about the law to be applied in the United States. This resulted in a muddled situation in the legal map of the area made up of colonial legislation, English law reception and the legislation of the new states. New York State felt obliged to create a complete register of the effective sources of law in a separate Act (1778). The requirement of establishing order in law was satisfied by consolidating collections. This was the reason for the introduction of the New York Revised Statutes (1828), and of the Massachusetts Revised Statutes (1836), though a general, comprehensive codification had been decided upon there earlier in the year.[20]

The *codification boom*, a movement reminiscent of the dynamism of the American heroic age, began only in the middle of the 19th century in New York State. That was the time of the early economic growth, that eventually made the United States the world's major industrial state, once uninterrupted immigration had been assured and the Civil War ended. New York was one of the leading industrial states; its trade grew fast and its population increased rapidly. The ambitious lawyer, David Dudley *Field*, also played a role. He started a press and propaganda campaign in 1837. He scored his first success and his most enduring achievement by accepting the Code of Procedure (1848), the work of a committee. Code drafts of civil and criminal procedure were also completed within a year, while the effective Code of Procedure went through a continuous metamorphosis. It was modified in 1849, 1851 and 1852 and several times thereafter, until it was replaced by the Code of Remedial Justice (1876), which subsequently changed to the Code of Civil Procedure (1877), and finally to the Throop Code (1880). It was the proliferation that turned the original collection of 391 sections enacted in 1848 into a 3441 section monster after

two further modifications (1890; 1897) of the 1880 version, until it was reduced to manageable size (Civil Practice Code, 1921).

Various committees laboured over other drafts by Field, several of which reached the Bill stage (Political Code, 1860; Penal Code, 1864; Civil Code, 1865). Their passage was full of ups and downs. The codes of criminal law and procedure were finally enacted in 1881; but the drafts of the political and civil codes failed for good due to the resistance of the legal community.[21]

It soon became clear that the fruits of codification were harvested by others. The Code of Procedure (1848) was eventually adopted by 31 federal states (by 20 of them within 20 years); 24 of these states also adopted the New York's Code of Criminal Procedure, and 5 enacted civil and political codes on the basis of the drafts which had failed in New York, while 4 enacted penal codes of the same origin. This is all worthy of note, since it shows that the codification movement, supporting real needs and kept alive by all possible means, gained great strength in Common Law where this law was at its weakest: in civil procedure, where codification served as an instrument of reform, introducing, among others, code pleading.[22] Essentially similar reform tendencies furthered the success of the codification of criminal procedure, since this was precisely the field which suffered from the particularism of English legal development, hemmed in as it was by specific historical conditions, as well as by its apparently autotelic technicality.

New territories joined the United States in the middle of the 19th century, and their entry into the Federation again demanded codification. For there had been a *legal vacuum* in the majority of the new territories. In some areas the law of the jungle prevailed. In others foreign, mainly Spanish traditions had been inherited. California, for instance, was formerly under Spanish-Mexican rule. When English-American law was introduced there after it had become a new member of the Federation (1850), it came with the adoption of the codes of civil and criminal procedure, adapting the Field's drafts, which were in turn exchanged for the series of Political Code, Civil Code,

Penal Code, and Code of Civil Procedure (1872; 1874). This re-codification proved to be a significant event in the formation of the United States. Whatever the contents of Field's codification in the State of New York, it is a fact that it encompassed the condensed experience of regulation by a nascent English-American law. Where it was acutely necessary to acquire these experiences from one day to the next, they were destined, almost independently of their intrinsic value, to become the *sources of a new legal set-up*. This is how it happened in Dakota, a part of the United States since 1803, but inhabited only by Sioux Indians (apart from some two thousand white settlers) until 1858. When the state's legislative assembly first congregated (1862), it enacted a rudimentary Code of Civil Procedure, as well as a Code of Criminal Procedure, to which a Code of Penal Law (1863) was added later, soon followed by the enactment of the Field drafts themselves (Penal Code, 1865; Civil Code, 1866; Code of Procedure, 1868; and Code of Criminal Procedure, 1869). After this sudden change, all of these were re-shaped in the form of a Revised Code (1877), and this was again followed by re-codification in 1895 in North Dakota, and in 1903 in South Dakota.[23]

It seems astonishing that both *Bentham*, who had also fired the United States with the fever of codification,[24] and *Field*, in company of their allies, failed in their ambition to codify. Their scheme was only realized to the extent and in the fields urgently needed by local legal development. Yet their work was not entirely wasted despite its failures: codification became the means of mediating pioneering experiences of forming a legal set-up throughout the American continent. There are hardly a dozen states, where codes were created as a result of the work of inner forces. Though an apparently general codification (Revised Code of Laws, 1860) was carried out in Georgia, which came under English authority in 1732, this collection, renewed by the 8000 sections and five volumes of the Code of Georgia (1895), was nothing but a compilation of the law already in force. Its indecisiveness is shown by the fact that, although in its own wording it became effective by enactment, each of

its sections were annotated by quoting earlier case law or statute law.[25]

Credence must be given to the view that Field's struggle was a "popular" aspiration in the strictest sense of the word. "Almost singlehanded he carried on against the New York bench and bar (notably against Chancellor Kent) a campaign for codification of the common law. This reform, which Daniel Webster called 'the wildest and weakest argument of the age,' was conceived as a protection of the people from lawyers."[26] Yet, if we compare Field's profession of faith with the actual product, the result is an almost unbridgeable gap. "While the Code was small, the decisions as to what it meant were many. The statute itself was amended from year to year, and the decisions under it were gathered into series of 'Practice Reports'..." The code was "subjected in its passage through the legislature to alterations, which perverted the effect of many provisions and desstroyed the harmonious relation between them and others; amended at nearly every subsequent session, sometimes by more than one act, and often in order to affect the decision of a particular cause; nearly every important section has now had so many amendments tacked to it (which in turn have been repeatedly amended, repealed and restored), that the whole presents a tangle, at the sight of which the student and the foreign jurist stand aghast, and through which even our trained lawyers find it difficult to pick their way".[27]

When one is to enquire into the reasons for this result at variance with itself, one gets only uncertain answers. The codes of the American heroic age were full of provisory and random measures generated by unclear principles; they fell prey to illusory brevity, and were more like legal textbooks.[28] They provided a setting for meaningless generalized principles, useless in the practice of common law traditions; indeed, they were "built up under a microscope".[29] They were not even considered as a break from the by now burdensome inheritance of common law, thus they were soon degraded into an almost subsidiary source of law.

As a matter of fact, all the above mentioned factors contain some partial truths, but they do not hit the nail on the

head. Pound seems to have given the best description, when he related the concept of American codification, full as it was with utopian rationalist illusions, to natural law influences. As he explained, the failure of the codification movement was logical, indeed quite desirable, since it could only be *immature* in the legislation of the formative era.[30] This explains the fact that codification only provided some *temporary* solution. This is why, in the final analysis and besides its positive aspects, it hindered the theoretical development of the American law; when all is said and done, it *discredited the codification idea* for a long time.

7. SPECIAL ASPECTS OF CODIFICATION IN COMMON LAW SYSTEMS

British and American codification efforts have been nothing but a struggle right up to the present day: apart from initiatives that bore no fruit nothing has been achieved in almost 500 years.

Under such circumstances it is even more remarkable that the idea of codification inspired not only enthusiasts such as Bentham, but also thinkers respected precisely for their adherence to the traditions of the culture of Common Law. *Austin* was not alone in the second half of the last century in believing that the natural course of legal development was from the fluidity of morality to the establishment of codified law.[31] *Pollock* was of the same opinion, admitting: "I am a strong believer in codification," and that "no better reasons than ignorance, timidity, and the extreme cumbrousness of our legislative procedure, stand in the way of our doing it at least as well as our neighbours have done." Indeed, *Maitland*, the admirer of German codification, had similar views.[32] Naturally, opinions diverge. The *Law Times Journal* reproduced one of his articles, first published in 1848, a few decades ago in *facsimile*, according to which "the law of England has swollen to an unmanageable bulk... There is but one cure and that is codification".[33] Nevertheless, also the views are popular, holding that, in case of codification, "much of the detail would thus

be removed, but respite can only be temporary. No code can provide for the future except in generalities".[34] It is natural that deep-rooted anti-codification attitudes are put in like terms; the main lesson lies, however, in the sources of opinion.

A contemporary study mentions the following factors in explanation of the non-codified state of English law: the British mentality; reticence; national conceit due to unbroken development over many centuries; the non-divided unity of common law; lack of the reception of Roman law; practical legal training; the system of obligatory precedents; the fragmentary character of statute law and its practical application which involves interpretation according to the principles of common law; and, finally, the fragmentary nature of social reforms and, particularly, legal reforms.[35] As far as the context of the present study is concerned, I consider the *unity of law* which has prevailed ever since the 13th century and continuous evolution (by means of compromises) from feudalism to present-day capitalism to be the decisive causes. Reflecting on the problems of the European continent, *Bacon* concluded in England: the trouble lies not in the matter of the laws, but in the "manner of their registry, expression, and tradition".[36]

It was the conclusion drawn in one of our earlier chapters that the need to clarify the law hardly ever resulted in comprehensive codification, save perhaps in regimes reminiscent of the rule of Justinian or more recent absolutisms. The question is whether the traditions of *British parliamentary procedure* and democracy and the frequent changes of governments favour the appropriate preparation and implementation of codification or not.[37] Renewing the law in the form of codes still took decades of work on the Continent, even though it was an imperative need. Meeting the relatively ephemeral need of organizing English law by the means of codification would mean giving up ancient traditions of a millennium, the restructuring of the form of law, leading to a change that would "set a dangerous precedent"[38] with unforeseeable consequences. And it would involve a parliamentary procedure which might, by rending asunder the barriers of its own traditions, perhaps question the whole content of the law.

The majority of writers envisage efficient codification as one that would replace the whole system of *case-law.*[39] But this would be tantamount to perverting English *traditions*. Thus the idea of codification has always proved to be unworkable in practice. Field's Code of Procedure (Section 389) and Civil Code (Section 2033) also surrendered this possibility, and only called for the cancellation of provisions irreconcilable with the codes, something specifically demanded by the California Civil Code (Section 5): "The provisions of the code, as far as they are substantially the same as existing statutes, or the Common Law, must be regarded as continuations thereof, and not as new enactments." This is also the fundamental principle of the English partial codification Acts. The Bills of Exchange Act (Par. 2, Art. 97), for instance, also recognizes the reconcilable common law rules as being unchanged and obligatory. This is the logic why the huge quantity of British and American legislation has no real analogy in continental legislation. The former are not law-alternating but law-reforming Acts, which not only leave common law precedents unchanged, but are themselves sources for judicial practice only through their reformulation and interpretative (i.e., 'distinguishing') actualization in precedents.[40]

Moving from the essential to the symptomatic, one could find various factors of psychological relevance, among them the aversion, indeed, the fear of "the first |uprising of the bourgeoisie| ... entirely fought out",[41] and its product: codification as symbolized by the name of Napoleon. Dislike of revolutionary methods, and the *preference for reforming methods* (which is also a consequence of the compromise of the English bourgeois transformation in the guise of traditions) is another such factor. And so the "highly organized professional bar", i.e. the *legal fraternity*, is an undoubted beneficiary of the existing situation, quite apart from the conservatism stemming from its inherited and class privileges.[42] Indeed, I could also point to the naive, but presumably historically well-founded opinion: "If citizens will only realise that law is not something like a disease, to be avoided, but that it enters into every transaction they undertake, they can demand that in their

own interests it should be clear and accessible."[43] But neither the exploration of causes, nor any explanation of splendid isolation can help beyond a certain point. By now the prevailing British and American law has gone beyond the limits of perspicuity.

8. SUBSTITUTES FOR CODIFICATION IN COMMON LAW DEVELOPMENT

Precedents filled about 150 volumes in England in 1794; the number of these increased to about 500 by 1848, and to 6000 by 1917. In 1930, the number of the *Law Reports'* volumes reached 450, even though they only provided an incomplete and not even authenticated collection of cases from 1865. The series of *Halsbury's Laws of England* (1908-1917), a text-book that systematically surveyed English law, quoted almost 300,000 cases.[44] The number of volumes of precedents in the United States was estimated at 10,000 in 1917 and 18,500 in 1923. The yearly increment of the *National Reporter System* in 1958 was approximately 108,000 pages. A total of 2,300,000 cases were estimated by the late 60s, which increased at the monthly rate of some 22,000, comprising about 1,500,000 words of decisions by the US Supreme Court, 18,000,000 words by other federal courts, and finally 57 million words by the state courts.[45] Around the end of the last century, Tennyson's poem, *Aymler's Field* told of a "codeless myriad of precedents". An official statement made by the Law Reporting Committee in 1940 indicated the trend of development. On the pretext of strengthening the case-law system, the Committee felt obliged to point out that any further growth could only result in "a rubbish heap".[46]

Turning to *legislation*, there were 101 volumes of statute laws in 1917 in England, instead of the 40 that existed in 1848. Confusion was evident, when a judicial ruling made in 1842 enlarged upon the interpretation of an Act which had not been in force for fifteen years, or when an 1858 Act repealed three Acts which had already been revoked twenty years earlier.[47] When the statute law revisions began, a single Statute Law Revision Act

(1867) abrogated 1700 other laws.[48] The position of United States statutory law is in an even worse shape. The incomplete material of federal law alone, the Federal Register, consisted of 3,000,000 pages in 1963, and, at the same time, the US Code of Federal Regulations, having registered 250,000 statutory changes, contained current laws of administration in 700 volumes.[49]

The chronic swelling of current law in England and the United States brought with it the need of "not only inevitable but immediate" consolidation of the law.[50] *Revision* and *consolidation* became the most practical forms in England. The efforts at codifying criminal law that began in 1833 led to the enactment of seven Criminal Law Consolidation Acts within three decades. A total of 109 consolidation Acts were enacted between 1870 and 1934. Their effect may be seen in five consolidation Acts passed in 1952-1953, whose 1,247 sections consolidated and harmonized 368 earlier statutes.[51] The United States also attained the most spectacular results in the rationalizing of statute law. Almost every state completed the revised collection of statutes in Revised Statutes volumes. As a rule, they have no force in law, and are frequently annotated. And even if they are not authenticated (they have the force of *prima facie evidence of existing law*), they are widely used owing to their up-to-date character and good indexation.[52] Consolidation of law is also extensive at a federal level. The Revised Statutes (1873), the federal Criminal Code (1909) and Judicial Code (1911) were followed by the US Code (1926), which has been revised ever since about every seven years, a collection under 50 titles, giving source references in notes in the margin of each section. The codification and congressional enactment of the law that had been revised and harmonized under each of these titles began in 1947.

The states' *uniform legislation* is also to be mentioned. A movement was started back in 1889 by the American Bar Association under the chairmanship of Field for the unification of the member states' law. Success only came after 1912, however, and this was a result of the establishment of the Conference of

Commissioners on Uniform State Laws. So far, 80 of the already completed 1,000 drafts of statutory provisions have been recommended to the states for enactment; some 100 Acts were passed in 51 states on the basis of these. Three of the drafts were accepted by all of the member states, 12 of them by at least 30, and 7 drafts by at least 20. These statutes, like the draft of the Commercial Code (1950), relate mainly to commercial life. Their unifying effect is diminished, however, by their diverging interpretation, and their social importance by the circumstance that they shy away from any radical reform in order to find as wide an acceptance as possible. Thus they preserve legal development, yet are still suitable for partially satisfying the need for replacing common law.[53]

The *Restatement of the Law* is without doubt the most noteworthy as far as substitutes for codification are concerned. Restatement has been aimed (though only through persuasion) at moving away from the sole reliance upon the body of common law: at reducing the jungle of case law principles into clearly arranged system of general principles as developed with logical coherence. The American Law Institute (established in 1923), with the cooperation of leading judicial and lawyers' associations and foremost representatives of jurisprudence, began the restatement of common law on the field of ownership and trade. They also drafted *model codes* (in criminal law and procedure, evidence, and juvenile criminal procedure) up to 1944. The transitional character of this venture is indicated by the following description: "Even though in principle all this is only the exposition of the law generally accepted by the courts, it still appears as a code. The Restatement exposes the law as a series of clear, legally ordered provisions."[54] The Restatement of the Law of Contracts (1932), for instance, reformulates the huge mass of the principles in precedents in 609 sections; each section is followed by explanatory comment and illustration, which throws light on marginal cases by means of examples; and a 100 page index and register completes the work.[55] But the Restatement is only a private work. The judges may or may not use this collection or, more precisely, its state version sup-

plemented by State Annotations (with only about a 2 per cent difference). It is up to them.[56]

In fact, the Restatement is nothing but a doctrinal summary: a vade-mecum, serving as a time and energy saving guide for the weaker brethren. "This restatement of various branches of the common law by law professors is only another example of Justinian's method except for the fact that it is being accomplished by a private foundation."[57] American practice is inclined to utilize private codifications of the Restatement as codes, though it regards them in principle as a doctrinal source, as a state of the law before codification. "A work such as the modern American Restatement of the Law is no subsitute for a code. It may indeed be regarded as the indispensable spade-work upon which a code may be reared... In the same light we can contemplate the thirty-seven volumes of Halsbury's *Laws of England...*"[58] The reason this parallel may awaken our interest is that Bryce took a stand some 70 years ago: "I have heard an eminent judge |the late Lord Justice W.M. James| of our own time observe that the easiest way to codify the law of England would be to enact that some eight or ten established text books... should have the force of statutes."[59]

The British and American revision and consolidation, as well as restatement, of the law, and even some textbooks, are *codification-related* phenomena. In fact, they have had a *de facto* codification substitutive role to play in their own context. Owing to the quantitative reduction of the body of laws they have achieved and their systematizing-rationalizing effect, the codification needs which bring about codes elsewhere are eminently satisfied by them. And this indicates again that the demand for codification is an in itself amorphous, socially shaped phenomenon, that insists on and meets its satisfaction in one or another way. Consequently, if there is no adequate response to the challenge, the deficiency will not suppress the need; it will only *deform* its satisfaction and adapt it to the given conditions.

Thus the remark that "a good textbook has often been the foundation of a code, and in the meantime is not a bad substitute"[60] cannot be seen as unrealistic in the world of Common

Law. The connection between *doctrinal development* by books of authority and *attempts at codification* is a well-known fact in England. It is enough to refer to the fact that while Sir James Stephen's draft of an English criminal code failed, it still became the basis of his standard works treating criminal law and procedure. And the three Acts partially codifying civil law were developed in reverse order, from textbooks in the relevant fields of law.[61] This is why eminent English and American authors could say with justification: "and these unauthorized digests, some of which have already passed into Acts of Parliament, are laying the foundation of a complete code of the law of England", or, that "these private restatements... might well pave the way for codification."[62]

When drawing up the final account of the question of codification in Common Law, it is to be noted that the demand for rationalization arises repeatably and with increasing pressure and that the various codification substitutes are less and less able to cope with it. In consequence, competent authorities expressed their faith in codification with growing determination, e.g. in the late 60s.[63] This was formulated as the bankruptcy of the hopes put in codification substitutes: "a time may come when consolidation of the statute law of a particular subject is not enough and... the logical course is to proceed to codification."[64] What is certain is some *inclination towards codification.* Practice will be the proof, as the ex-chairman of the English Law Commission once said: "It is too early to tell which course English legal development will take. If codified law succeeds in becoming more manageable and easier to understand than the law which it supersedes, the habit of codification will spread. If it fails, Codes will become part of the useless lumber of our law."[65]

9. CONCLUSION

The unity of law evolved very early in England in the wake of royal court practice and, in function of this, the procedural method of legal development became institutionalized. Be-

cause the compromise of the bourgeois transformation left this unity to posterity practically intact, the ideal of and the strive for codification was not as strong as on the European continent. Codification served fundamentally simple rationalization.

Legal reform combined with unification was at the centre of codification in British India. In other parts of the British colonial empire, codification served only as the means of exporting and imposing a primitivized English law.

Moved by the need for lay administration of justice, the first codes of the American colonies also came about as summaries of primitivized English law, and later spread to other colonies as import of this primitivized law. The 19th century experiments in New York reaped success partly as embodiments of the reform of English procedural law, and partly as a condensed adoption of legal experiences gained in other newly established states in America.

In sum, Common Law codification took several forms and served several purposes. Nevertheless, it still seems deformed compared to the classical model of European continental codification: particularly because it neither attempted nor carried out the *replacement of case-law* with, and the *reduction of law* to, the code-text.

At the same time, a kind of dialectic can be seen in the satisfaction of codification needs by *codification proper* and its *substitutes*. Consolidation and uniformization, as well as doctrinal codification (i.e., restatement and text-book writing) represent in Common Law a genuine substitute for codification, neutralizing the demand for it.

NOTES

1 Stephen's *Commentaries on the Laws of England* 21st ed. L. Crispin Warmington, I (London: Butterworths 1950) p. 8.

2 Quoted by F.W. Maitland 'English Law and the Renaissance' |1901| in his *Selected Historical Essays* intr. H.M. Cam (Cambridge: University Press 1957) pp. 149f, note 6.

3 On the one hand J.G. Nichols *Literary Remains of King Edward VI* II (London: Nichols 1858) p. 486 and, on the other, Bacon, pp. 540-547.

4 See Pound, p. 268.

5 *Journals of the House of Commons* (1650) p. 427, quoted from Vanderlinden, p. 358.

6 Quoted by Lang, pp. 42-54, especially at 46 |*Hansard*, November 16, 1852, Vol. CXXIII, pp. 191f| and 52 |J. Pollock|.

7 Cf. Lang, pp. 54f; Ilbert, p. 127.

8 Holland, pp. 9-26, especially at 23.

9 Cf. Lang, pp. 55-57; Ilbert, pp. 127f.

10 Seagle, pp. 295f.

11 Holdsworth, p. 225.

12 Cf. Lang, pp. 70-92; Ilbert, pp. 129-155; H. Kusumoto 'Some Observations on Codification in British India in the Nineteenth Century' *Comparative Law Review* |Tokyo, Waseda University| VI (1970) 1, pp. 7-10.

13 Holdsworth, p. 317.

14 Cf. B.K. Acharyya *Codification in British India* (Calcutta: Banerji 1914) p. 136.

15 Pound, p. 274.

16 See Ilbert, pp. 155 and 200-207; Lang, pp. 67f.

17 *Calvin's Case* (1608) 7 Co. I, 17b.

18 An expression by Pound *American Law*, p. 11.

19 Cf. P.S. Reinsch 'The English Common Law in the Early American Colonies' |Bulletin of the University of Visconsin, II {1899}| in *Select Essays* I, pp. 367-415.

20 See Pound, pp. 271f; W.J. Wagner 'Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States' *Saint Louis University Law Journal* II (1953) 4, pp. 347-349.

21 See Lang, pp. 114-148.

22 Cf., in general, C. McGuffey Hepburn 'The Historical Development of Code Pleading in America and England' |1897| in *Select Essays* II, pp. 643-690 and, in particular, L. Mayers *The American Legal System* rev. ed. (New York: Harper and

Row 1964) pp. 226f; C.E. Clark *Handbook of the Law of Code Pleading* 2nd (St. Paul: West 1947) pp. 21-23.

23 Cf. Lang, pp. 153-158; J. Morris 'Some Historical Origins of Statutory Law and Judicial Decisions in North Dakota' in *Essays in Legal History in Honor of Felix Frankfurter* ed. D. Forkosch (Indianapolis, etc.: Bobbs-Merril 1966) pp. 101-109.

24 See, in more detail, C.W. Everett 'Bentham in the United States of America' in *Jeremy Bentham and the Law* ed. G.W. Keeton and G. Schwarzenberger (London: Stevens 1948) pp. 185-201.

25 Cf. Lang, pp. 158f, 149-152 and 272f.

26 S.E. Morison *The Oxford History of the American People* (New York: Oxford University Press 1965) p. 494.

27 G.A. Miller *An Introduction to Practice* with Special Reference to the New York Code of Civil Procedure (New York City: Tompkins 1903) p. 1 and 'Report dated 1st. January 1872, of Revision Commission' in *Senate Documents* I (1872) 8, p. 13, quoted by Lang, p. 165.

28 Terry, p. 640, more generally pp. Vf and 636-643.

29 Wm.B. Hornblower 'The Revision of the Code' in *The Albany Law Journal* LIII (1896), p. 152.

30 Pound *American Law*, pp. 23f and 152-154.

31 J. Austin *Lectures on Jurisprudence* 4th ed. R. Campbell (London: Murray 1873) lecture XXXIX, pp. 669-704.

32 F. Pollock 'The Science of Case-law' and 'Some Defects of our Commercial Law' in his *Essays in Jurisprudence and Ethics* (London: Macmillan 1882) pp. 260 and 93 and F.W. Maitland 'The Making of the German Civil Code' in his *Collected Papers* ed. H.A.L. Fisher, III (Cambridge: University Press 1911) pp. 487f.

33 *Law Times Journal* CCVI (1948), p. 157.

34 R.W.M. Dias *Jurisprudence* 2nd ed. (London: Butterworths 1964) p. 75.

35 Vadon, pp. 55-117.

36 Bacon, p. 540.

37 Questions like this are quoted by Lang, pp. 64f and Lloyd, p. 171.

38 A. Harding *A Social History of English Law* (Harmondsworth: Penguin 1966) p. 430.

39 E.g., S. Amos *An English Code* Its Difficulties and the Modes of Overcoming them: A Practical Application of the Science of Jurisprudence (London: Strahan 1873) p. 63.

40 W. Friedmann *Legal Theory* 3rd ed. (London: Stevens 1953) p. 374.

41 Engels 'Socialism', p. 107.

42 M. Radin *Handbook of Anglo-American Legal History* (St. Paul, Minn.: West Publishing Co. 1936) p. 339.

43 *Law Reform Now* ed. Law Reform Committee of the Haldane Society (1947) p. 25, quoted by Lloyd, p. 171.

44 Lang, pp. 21-24; Vadon, p. 8; Lloyd, pp. 168-171.

45 Goulet, pp. 12f; Stone, p. 139; Lang, pp. 22f.

46 See Lloyd, p. 170.

47 *Reg. c. G.W. Railway Co.* (1842) 3 Q.B. 333, and *21 and 22 Vict.*, c. 26. See Holland, p. 122 and Allen, p. 427.

48 Allen, p. 428.

49 Goulet, p. 13.

50 Stone, p. 129.

51 Craies on *Statute Law* 7th ed. S.G.G. Edgar (London: Sweet and Maxwell 1971) pp. 59f and 361-365; Holdsworth, p. 316; S.L. Zivs *Razvitie formy prava v sovremennokh imperialisticheskikh gosudarstvakh* |Development of the Forms of Law in Contemporary Imperialist States| (Moscow 1960) passim.

52 Cf. Tunc and Tunc, pp. 339-342.

53 See, in more detail, Tunc and Tunc, pp. 342-344; Pound, pp. 279f.

54 Tunc and Tunc, p. 348.

55 *Restatement.*

56 Cf. Tunc and Tunc, pp. 344f; Wm.D. Lewis 'Introduction' in *Restatement*, p. VII; B.N. Cardozo 'The American Law Institute' in his *Law and Literature* (New York: Harcourt, Brace and Co. 1931) pp. 121 and 141; Stone, passim.

57 Seagle, p. 297.

58 Lloyd, p. 165.

59 J. Bryce: 'Methods of Law-making in Rome and in England' in his *Studies in History and Jurisprudence* (New York: Oxford University Press American Branch 1901) pp. 685f.

60 Ilbert, p. 162.

61 Cf., e.g., Holdsworth, p. 317.

62 A.V. Dicey 'Blackstone's Commentaries' *Cambridge Law Journal* IV (1930-32), p. 307, on the one hand, and Pound, p. 281, on the other.

63 As far as the United States is concerned, "it seems reasonable to think that a revised interest in it must be expected and that codification is not unlikely to be one of the chief problems of American law in the next generation". R. Pound *Jurisprudence* III (St. Paul, Minn.: West Publishing Co. 1959) p. 677. As for England, "it is difficult to believe that the codification of English law will not become a live issue within the next fifty years or so". R. Cross *Precedent in English Law* (Oxford: Clarendon Press 1961) p. 199.

64 *Statute Law: A Radical Simplification* 2nd Report of the Committee Appointed to Propose Solutions to the Deficiencies of the Statute Law System of the United Kingdom, Statute Law Society (London: Sweet and Maxwell 1974) p. 47.

65 L. Scarman 'Codification and Judge-made Law' *Indiana Law Journal* XLII (1966), p. 355.

VII. STRIVING FOR CODIFICATION: AFRO-ASIAN SYSTEMS

1. THE COMPLEXITY OF AFRO-ASIAN LEGAL DEVELOPMENT

As far as political and social structures, levels of economic development and cultural traditions are concerned, Afro-Asian systems show remarkable diversity. They range from an adherence to tribal conditions to imperialistic tendencies right up to an acceptance of the revolutionary objectives of socialism. They include states in the initial stage of becoming acquainted with the basic achievements of civilization so much as those regarded as major industrial powers. They are equally heterogeneous from the point of view of cultural traditions: there are societies based on the prevalence of tribal beliefs or the community-shaping power of old religions which have become bogged down at a given point of their development so much as secularized societies with institutionalized western traditions.

And yet the Afro-Asian states have one feature in common. As a consequence of their delayed development, they are all confronted with the urgently felt *need to modernize* if they are to solve their social problems. This time-lag in development follows to some extent from their former colonial status. Namely, liberation has enhanced the potential of these states, but they have had to find that independence has had a dual effect. Although they have got rid of unfavourable external influences, they have not been able to pursue a national policy of their own without turning their own *traditions* into a guiding force.

And these traditions are mostly archaic: in Africa, of a *tribal* nature, in Asia, of a *feudal* one.

So we have to reckon with a basic duality in the legal systems of Afro-Asian states. First, there is *traditional law*, embodying in some way national (more accurately, pre-national) traditions. But at the same time, there is *law inherited from the former colonizer*. After appropriate reforms, the latter can serve as a basis for modernization. This duality in Afro-Asian legal systems also determines the form in which codification may appear in Africa and Asia. For, in respect to traditional laws, codification is often the only means of handling them in a western manner: detaching them from their origins, turning them into enacted law, and changing them - in however a modest way.

Within this relative commonness, codification may produce countless individual variants. If we want to sort them out, first of all we shall have to draw a line between, on the one hand, the Islamic systems in which a process of modernization began in the last century and in which traditional law amounted to a system of religious teachings and related logical implications accepted as revelations and, on the other, Afro-Asian systems in which modernization started in the 20th century and in which traditional law amounted to a system of archaic, divided *tribal* customs which, in many cases, could not even be classified as law. However, it is necessary to note that there is also a third variant. It emerged in countries where modernization in the late 19th or early 20th century resulted in unprecedented progress and took place irrespective of Islamic or tribal traditions. These countries accepted or rejected codification according to the western examples determining their legal development as a whole.

2. CODIFICATION IN ISLAMIC LAW

Islamic law is religious law based on Allah's *revelation* which was true for all time. It is a revelation transmitted by Mohammed, the founder of Islam, and is incorporated in the sa-

cred text of the *Koran*. As only about one-tenth of the Koran is made up of instructions for everyday life, it serves only as a basis for teachings on law. To turn these teachings into a system of legally relevant provisions, lawyers considered first the *traditions* based on the prophets' deeds, then the unanimously accepted *principles* used to interpret those traditions, and finally the solutions reached by *analogy* and, then, similarly endowed with the sanctity of the Law.[1] This categorization of the sources of Islamic law paved the way towards the elevation of religious and legal teachings to unalterable doctrine but did not result in their codification.

Obviously, interpretation, for the purpose of practical application, promotes the further development of any system and ends in its disintegration into various doctrines or sub-systems. Islamic law was no exception to this dual process of progress and disintegration. In the 750s, a few decades before the split in the increasingly independent *schools of interpretation* ("rites"), there emerged a plan to officially codify the generally accepted interpretations of the holy texts. However, this was turned down by the caliph, due to the advice of the founder of the Malikite rite.[2] So the texts commanding religious authority took the final form of chaotic layers compiled by history, and gradually turned, by the force of tradition, into a sacrosanct source, which did not allow of the slightest alteration either by state power or any other theocratically charismatic personality.

It was with this claim to constancy that Islamic law was passed down from generation to generation for one thousand years, with only administrative, fiscal and criminal rulings being amended. *Shari'a* law remained unchanged. In fact, this limited room for manoeuvre was sufficient for the Empire[3] until the wind of change coming from Europe made economic growth an absolute must in the 19th century. The proclamation of the *Tanzimat* (1839) which, under French influence, aimed at bringing the Ottoman Empire onto the European road of development, promised changes in three fields: regulation of areas left uncovered by *Shari'a* was replaced by codes based on a French model;[4] for their administration, secular courts were estab-

lished (1860) in addition to the hitherto exclusively existing religious courts; and finally, *Shari'a* and the *fiqh*, the body of its underlying practical and doctrinal material, were arranged into a system and, with the exception of the hitherto untouched teachings on family law and the law of inheritance, were given a codified form in the *Mejelle* (1876).

In sum, codification came about initially as a type of French legal export. The enactment of a commercial code also meant an intrusion by Western law into the sacred realm of *Shari'a* and its consequent loosening.[5] Related to this, the establishment of commercial courts, i.e., secular courts of exceptional jurisdiction, soon reduced the former absolutism of the religious courts to being of any significance only in exceptional cases, in fact, to having the status of a historical relic.[6] And, finally, albeit all this formed a part of the process in the light of which the promulgation of the *Mejelle* undoubtedly amounted to a frustration of Pasha Ali's favourite dream of transplanting the French *Code civil* (1868), yet, in the development of Islamic law, finally it led to an irreversible disintegration, the secularization of *Shari'a*, its submission to state authority, its becoming dependent on human arbitrariness in law-making and its ensuing profanation into enacted law.[7]

Up to the end of the 19th century, there was no fundamental change in the obligatory nature of the *taqlid* which preserved the unity of Islamic law and in the unconditional acknowledgement of juristic interpretations.[8] Yet, the need to adapt from other systems set law in motion. For instance, codifications aimed at covering areas unregulated by *Shari'a* included provisions that, in their consequences, limited the implementation of *Shari'a*. Or, they began juxtaposing certain rites, and found new solutions to the anomalies analogical reasonings revealed. And if they failed in this, they could restrict *Shari'a* by reorganizing the rules of competence and procedure of secular jurisdiction.[9] In countries where the restrictive power of traditions was less, modernizing of law by means of sophisticated manipulation was abandoned, only to give way to solutions which could cut into the very flesh of *Shari'a*.[10]

If we accept the typology that takes *Turkish development* as a yardstick to measure the modernization of Islamic law,[11] we shall see that, after the initial taking root of Islamic law (610-1839) – characterized by theocracy and an inner immobility – and the phase of semi-separation in which a process of fermentation began (1839-1917), starting from the reforms of the Tanzimat, we have to distinguish the period of the disintegration of Ottoman law (1917-1926). This period was characterized by profane legislation which was altered by the innermost core of *Shari'a*, namely, its provisions concerning personal status, family and inheritance.

The rearrangement of the peripheral fields of Islamic law with the help of western techniques of *codification* and especially the rearrangement of *Shari'a* (casuistic in its traditions) with a system-patterned technique of codification, calibrated to a construction through general abstract principles, shook not only the various institutions, but also the very nature of Islamic law. Codification provided substantive solutions, and introduced a different world of legal concepts, regulations and implementation. And, though perhaps less spectacular, it was certainly a factor producing a more profound effect than those mentioned before. This non-organic implantation, added to the old form of law without replacing it or mixing with it, might easily lead to a duplication of the law.[12] As a matter of fact, any disruption of the legal structure from the inside will certainly achieve its aim. It is almost impossible to resist disruption caused by *technical restructuring*, and the law in question will be practically helpless. In this way, the transforming role of codification was by far not limited to a transmission of substantive solutions. It was also a transplantation of a new technique in law.

In Turkey, the transition to the third phase took place with the introduction of a reform code of family law (1917). Although it was abrogated two years later, its impact proved to be strong enough to shake *Shari'a* to its very foundations by introducing written contracts as a condition of marriage and by granting wives the possibility of a divorce. It was also strong

enough to spread the idea of reforms in much of the Muslim world.[13]

Apart from Yemen and Saudi Arabia, the two states preserving their autocratic immobility, all the Islamic countries entered upon the road of reforms I have described as the third phase of development. However, it might be regarded as an irony of history that, apart from Turkey (and the Turkish Cypriot community), no country with a Muslim tradition laicized its legal system in its entirety.

This, however, was not the end of the struggles for Islamic legal traditions. Indeed, it was only in this phase that a process of sublation assumed more delicate forms. In the field of civil codes, there emerged some which were mostly under the influence of the French *Code civil;*[14] and there were attempts to create codes representing a synthesis of the European type of received and orthodox Islamic tendencies;[15] yet, the words and spirit of Islamic law, which had been eliminated from enacted provisions, found their way back in the declaration of *Shari'a* to be a general subsidiary source of law, namely in the provision that, in all cases for which the code made no provision, the law to be followed was customary law, and in its absence, the principles of *Shari'a*, or the teachings of natural law or equity.[16]

However, the use of *western* techniques and substance in codification in the contexture of subsidiary *Islamic* law meant the victory of *traditions*. It is typical of its ambiguity that it was interpreted in Egypt as a move away, made by fear, from complete laicization, while it was regarded as a step forward in less westernized countries.[17]

There is, however, yet another factor that barred most of the Islamic countries from further progress despite their complete adoption of the European technique of codification. Namely, that the right of personal status assumed the guise of codification in a way to preserve its intimate ties with muslim traditions.[18]

The fact that codification definitely emerged as a *means of the reception of new contents and/or form* and that it has always been at odds with its environment (having been introduced

as an alien element and retaining that character) also indicates some specific new motifs. Namely, that the ensuing acts of codification tagged onto *Shari'a* did not aim at overall codification. They were but modest forms of further (and always fragmentary) reforms. It must also be noted that the transplantation-minded attitude to codification often led to an atrophy of the forces of inner legal development,[19] and that what was sometimes an exaggerated openness to foreign solutions resulted in a sediment, sometimes settling inorganically on national law and sometimes being rejected by it.[20] In other words, the treatment of receptive codification as a kind of panacea and, indeed, the frequent failure of a minimum adaptation of the law to local conditions, both of them resulted ultimately in a slackening of the incorporation of western models despite reforms that brutally upset traditional law.

This was a situation in which less would have been actually more. The fact remains that the inner development of the received codes in practice lagged behind its own possibilities. It is also a fact that the codes were treated as means of *law-transplantation* and they had been applied in practice as models, as collections of abstract rules *isolated from their social and legal environment*, instead of being regarded as only relatively independent components of a complex socio-legal process. In consequence, these codes also ignored their original legal environment and contexture, i.e. the national ethos and jurisprudence that originally made and sustained them, and they also neglected to develop them by the enactment of supplementary decrees. Finally, the ensuing disappointment (partly to be attributed to the mechanic copying of foreign laws and to the fact that local traditions were repeatedly ignored) resulted in the revival of Muslim traditions in a secularized form. Its main force was and is nationalism, a phenomenon especially strong in Arab countries.[21]

The radical transformation of the legal arrangement was carried out most consistently in Turkey. This was also a reform introduced by the "stroke of a pen". Eight new codes were introduced in the course of three years and they completely replaced traditional law.[22] As far as the European models of cod-

ification were concerned, and as a possible alternative to breaking with Islamic legal traditions even admitting the influence of special and accidental factors,[23] the most remarkable of all these was the adoption of the Swiss *Zivilgesetzbuch*. This expressed both the outdatedness of the French *Code civil*, especially in the field of family law, and the unprogressive nature of certain aspects of the German *Bürgerliches Gesetzbuch*. Introducing the fourth period of our typology started with the year 1926, legislation in the Turkish Republic was aimed at completely overturning earlier law without any compromise whatsoever.

In Turkey, too, transplantation was only aimed at adopting foreign codes as pure forms isolated from their social and legal environment, i.e. as *textual objectivation transmitting technical construction* which is self-sufficient: transplantation was aimed at the originally enacted doctrinal premises rather than at the implementation of underlying social objectives. And all this took place in the belief that "statutes are but the framework of law. For real law can develop within such a framework, as applied and adapted in jurisprudence according to the needs of a country".[24] Viewed from such an angle, just the general formulations of the received *Zivilgesetzbuch* and its rather liberal provisions on filling the gaps and on the rather large scope of action by the judges were required to give Turkish civil law an independence of contents and make it increasingly adaptive to specific national conditions, despite a formally almost identical text.[25]

Codification therefore, as a means of legal reception based on a given text, does not of itself prove its value. Turkey ruthlessly replaced feudal, traditional religious law with a legal system of a monopoly-capitalist and secular type. Institutionalized "safety valves" and improvement of details made such a radical change possible (albeit not entirely free of difficulties). This explains why the coexistence of a foreign code and national legal development can be seen to this very day as an inexhaustible source of reserves. The received code has, at least in urban centres, become accepted. As the generally held view suggests, it is more suitable than any national

version lawyers might have elaborated themselves, either in the past or indeed today.[26]

3. CODIFICATION AS A MEANS OF SUBSTITUTING TRIBAL CUSTOMS

Confrontation with the modern age only began a few decades ago in those Afro-Asian systems in which traditional, tribal customary law prevails. The lag not only indicates the backwardness inherited from a colonial past but also the scale and urgency of the problem.

Although the French and British systems of *colonial administration* were characterized by differences in colonial policy, the outcome was rather similar. Whether they forced their own institutions on their colonies as the French did, or retained traditional native institutions and merely placed them within the framework of the colonizer's law as the British did, the two types of rule differed only in method and not the fact *of the interference with and eventual subordination of the native law:*

In so doing, in most cases the result was *duplication of the law.*[27] Finally, even by integrating their own law to act as a kind of "safety valve", they left the traditional native laws of the colonies to their fate. Contrary to their principle of non-interference, British colonial rule established the superiority and predominance of British law. This led to the curbing of customary law and its subordination to British legal principles.[28] There was hardly any progress in *customary law* through the centuries. Today, as a result, they have nothing but local customs that have sometimes been incapable of assuming a crystallized form, even in the legal sense. Local customs did not only resist becoming detached from everyday social practice, but, in many cases, they also failed to become differentiated from other norms regulating tribal community life. That is why an eminent scholar specializing in African law had good reason to say: "Instead of declaring that nothing is legal

in so-called 'primitive' societies, we might as well say that everything is legal in these societies."[29]

In most cases, territories gaining their independence *adopted the sources of law imposed* on them in their colonial past. So they preserved existing law and made provisions to introduce customary law as a subsidiary source. Thence it follows that neither the development of their own legislation,[30] nor the occasional preservation of former metropolitan law[31] could affect the actual rebirth of customary law. Regarding it as something of their own, the population held on to customary law as something that not only had a past and present, but a future as well.

This is reflected first chiefly in the process whereby political independence led to a burgeoning tribal and national awakening. A sense of *Africanism* emerged, which found one of its expressions in the *traditions of customary law.* They varied, of course, from tribe to tribe.

For the new African states which were setting out on the road of national construction, customary law represented, on the one hand, the most anachronistic relic of their primitive past; on the other hand, however, the same law embodied the promise that African nations might find their national identities and, as such, was the depository of an African future, preserved from a golden age in the distant past. The contradiction is a genuine one and therefore cannot be resolved by eliminating either of the two clashing arguments. No doubt, this body of customary law has grown out of tribal organization. But it is equally obvious that it identifies itself with African traditions on more levels than that of tribal organization. Yet, its days are said to be numbered in Africa. And since its continued existence relies on the everyday practice of the tribal community, it is possibly bound to disappear from the life of the communities in the next few decades, that is, long before the lessons they might have to teach could be studied by legal ethnologists or made use of by local legislators striving for national independence.[32] This is explained by the fact that, from among the tasks facing African law-makers today (i.e., *modernization*, *unification*, and *Africanization*), mod-

ernization is obviously the most important – in the sense that it seems to be a *sine qua non* of mere survival. And this, inevitably, is somehow directed at the elimination of anything customary.[33]

Of course, relative clearsightedness concerning long-term perspectives is no consolation when it comes to solving thorny problems of the present. A survey of legislative programmes sometimes creates the impression that it is the new states themselves that are pioneering in the attempts at getting rid of the burden of customary law. In fact, what we face here is not so much an attempt to do away with traditions than problems cropping up in their practical application. In other words, there is a widely held general view according to which the body of customary law cannot be the law of the future. But any decision on immediate problems now will depend on the role the system of customary laws actually plays in a given community, on faith in the viability of its traditions, on the way the community develops towards nationhood, and on the nature, stability and social acceptance of the prevailing trends.

There are various alternatives available in the *way customary law is utilized*. The alternatives are not simply those of complete substitution versus complete preservation, but a much more sophisticated range of possibilities. One of the alternatives, the *judicial development of customary law*, is essentially a denial of codification. Another alternative, that of the *consolidation of customary law*, is an affirmation of codification. The third and final possibility, the *substitution of customary law* by an all-comprehensive codification, represents a complete utilization of the instrumental potential of codification.

The *development* of local customs by the everyday practice of local law-courts is an obstructive tactic as it is based on the rejection of codification. It is clear that partial modifications of contents are inadequate for the transformation into written law. Such adaptation of customary law might reduce the gap between social contents reflected in customary laws and the requirements of modernization, but it cannot change the underlying nature of customary law. Notwithstanding, this suggestion of a compromise is heightened by the fact that neither unifica-

tion nor centralization of the judicial system has been achieved in the majority of states that have chosen this alternative.[34] A lot is revealed about this approach by the attitude of Uganda. There, the government hoped that customary law might become automatically integrated with written law,[35] and that those responsible for legislation would thereby be relieved. Such hopes were, however, dashed by social exigencies, and even the Supreme Court has been forced to develop local customary law.[36]

Naturally, the developmnet of customary law through judicial practice can also take the form of a consciously planned legal programme.[37] But in the light of experience till now, it does not seem to offer anything new; and any new feature it incorporates can only be used as raw material for codification.

Therefore, judicial development of customary law seems to be a transitionary affair, an intermediary phase paving the way for the codification of customary law. This is somehow foreshadowed by the fact that such development was already widespread in the judicial practice of the colonial period, albeit without producing any startling result. At the same time, the codification of customary law was more productive in that period as well.[38]

With Afro-Asian systems, the *codification* of customary law is the opening rather than the final act of a historical process. Its ultimate significance lies in the fact that it shakes the very foundations of ancient traditions. Thereby the extremely close, organic unity of customary law with the everyday life of the tribal community is disrupted and customary law is objectified. Its written, consolidated and externalized form then breaks up its very essence, imposing a form on it that is rather a death-mask of it. In the process, customary law as such will come to an end. At the same time, however, the new form will provide the possibility of reforming the law-making and law-applying techniques imported from Europe.

Thus, the codification of tribal law is not far removed from codification functions that called the *Mejelle* to life and from those other products of legislation in which religious revelationary laws were secularized through their enactment. Two

interconnected processes are of decisive significance in all of this. One is the *detachment* of traditional law from its original environment; the other, the instilling of *European techniques* and means of codification into this law and, thereby, a denaturation of this very law. The Afro-Asian codification of customary law is at the same time analogous with feudal codification in Europe in that the processes of consolidation and unification are combined with reformist trends.

There are, of course, significant divergencies within this affinity. First of all, in feudal Europe the same law was transformed to assume a written form. In the case of tribal law, the transformation is more than just formal: it involves a transition from one potentiality, underlying a concept, and instrumental idea of law to another. For what is embodied by tribal customs is not a set of formally identifiable standardized patterns of behaviour used to provide an exclusive criterion in the resolution of conflicts, as it is in the European tradition. In contrast to the European concept, calibrated to formalized procedure and litigation between antagonistic parties, this law is of a *conciliatory* attitude. Its aim is to solve conflicts by bringing them to a final settlement through appeasement, therefore, it is *non-formal* and *not aimed at embodying the law.*[39] The other distinguishing feature is that, while in Europe the consolidation of feudal customary laws accompanied a process of transition within the same socio-economic formation, in Africa, it has taken place in a situation where tribal (and often nomadic) conditions of life continue to exist in a system subject to the effects of monopoly-capitalism. In other words, the codification of customary law in Africa postulates a *confrontation* between the legal arrangement of the tribal community and the needs of modern capitalism. The third difference consists in the fact that whereas in Europe the consolidation of customary law only affected certain sections of the population in that it abolished dividedness, in Africa codification has had a *subversive* effect on the entire population in so far as it is organized on a tribal basis.

This is the reason why customary law has remained an open question up to this day. Several factors may limit or complete-

ly frustrate it. It may be challenged by extremely fragmentary tribal, territorial and linguistic dividedness within a given political unit;[40] the almost unbridgeable differences in the levels of development within the same state;[41] or the legacy of division which, as a result of various colonial factors, produced different traditions within the same country.[42] Another problem: the codification of customary law can only be successful if it is done locally. It is, however, often a federal affair where local codification is ruled out by the federal constitution.[43]

As a result, tribal law is consolidated largely in *exploratory compilations* that are, in principle, of *private* rather than official significance.[44] At the same time, also formal codifications have a tendency to *harmonize* customary law on a regional or national basis. In fact, codification has only proved to be successful where codifiers could manage to break free from the limitations by tribal constraints and thus meant, and realized, *unification* as well as codification. This, however, requires a great leap forward which, in the absence of appropriate social and political background, could hitherto only take place in smaller political communities or, under the pressure of considerations of legal guarantee, in the field of criminal law.[45]

In any case, it is not an easy task to draw a line between the second and the third alternatives. The fact is that it is almost impossible to distinguish the *unifying codification of customary law* from what was described earlier as *substitution of customary law by codification*. For unification inevitably requires that the code include provisions not featuring in any of the unified sets of norms.[46] Yet, what makes a distinction between the two is that the codification of customary law treats tribal traditions as a sovereign source of law, distinct from all other sources, without acting as an intermediary between the body of tribal customs and the other sources of law.

The *transition through codification* of customary law appears to be a necessary phase. Doubts about it are expressed mostly by Europeans who argue that the consolidation of customs in a given phase artificially terminates a natural course of

development.[47] Confronted with the human values embodied in tribal traditions as well as with awakening nationalism, the African states themselves opted to prepare the ground for a sensible, although painful, decision in the need to solve a nasty dilemma: namely, tradition *or* modernization? Under the accelerating pressure of economic survival and possible development, African states almost unanimously accept the consolidation of customary laws; nevertheless, their attitude is characterized by hesitance. It is not the need for transition that they question, but whether there is time or not for a gradual transition when they are unable to afford the luxury of wasting several decades. Therefore, nowadays "nearly all African governments wish to see new codes instead of books of customary law... It may be equally worth while considering whether, in the face of codification, the compilation of |customary| lawbooks will not be seen as obsolete before it is even achieved."[48]

Therefore, the choice of *substitution* by codification may be tempting especially for the young states of Africa and Asia, mainly because it offers the hope of a rapid transition and a definitive solution. Substitution by codification is the unification of a legal system hitherto divided ethnically, regionally, and also in terms of its legal sources. It replaces previous law, whilst it preserves those components that are judged to be useful, and combines these with reformist ideas and the establishment of a new codified law as a basis for further development. Potentially, replacement by codification also achieves a "harmonic synthesis" between preserved traditions and the acceptance of the demands of modernization.[49] So one could say that *tribal-national character* is not exclusively linked to *traditions*. It can have an important role to play in *reformist legislation* as well.[50]

This third alternative also allows of various solutions. It may happen that efforts towards substitution by codification are concentrated on one particular area of law;[51] that the need for substitution may lead to a whole new series of codes with the underlying purpose of compiling and systematizing the whole body of law[52] or to a single, albeit all-comprehensive code;[53] and finally, reformist tendencies may also predominate and lead

to a type of law-transplantation code. (The switch-over to codification may pose an additional problem to countries with Common Law traditions in acquiring the technique of codification characteristic of Civil Law. In most cases, this problem has no bearing on whether a country finally chooses the path of codification or not, but it may slow down or even defer its achievement.[54])

Obviously, this latter type is the one to represent the most determined step forward on the path of modernizing the law. It is also the one where the danger of losing touch with the present is the greatest. This question is certainly justified from the point of view of the future, although (and this is a paradox of the development of backward countries) it can hardly be expected to influence the choice made; for such a choice may simply be inevitable: either because reliance upon tribal laws is simply hopeless in the light of their extreme division,[55] or because the possibility of developing extremely primitive tribal laws appears to be a mere illusion, while the pursuit of other traditions is considered politically undesirable.[56]

To understand the reason why some countries choose the rather dramatic alternative of substituting customary law by codification, we should bear in mind that development in these countries started from an incomparably lower level than even in countries like Turkey in the years of the First World War. *Ethiopia*, for instance, was one of the most backward regions in the world only a decade ago, therefore the direct transplantation of a western code would have amounted to have a leap over an unbridgeable gap. It appeared therefore to be an obvious solution to prepare a simplified code of law in substitution of African tribal traditions. To this end, an artificial, so-called "comparative" code was enacted.[57] Paradoxically, this code was enacted in the last years of imperial rule. The code got very weak approval.[58] In effect, the chance was the same as it had been half a century ago in Turkey for the enacted text becoming mere "laws of phantasy",[59] in other words, an idealistic construct with no hope of actual influencing.

To sum up the questions related to the modernization of tribal customary law, it can be said that the code is an instrument that can be used in a variety of ways to modernize customary law. There is a variety of means and a variety of ends. *Systematization* is a predominant target in the codification of customary law. Codification aims at moulding the mass of chaotic materials of customary law into a conceptually well-arranged shape, and, by making their inner relationships explicit, transforming them into an aggregate of norms. In substitution by codification, systematization may assume nothing but a secondary role. The new form will go hand in hand with the new contents, its novelty lying in the *fresh start*, discontinuous with earlier development.

Therefore, substitution by codification has a directly social significance: it is an element of a largely controlled process of *development* covering the whole social field with law providing only its form. In other words, law has a merely ancillary role to play here. For Europe, codification could be the culmination of an organic development which, on the whole, did not deny the previous phase of development, although it brought it to an end. In contrast to it, the Afro-Asian states have had to adopt this model without ever acquiring its organic substance. In the modernization of Afro-Asian law, codification as an instrument of the substitution of tribal customary law has to realize the dual role of the *ancilla* and of the *dominus*. Its outcome has to become an image foreshadowing a future worth fighting for, without becoming a *tabula utopiarum*.

4. CODIFICATION IN THE MODERNIZED AFRO-ASIAN SOCIETIES

There are Afro-Asian countries that a long time ago accomplished the tasks of secularization, laicization, and the establishment of a modern statehood and a unified, statutory enacted system of law. Therefore their codification shows an affinity not so much with those analyzed so far, as with those

kinds of codification that serve as and have been used as models.

It is a case of systems completely assimilating the external influences they were exposed to during the period of colonization or whilst they were receiving foreign laws. They were so receptive to alien influence that they lost their national identities. Later, legislation only strengthened these lost identities instead of reviving a genuine national identity.

One might mention the example of a state where the continental European traditions of codification of the first colonizer were superimposed on the local traditions of codification. This was not changed, only further extended by later English and American influence. Finally, national development also adopted the old sources and if any change was emphasized in the process, all it amounted to was a higher degree of flexibility *in synthesizing the opposing influences of the colonial period.*[60] – There is a state where the Dutch version of Roman-Germanic law had been preserved and this pre-codification tradition, combined with Common Law influences, had been given such decisive importance that even in the presence of national legislation, the idea of codification was killed in its infancy.[61] – And there is yet another state in which British colonizers sought to secure the export of their own law by institutionalizing it through its primitivizing codification. Since then, almost one century has passed and although national independence brought with it the promise of a national legal development, law has not changed in its essence. Both legal form and contents are to a great extent represented by codes re-establishing the law imported during the colonial period.[62]

It is a general feature of modernized Afro-Asian states (even if it is not manifest in each and every case) that they adhere to the pattern provided by the system having exercised a *modernizing influence* on them. There are states which advanced from the absolutism of unconditional autocracy to a European-type legal arrangement interpreting law as an expression of social equilibrium. The law which had never before been objectified as distinguished from the institutions of the law-giving divine *Tenno* was now modernized in a way which both demanded

and allowed of the introduction of the very concept of rights. With the help of a series of codes of French and German origin, its law was reshaped. Moreover, the impetus of codification was not lost.[63] – But there is another state which suffered the combined influence of Islamic, French and English legal traditions. Now it makes use of these influences, cementing them with its own ancient national and religious traditions and generating a new impetus in a country where, recently, the Anglo-American pattern is followed. Jurists are now trying to produce something new from the chaotic legacy of the past with the aid of codes. However, this cannot work, at least for the time being: all such attempts are bound to founder on the rocks of centuries old own traditions.[64]

In sum, most of the Afro-Asian states that have already been successful in substituting their old systems with new law, have adopted the codification practice of the substituting system. The kind of codification used in the process of modernization was regarded as being so *progressive* that it could easily create the impression that the process of codification stopped at a given level of development and consolidated its hold. If, however, modernization did not prevent a re-assertion of national traditions, codification, connected as it was to that of the modernizing system, survived as an *autonomous* variant in the series of the strategic alternatives.

To illustrate the point with one of the previous examples: in *Japan*, what has occurred has been a return to the ancient practice of conflicts resolution when it came to applying the codes. And there are growing signs to indicate that the body of codified norms is not recognized as the exclusive embodiment of law in contemporary Japan, either. In other words, enacted law is a manifestation deserving respect but having only a rather doctrinal interest being a weighty, but by far not the only and not even the final argument. Instead, "well-structured rules applicable to a problem set out ahead of the need... form only one of the bases for judgement" and, if considered necessary, even "the presumption of the reasonableness of the law" will be rejected by the judge.[65] And a similar effect is produced in *Israel*, where the emergence of nationalism in the revival of

religious and legal traditions cannot only frustrate attempts at codification, but, reinforced by American influences, is often to paralyze the enforcement of existing codes as well.[66]

In addition to all this, another feature peculiar to modernized Afro-Asian systems is that, in a majority of cases, codification of the unifying and substituting kind is only able to produce a formal unity of national law. The result is what usually happens when the opportunities of existing reality are ignored: the new gets *superimposed* on the old instead of replacing it, a phenomenon leading to *legal pluralism*.

Whether codification has been simply tolerated[67] or, just to the opposite, has been explicitly legitimate,[68] or has taken place as a matter of purely secondary importance,[69] the essence has remained the same. Namely, the code can lay no claim to having general significance: it merely reflects *one particularity over and against another particularity*, even if an older and more deep-rooted one.

There are two alternatives concerning how received influences can assert themselves. Namely, reception may weaken or even smother the forces of *internal* legal development. On the other hand, it may cast the contents, taken over by codification in its *own* image, its own (national) heritage and traditions. These alternatives may manifest themselves in the use of the wording of the code as a compulsory deductive basis for judgement or, alternately, as one of several equally conceivable bases of reference for argumentation. At the same time, these may also appear in the limitations of the legal unity the code is designed to bring about: in the limitations of its territorial range, effects, and/or integration in the law as a whole.

In any case, the value of reception is to be judged by the experiences of the receiving country. In other words, no "distortion" occurring in the course of reception is to be necessarily interpreted as a loss of value; on the contrary, it may also create new (national) values.

Therefore, according to its inherent potential, the process of Afro-Asian legal modernization may have a dual tendency. On the one hand, it may contribute to the *unification* of legal in-

stitutions *on an international scale*. This is beyond doubt a characteristic feature and desirable consequence of 20th-century development. On the other hand, it may also contribute to a creative use of *national heritage* and the *survival of traditions* worth preserving: a remarkable incentive towards social progress in our age.

5. CONCLUSION

Among the legal systems which have emerged in human civilization, those of the Afro-Asian societies are the ones to have preserved in an almost intact form their ancient character. They were based on religious revelations or tribal customs and, owing to their deep-rooted traditions, they were rather introvert, guarding their past instead of promoting progress. Their existence, however, was not an atavistic survival. They simply reflected the conditions prevailing in their respective tribal, pre-feudal or feudal (in any case other than European) societies.

It followed from their economic, political and social backwardness and weakness that they were soon exposed to European and, later, American colonization. The extent of intrusion ranged from persuasion to outright colonialization. Basically economic in its direct goal and nature, colonization had political, social as well as legal consequences.

In these systems, 19th and 20th century development took place almost exclusively through codification, or with codification laid down as main objective. The widespread use of *codification* is in striking contrast to the *absence of local traditions in codification*. This apparent contradiction reveals two messages. One, the most suitable way to *export* law is codification. Two, codification is the most suitable medium for carrying out a radical *reform* in law.

In fact, the Afro-Asian societies concerned were so heterogeneous and underdeveloped that they could draw little from their own resources. Many impulses were bound to come from the outside. *Imperialist pressure* was combined with the *high level*

of development of the countries exerting pressure, and the two together often determined the path of their further development. This explains why the former colonialist influence could become part and parcel of traditions, and what was formerly dictated by *ratione imperii*, now often found followers *imperio rationis*.

My main concern here lies with the relationship of these processes with codification. Notably the fact that codes have proved to be most suitable means of imposing law, receiving foreign law, or institutionalizing an artificially made law. Codes have been used for imposing, transplanting or radically renewing law in states inheriting both Common Law and Civil Law influences. The recourse to codification has become an urgent necessity that could not even be halted by the aversion to codification firmly established in new states where Common Law traditions prevailed. There, at most, intermediary stages were to be interposed.

Modernization of law by means of codification often requires a sudden and complete change: an *overall replacement of the very concept and ideology of law*, the system of the sources of the law, the techniques of making and administering the law, and so on.

This explains why codification has grown into a *symbol of Afro-Asian modernization*. In this region of the world, codification is so closely linked to socio-economic progress that it is often overestimated as a kind of panacea. Therefore I must add: when I emphasize the instrumental appropriateness of the code, I am aware of the fact that it is merely a *form*, an *instrument* with variable contents. It is an intermediary instrument which, as an optimum reflection of underlying conditions, should fully develop and not smother the inner forces and reserves of progress.

NOTES

1 For more details, see Bousquet, pp. 22ff.

2 Velidedeoglu, p. 26.

3 Unlike *Shari'a*, this set of secular norms was soon influenced by codification, at least in the form of compilations. The rule of Mohammed II saw the birth of the *Kanunname* (after 1453), this systematized compilation of all the administrative decrees enacted since the foundation of the Empire. This was followed by compilations by other sultans also covering fields such as that of criminal law. Finally, compilations of the subsidiary laws of the various provinces, towns and other communities were also published under the title *Defter Kanunu*. Velidedeoglu, pp. 27f.

4 They included a criminal code (1840; 1858), a commercial code (1850), a procedural appendix to the latter (1860), a code of maritime trade (1864), and codes of criminal and civil procedures (1880).

5 It is only the commercial code that formally dispensed with the strict prohibition on charging interest (although it was neglected to some extent in the actual practice of the cadis). And the French *Code civil*, although it was prevented from gaining ground by the *Mejelle*, this tradition-oriented codification of the *Shari'a*, asserted some of its principles through the French-type codification of civil procedure. Tedeschi, p. I, note 8.

6 Anderson, pp. 245f.

7 A loosening of the religious ties was indicated by what then appeared to be the shocking fact that the *Mejelle* came to life not as a continuation of the *Hanafite* rite, then predominant in the Ottoman Empire, but in an attempt to mediate between various orthodox, and even heterodox, Islamic schools. Cf. Velidedeoglu, pp. 36f and Anderson, p. 245.

8 Cf. L. Milliot 'Coutume et jurisprudence musulmanes ('Orf et 'Amal)' in *Rapports généraux au Ve Congrès international de Droit comparé* (Brussels: Bruylant 1960) pp. 180f.

9 Bousquet, pp. 186ff.

10 This was the situation in British *India* with the enactment of the Penal Code (1860), the Evidence and the Contract Acts (1872), as well as the Transfer of Property Act (1882). But it was even more open in Egypt where, almost immediately after the country gained her independence (1874), civil codes were elaborated under French influence, with separate code for the mixed tribunals handling cases with European involvement (1875) and different one for the native courts dispensing justice over Muslim subjects (1883).

11 See Velidedeoglu, pp. 23-25.

12 Cf. Eörsi, p. 461 and Gy. Eörsi 'A burzsoá magánjogi rendszerek kialakulása: Jogcsoportok a burzsoá magánjogban' |The Formation of the Bourgeois Private Law Systems: Law Groups| *Gazdaság- és Jogtudomány* (Az MTA IX. Osztályának Közleményei), III (1969), pp. 307ff.

13 The Turkish code of family law was adopted in Lebanon, Syria, Palestine and Jordan; it continues to be in force in Lebanon and Israel.

14 Egyt had a civil law code like this (1948). With a view of a possible legislative unification, it was adopted in Syria and Libya.

15 E.g. the Iraqi civil code (1953), which is influenced both by the *Mejelle* and the legal traditions of the British mandate.

16 Besides the civil codes of Egypt |Section 2| and Iraq |Section 2|, a similar provision was adopted by the civil codes of Libya, Kuwait and even Syria.

17 Cf. Tedeschi, pp. 8f.

18 The law of personal status was codified by Jordan (1951), Syria (1953), Tunesia (1956), Morocco (1958), and Iraq (1959), with Aden, Algeria and Lebanon following suit later. Tunesia was the country to implement the boldest reform when it banned polygamy. Anderson, p. 247. The Dissolution of Muslim Marriages Act in India (1939) and the Muslim Family Laws Ordinance in Pakistan (1961) also provided for a codification of personal status. J.N.D. Anderson 'The Future of Islamic Law in British Commonwealth Territories in Africa' in *African Law* New Law for New Nations, ed. H.W. Baade (Dobbs Ferry: Oceana 1963) p. 86.

19 In Egypt, e.g., a code for mixed tribunals (1875) was compiled by an Alexandrian lawyer after a few months' preparation. Tedeschi, p. 12.

20 *Lebanon*, e.g., became a French mandate in 1918. Since then, it has enacted codes of obligation and contract drawn from Egyptian and other sources (1932); a code of civil procedure inspired by Austrian law (1933); the country adopted the Turkish reform code of family law; and its code of maritime trade (1947) was inspired by the respective code in Morocco; its criminal code was compiled under Italian influence; while its code on land registration followed the Australian example. *Iraq*, on the other hand, was under British mandate from 1925. Its codes of criminal law and procedure (1918), as well as its company law act (1919), reflect a strong British influence that had to operate together with Iraq's civil code, adopting the principles of the *Mejelle* (1953), its commercial code (1943) and code of civil procedure (1956), both received from Turkey, as well

as the country's own self-inspired personal status act (1959), compiled in the spirit of *Shari'a* law.

21 Cf., e.g., Tedeschi, pp. 12 and 6.

22 The civil code and code of obligation (1926), as well as the code of law enforcement were imported from Switzerland; the code of civil procedure (1927) from the Canton of Neufchâtel;the criminal code (1927) from Italy; the code of criminal procedure from Germany. *Introduction to Turkish Law* ed. T. Ansay and D. Wallace (Ankara: Turkish Society of Comparative Law, etc. 1966) pp. 10f.

23 The effect of the Lausanne treaty (1923) may be mentioned here, which was one of the factors defining the political line adopted by Turkey. In addition, there was a preference for Swiss solutions because Kemal Atatürk, together with other leaders of the republic, graduated at Swiss universities. Cf. G. Sauser-Hall 'La réception des droits européens en Turquie' in Faculté de Droit de l'Université de Genève *Recueil de Travaux* publié à l'occasion de l'Assemblée de la Société suisse des Juristes à Genève (Genève: Kundig 1938), pp. 345f.

24 Velidedeoglu, p. 49.

25 Elbir, pp. 55ff.

26 Cf. Elbir, pp. 63f. In order to accomplish the assimilation of the Code, to turn the deformities following from its adaptation into an accepted norm and to promulgate it as the country's new national code, a special civil law codification committee was set up as early as 1951. However, the committee was unable to do more than adopt a basically hesitant stance. See, e.g., Velidedeoglu, p. 23.

27 Allott, p. 221.

28 The *first layer* of British law, introduced at a date separately set for each colony (1862 for Sierra Leone; 1874 for the Gold Coast; 1920 for Tanganyika), was the law in force in Britain, with some minor chances for local adaptation. David, p. 558. The *second layer*, for indirect use, was constituted by the principles of *"natural justice, equity and good conscience"* which were institutionalized to promote a limited enforcement of customary law. E.g., in the Gold Coast, two years after the introduction of British law in the form of common law, equity, and the statutes of general application in force in England, it was allowed to regard local customs in the relations among natives as binding. At the same time, however, it was stipulated that should these customs clash with the principles of natural justice, equity and good conscience, or should they contain any gaps, those three principles must be taken as bases for judgement |Supreme Court Ordinance of Gold Coast 1876, Section 19|. This provision, which also brought the applica-

tion of customary law in Gambia, Northern Nigeria, Northern Rhodesia, Sierra Leone, and the Sudan, helped to bring British law once again in through the backdoor, as it were. Historically, it might be obvious that, according to original intentions, this auxiliary and restrictive source of law was meant to uphold humanistic values, regarded as eternally human. But it is equally true that, originally, "the formula was a device to escape from English law, not to call it in". Yet, in the role of civilizing missionary, British colonial administration might have felt it was most natural a thing in the world to consider its own domestic law the embodiment of "natural justice". Thus, they also achieved a kind of *unification* in the ways they have administered customary law on an imperial level, especially in Bengal, India, Pakistan and Burma. D.M. Derrett 'Justice, Equity and Good Conscience' in *Changing Law in Developing Countries* ed. J.N.D. Anderson (London: Allen and Unwin 1963) pp. 114-153, especially at 151.

29 Gonidec, p. 8.

30 In the Malagasy Republic, e.g., the process of establishing a legal system was indicated by 300 legislative *ordonnances* in the period between 1960 and 1962. Gonidec, p. 117.

31 In the *Gold Coast*, the only change in the system of the sources of law has been their being put in the hands of independent state legislature. According to Section 40 of its Constitution (1960), English common law is no mere subsidiary source of law any longer, but precedes customary law in the hierarchy. W.B. Harvey 'The Evolution of Ghana Law Since Independence' in *African Law* New Law for New Nations, ed. H.W. Baade (Dobbs Ferry: Oceana 1963) p. 60. This does not place customary law in a more favourable position than the one it enjoys, e.g., in *Pacific Islands*, having a system of the sources of law established under American trusteeship, which follows American and Trust Territory legislation in recognizing the validity of local customs as a subordinate, although not subsidiary source of law. It is interesting to note that the American Restatement of the Law volumes, completed by then, were attached to these as a general subsidiary source of law |Trust Territory Code, Title I, Section 103|. Cf. *Trust Territory of the Pacific Islands* 24th Annual Report to the United Nations on the Administration of the Trust Territory of the Pacific Islands 1971, US Department of State (Washington: US Government Printing Office 1971) pp. 40f.

32 This most daunting venture is urged as a cry for help by J. Poirier in his 'Situation actuelle et programme de travail de l'éthnologie juridique' *Revue internationale des Sciences sociales* XXII (1970) 3, pp. 509ff, especially at 522ff.

33 A strict adherence to its *customary* nature would inevitably destroy its *legal* character, whereas if it is made as writ-

ten law, it will end its organic relationship with everyday practice. Allott, p. 239. In other words, one may say that African customs, with their tribal nature, will soon lose ground, while modernization of their contents will simply make them superfluous, reducing to a mere clog their strictly customary appearance.

34 *Traditional courts* applying nothing but customary law alone have been kept as a temporary solution in East Cameroon, Niger, Gabon, Dahomey and, with the aim of permanency, in Togo, Chad, and Upper Volta. Gonidec, p. 272.

35 They wrote the following: "The codification of customary civil law... is not envisaged. It is hoped that with the complete integration of the courts systems in Uganda, statutory civil law will in time become accepted everywhere." *African Conference on Local Courts and Customary Law* Record of the Proceedings of the Conference held in Dar es Salaam, Tanganyika |1963| |n.p., n.p., n.y.| p. 96.

36 Cotran, pp. 81f.

37 In *Indonesia*, e.g., where eighteen different linguistic-regional systems of the Adat-law, traditionally used among natives, was in force, as well as written law of Roman-Dutch origin, the Minister of Justice suggested in 1962 that, in order to promote legal development of a national character, laws should not be codified. In fact, the Minister even proposed that foreign codes, including the civil and commercial codes (1847), which were seen as obstacles in the way of legal development, should be treated as invalid, with the aim of paving the way for a future merging of the traditional and the modern in the course of judicial practice, which would eventually lead to codification. D.S. Lev 'The Lady and the Banyan Tree: Civil-law Change in Indonesia' *AJCL* XIV (1965) 2, pp. 292ff.

38 In the *Malagasy Republic*, the beginnings of customary law codification go back to the pre-colonization period (the end of the 18th century), to reach full development in the *Code des 305 articles* (1881) which brought together and reformed local customs. David, pp. 548f. In *Natal*, the South-African British colonial authorities tried to codify the customary law of the region in a compilation of 68 articles. The ensuing Code of Native Law (1878) and its second version (1891) recognized unwritten customs as a subsidiary source of law; but its third version (1932) reduced them to the codified wording of the law. Hahlo and Kahn, pp. 323 and 330. Local penal customs in the *New Hebrides* were codified in a Native Penal Code (1917), to be recodified (1927; 1940), although the Convention (1906) only permitted native customs to be considered in the administration of justice without attributing to them any significance beyond recognizing their subsidiary character. C.S. Belshaw *Island Administration in the South West Pacific* (London: Royal Institute of International Affairs 1950) p. 62.

39 Cf. Allott, p. 233. In these *conciliatory processes*, the patterns established through a mass of similar processes are not used as binding precedents, but as one of possible arguments, a *talking point*, as it were. A.N. Allott *Essays in African Law* (London: Stevens 1960) p. 68. In this, they are not far removed from the Greek-Roman attitude where law |*dikaion*| offered the concretely just solution to a given case, in the achievement of which even codified norms "served as a stepping stone rather than premisses". M. Villey 'Questions de logique juridique dans l'histoire de la philosophie du droit' in *Études de logique juridique* II, ed. Ch. Perelman (Brussels: Bruylant 1967) p. 15. There is every reason to assume that this *sui generis* type of law can be regarded as a relic of ancient customary law, dating from a period before its institutionalization and formalization. The confrontation and incompatibility of these two types of law, as well as ensuing social tensions, are illustrated (taking the examples of native Australians and the original settlers of *Niugini* |New Guinea|) by J. Goldring 'White Laws, Black People' *The Australian Quarterly* XLV (1973) 3, especially at pp. 9ff. As a first theoretical attempt, see R. Dekkers 'Justice bantou' *RRSS* XII (1968) 1, pp. 56ff; R. David 'Deux conceptions de l'ordre social' in *Ius privatum gentium* Festschrift M. Rheinstein, I (Tübingen): Mohr 1969) pp. 56ff.

40 One commentator's vivid formulation: "The 4-500 million people inhabiting Europe from Spain to Russia show less variety than the 15 million Belgian Africans do." A. Sohier *Traité élémentaire du Droit Coutumier du Congo belge* 2nd ed. (Brussels: Larcier 1954) p. 13. In Kenya, Uganda and Tanganyika, there are more than 200 independent systems (Cotran, p. 74); 68 systems of customary law are registered in Senegal with a population of just about two and a half million (Baye, p. 23); and more than 100 systems in New Guinea and Papua where the number of natives is just over one million (A.B. Weston *The Marriage of Traditional Law with Common Law in Post-independence Developing Countries* |Address delivered to the Private International Law Section of the Hungarian Lawyers' Association, January 8, 1974).

41 In the case of Ghana, Nigeria, Kenya, Tanganyika, Zambia and Gambia, this ranges from an insistence on nomadic conditions to an endeavour to adopt western patterns of capitalism. Allott, p. 225.

42 In *Somalia*, e.g., apart from the need to end tribal traditions and Islamic influence, contradictions following from the after-effects of earlier Italian and British legal rule are also to be overcome. The same problem arises in *Cameroon* where the legal effects of former French and British colonization are to be reconciled. Bentsi-Enchill, p. 65.

43 See, e.g., the Contitutions of Cameroon |1961: Section 6| and Zaire |1964: Section 49|. Gonidec, p. 274.

44 The law of *inertia* leads almost inevitably to such collections of customary law being put to a codified use. While putting into writing is like a snapshot capturing one particular moment, codification has the effect of putting an end to all flexibility. To prevent this, when the Adat-law was laid down in Java in the 1930s, each page of the collection carried the following notice in capital letters: "THIS BOOK IS A DESCRIPTION, IT IS NOT A CODE!" Kenning, pp. 69f.

45 Buganda, Basutoland, Swaziland, Botswana and, to some extent, Somalia might be examples of the former (Allott, p. 225), and Nigeria (Allott, p. 227) and Kenya (Bentsi-Enchill, p. 65, note 2) of the latter.

46 This is emphatically stated in connection with the Tanganyika Customary Law Project by Cotran, p. 85.

47 See, e.g., Kenning, pp. 69ff.

48 J. Poirier 'La rédaction des coutumes juridiques en Afrique d'expression française' in *La rédaction*, p. 280.

49 Gonidec, p. 275.

50 S.L. Zivs in *Pravo*, pp.51 and 56.

51 In connection with attempts to codify civil law in Togo, see L.K. Amega 'Prière pour un Code civil togolais' *Recueil Penant* LXXVI (1966) 712, pp. 275ff.

52 From 1961 on, more than a dozen codes were enacted in *Senegal*, ranging from civil (1966), commercial (1963) and even public administration (1966) codes. *Pravo*, pp. 56ff; K.M. Baye 'L'expérience sénégalaise de la réforme du droit' *RIDC* XXI (1971) 1, pp. 36ff. This series of codification is characterized by a predominance of compromises, an almost servile copying of the French example and, in various ways, by the adherence to Islamic traditions. See J. Chabas 'Réflexions sur l'évolution du droit sénégalais' in *Études*, pp. 141ff.

53 As officially confirmed (*The Kenya Gazette* 17 March, 1967, Special issue), this idea was born in Kenya. *Pravo*, p. 51.

54 This was the final stand struck in the debate which ended with the *judicial development of law* as an effective means being excluded, and even a compromise proposal (Gy. Eörsi 'Some Problems of Making the Law' *East African Law Journal* III |1967| 4, pp. 275f) to codify step by step being regarded as far too radical and, therefore, unfeasible. This gave rise to another proposal (Y.P. Ghai and W.C. Whitford 'Reform of Private Law in East AFrica' *Mawazo* |Kampala, Makerere University|, II |1968| 1, pp. 50f), namely to start *codification* from law areas *peripheral* from the point of view of customary law traditions. This proposal had in

mind to open up the possibility of a continuous flow of practical experiences, in order to facilitate the future adoption of the new technique.

55 Basically, it was this that motivated the series of western-type laws enacted in the Ivory Coast (1964). Gonidec, pp. 273 and 276.

56 *Ethiopia* embarked on a comprehensive codification in 1954. It resulted in the enactment of a criminal code (1957), civil code (1960), commercial code (1960), and codes of criminal (1961) and civil (1965) procedure. The reason why old law had to be replaced entirely was that most customary law traditions were restricted to casual and pragmatic resolution of conflicts. Although there were traditions embodied in the orthodox Christian nomocanon, the 13-16th century *Fetha Negast*, that might be regarded as having a legal character, the new legal system had to rely solely on secular foundations. It was equally unrealistic to rely on Islamic traditions, as the Islam, imported from abroad, was against national Christian orthodoxy in Ethiopia. David 'Les sources', pp. 497ff, and Vanderlinden *Introduction*, p. 212.

57 Every article of the Ethiopian civil code was borrowed from provisions already in force or at least envisaged somewhere else, yet none were carbon copies. Thus, for example, in the regulation of agricultural relations in monocratic, semi-feudal Ethiopia, aspects of both the Soviet kolkhoz system and Czarist agricultural law were used. David 'Les sources', pp. 503 and 505.

58 In Ethiopia, 95 per cent of the population is illiterate, but half of the population would not understand the language of legislation (the national language, i.e. the Amharis) anyway. Under such conditions, it would be childishly naïve to expect the new legislation to bring genuine breakthrough. So it is natural that "Islamic law... is still valid although in point of principle it is void of any binding force, and the same is true of... traditional laws, which apparently survive side by side with the Code, for the state lacks the means to guarantee general respect for the laws of the country". Vanderlinden *Introduction*, p. 209.

59 Gonidec, p. 276.

60 In the *Philippines*, the ancient system of law of the Filipinos had certain local codification traditions in the form of the *Codex Maragtas* (around 1200) and the *Codex Kalantiao* (1433). Based on these traditions, the Spanish codes, introduced by the end of the 350 years of Spanish colonial rule (*Codigo Penal* |1870|, *Codigo Commercial* |1885|, the codes of civil and criminal procedure |1888| and *Codigo Civil* |1889|) sowed the seeds of the classical European tradition in codification. In the first half of this cen-

tury, American colonial rule continued this trend with a dual effect. On the one hand, it developed further codification traditions (Code of Criminal Procedure |1900|, Revised Administrative Code |1917|, Revised Penal Code |1932|, and the Rules of Court regulating civil procedure |1940|), but, on the other hand, it took the sting out of codification by giving a binding force to judicial precedents. When the Philippines gained independence after World War Two, legal development remained almost uneffected. While the Spanish-American codes remained in operation, the only novelties were the creation of a new Civil Code (1949), a revision of the Rules of Court (1964), and, now, the planning of a Code of Crimes and, anew, a Revised Administrative Code. The only attempt at a synthesis is indicated by a concession made to the Common Law approach to codification, namely by a Civil Code provision |Section 8|, according to which "judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines". Gamboa, passim, especially at pp. 12ff and 68ff.

61 In *South Africa*, both Justinian and the glossarists, including Grotius or Beccaria, as well as even the latest decisions passed by the Supreme Court of the Netherlands, can all be equally referred to as "authorities" in court proceedings. The idea of codifying this fragmented law was raised three times back in the 19th century. In the 1920s, it received a new impetus because of peoples' fear that unless it were consolidated by means of codification, the law might be absorbed into British law as one of the effects of the country's belonging to the Commonwealth. However, the tradition of a strong judicial power developed upon the basis of the country's uncodified and, therefore, more flexible law has proved to be stronger. Kerr Wylie (1939), then T.W. Price (1947) were already opposed to codification, suggesting only a digesting or a doctrinal systematization of the law, a modest programme which, however, has not been implemented because of a want of specialists. M.J.W. Bosch 'Quelques remarques sur le système du droit romano-hollandais et ses rapports avec les problèmes de la codification' *RIDA*, in particular pp. 247ff; Hahlo and Kahn, pp. 28ff, especially at 49, note 30.

62 In *India*, most of the codes and quasi-codifications in force are still those compiled to meet the demands of the export of British law. So the main body of Indian law comprises the Penal Code (1860); a renewed version (1949) of the Code of Criminal Procedure (1861; 1872; 1882; 1898), aimed at implementing equal rights; a copy of the Code of Civil Procedure (1859; 1877), adopting the reforms of the British Judicature Acts (Civil Procedure Code 1908); the Indian Succession Act (1865); the Indian Contracts Act (1872); and the Indian Trusts Act (1882) – all of which adapting British law –, and it also incorporates some partial codifications merely copying British law, notably the Indian Sales of Goods Act (1893 in Britain, 1930 in India),

the Indian Partnership Act (1890 in Britain, 1932 in India), and the Indian Companies Act. Close adherence to British legal development is exemplified by the Companies Act, being an exact copy taken straight from the colonial ruler not only when it was first promulgated (1890 in Britain, 1913 in India), but also when it was revised (1929 in Britain, 1936 in India). Although, several decades later, the Constitution (1949) declared that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India" |Article 44|, this was worded anyway in a preamble and the pledge has always remained a dead letter. But one should not blame only these attempts to preserve former colonialist law for the legislative backlag. Owing to the contradiction between what is *national* and what is *progressive*, the reason for British law being preserved now is identical to the one for its initial introduction: namely, the absence of any obvious alternative. True, India does have a national legal tradition (Hindu law), but it is a complex of moral, religious and legal norms, riddled by a multitude of different schools, and with sources embodied in holy books that defy both codification and modernization. The idea of a Hindu Code (1948) proved to be unrealistic. So the only remaining possibility was to use the common, unified, codified and secular British heritage that would also lend itself to legislative adaptation. Gledhill, passim, especially at p. 147, and the analysis of Hindu law at 208f.

63 In *Japan*, French and German influences competed against each other when the *Meiji* period opened up the way to codification. Ultimately, the codes of criminal and civil procedure (1890), the civil code (1898), the commercial code (1899), and the criminal code (1907) reflected mixed influences, but they did not infiltrate western ideas into Japan's increasingly militarized society. Only the collapse of imperial rule and the beginning of American military occupation, which brought about drastically substantial legal changes, started the country on a road of democratization. The redraping of the legal system in American colours, however, did not put an end to the country's own fifty year old traditions in codification. K. Nakamura *The Formation of Modern Japan* As Viewed from Legal History (Tokyo: The Centre for East Asian Cultural Studies 1962) in particular ch. II, section 2-4; Noda, in particular ch. 3 and 10-12. Most of the amendments by codification and re-codification have been carried out recently. The proportion of pre-war and post-war amendments by codification has been 2:7 in the case of the criminal code, 3:7 in the civil code, 6:13 in the commercial code, 8:9 in the code of civil procedure, and even the code of criminal procedure was amended nine times in one decade, although it was completely revised in 1948. *EHS Law Bulletin Series* (Series of Japanese Laws in English Version) Tokyo: Eibun-Horei-Sha 1962).

64 *Israel* inherited the code of *Mejelle* together with the unwritten body of Islamic law, the French codes adopted in

Palestine and the principles in force in Britain as a subsidiary law, accompanying British colonial legislation in Palestine. Here, too, British colonial rule has helped to establish a tradition of codification exporting British law, and it is chiefly embodied in the Criminal Code Ordinance (1936) and the Civil Wrongs Ordinance (1944). H.E. Baker *The Legal System of Israel* (Jerusalem, etc.: Israel Universities Press 1968) pp. 60-64. Intermingled with these influences, pioneering initiatives in the establishment of a new state have produced a bewildering complexity of idea, in which everything is mixed up with everything else, the only possible exception, the author humorously observes, being the idea of socialism. S. Ginossar 'Israel Law: Components and Trends' *Israel Law Review* I (1966) 3, p. 394. In this heterogeneous state formation, a mass of codifying statutes were enacted to realize the 2000 year old dream of establishing an independent Jewish state. But they were immediately reduced to having a merely relative value by being used only as references for making precedents. With the exception of the Code of Military Justice (1948), they are called simply "laws" |*khok*| and not "codes" |*khukka*|. The basic problem is that the prospects for a final settlement are still unclear. The main debate is over the issue whether to regard the Jewish *legal heritage* (Talmudic practice of the pre-Diaspora period and the still functioning but rigid rabbinical traditions that have survived in dispersed Jewish communities, often harrassed, outlawed, and kept under primitive conditions in the past) as a burden from the past or, rather, as the promise of a new future. Obviously, the desire to revive this heterogeneous and (as a result of the Diaspora) differentiated and particularized law territorially reduces the chances of codification. This is mainly because *rabbinical reasoning* is inevitably accompanied by the treatment of the written sources of law as merely a starting point for free argument. Of course, the issue may still swing either way. But it was decided that the *Hebrew language*, this dead form expressing a mostly dead content, would be revived. And in the continual conflict between endeavours to preserve traditions and those to implement an artificial linguistic renewal, the decision to revive the Hebrew language is also a serious obstacle to an acceleration of the renewal of law by codification. Akzin, in particular pp. 319ff.

65 Noda, pp. 218 and 222. In *Japan*, the law in books could actually be instantly Europeanized; but law in action could follow suit, if at all, only as a result of great efforts and perseverance. K. Takawanagi 'A Century of Innovation: A Development of Japanese Law, 1868-1961' in *Law in Japan*, p. 39.

66 Cf., e.g., D.M. Sassoon 'The Israel Legal System' *AJCL* XIV (1968) 3, pp. 413ff.

67 In *Japan*, perhaps partly because the "transplantation" of capitalism served a political-militaristic interest in the

second half of the 19th century, rather than genuine social transformation, *imported law* was an *external means* rather than an inner impetus of social progress. Its adoption has been seriously hindered by non-legal systems of norms (primarily the rules of *giri* with their preference for mutual acquiescence and refusal of standardization), established as a patriarchal heritage of Asian feudalism. A consequence of the attitude that "The Japanese do not like law" manifests itself in the fact that "The emotional excludes the legal". In other words, law is applied in practice only in rather exceptional cases, notably when, for resolving conflicts, preference is given to legal proceedings to take at all. Noda, in particular pp. 60ff, quotations at 160 and 179. For instance, in the period between 1953 and 1959, only about 0.3-0.4 per cent of all cases of traffic accidents resulting in physical injury or death went to court. In all the other cases, indemnification took place outside the law, through direct settlement by conciliation. T. Kawashima 'Dispute Resolution in Contemporary Japan' in *Law in Japan* pp. 42f, especially at 63. In addition, *customs* still play a decisive if not predominant role in several fields. The law of *Dajo-kan* (1875) defined the place of customs in the hierarchy of the sources of law as a source to function alongside statutes, but the law of *Horei* already termed them as a subsidiary source. None of these disrupts the practical life of law: customary law continues to challenge the imperative provisions of the codes, especially in farming and fishing villages. This has been proved in detail through examples of various contractual forms and varieties of ownership, the factual marriage based on customs, the survival of the power of paterfamilias in the law of inheritance, and so on, by T. Taniguchi 'La loi et la coutume au Japon' in *Études*, pp. 571pp.

68 Both in *India* (Gledhill, pp. 204ff) and in Israel, the law of matrimony, as well as the family and personal status, still depend on religious denomination. In *Israel*, for instance, they are regulated by Jewish law; by Islamic law incorporated in the principles of *Shari'a;* by Catholic canon law as codified in the *Corpus Iuris Canonici* (1918); and by the law of the Oriental Christian Churches, based on the Bible, the Apostolic traditions and the early synodical resolutions. Moreover, the Negev applies the customary law of the Bedouin tribes. Akzin, pp. 300f.

69 For their basically subsidiary role, illustrated by the example of the Philippines and South Africa, see Gamboa, pp. 14f; and Hahlo and Kahn, pp. 28ff.

VIII. NEW AMBITIONS IN CODIFICATION: SOCIALIST LAW

1. THE SOVIET-RUSSIAN EXPERIENCE

It is well known that the eruption by the October Revolution in Russia was preceded by a vast amount of theoretical and practical, ideological and organizing work. The analysis of the past, the determination of the tasks of the present and so the predetermination of the future through clarifying the aims of the day - all played their part in this work. The problem of the law, however, was accorded but a rather modest role. And this was by no means by chance alone. Lenin, as is known, was a law graduate, and also practised law in the early stage of his career; and later, when the situation demanded, he also handled legal problems with predilection, and did so sensitively, from a lawyer's angle. But revolutionary strategy was primarily engaged in issues of politics and power, and, after the successful breakthrough, in problems of arranging the day-to-day affairs of the state: legal issues could only emerge in their most general connections, as partial aspects.[1]

As a revolutionary, *Lenin* regarded the real world and the business of changing it as of primary importance. He fought to influence the real world, and, in doing so, he was ambitious in basing his activities on theoretical foundations. As communist reconstructions do suggest unanimously, Lenin's activity relied on a dialectic interplay between theory and practice by making practice the touchstone of theory. As Lukács says, Lenin evaluated theory and practice as components of one and the same totality, viewing their connection and separation in a constant

unity. This gained expression in the wish of gaining that delicate, always mercurial and always re-forming balance formed and again re-formed between conscious planning, on the one hand, and improvisation based on the factors of spontaneous development, on the other.[2]

It is precisely the rejection of such an interpretation that may give rise to polarizing points of view which depict Lenin's contribution and determination either as a sequence of pure improvisations or as the reaction to merely extraneous circumstances. The historical reason for such opposing evaluations is to be found in *Soviet development* itself. The end of World War I, the intervention, as well as the political and economic dénoument within, repeatedly gave rise to the problem of wither now. And, for obvious reasons, the technical questions of law could then only project their importance in an anticipatory way. Lenin was by far not engaged in minutely drawing up the shape of any future set-up; he wished only to carry current power aspirations to victory. Therefore, the timeliness of *his* theory was fundamentally practical: it formulated in theory whatever was made actual by the facts of revolutionary events as dictated by the logic of seizing and, then, consolidating the power.

Knowing Lenin's position, it is at least questionable whether we can give full credence to interpretations which see the annulment of the old law and the reliance on the casual discretion of judicial practice (i.e. so-called revolutionary law-making) as an opting for law-modernization with the rejection of the assistance of legislation. According to this view, the leaders of the revolution surrendered codification in order to render legal development subject to the mass of *ad hoc* experiments that result from the everyday administration of justice according to general principles alone. And they relinquished this method only after half a decade, under external pressure, in a critical economic situation; they had to surrender this policy and establish a stable legal system because of the New Economic Policy, the need for foreign capital inflow, and the re-establishment of foreign trade relations.[3] This view, while based on an analysis of actual development, still

distorts a bit, for it evaluates necessities recognized as being tactical as if they had been strategic ones.

By examining the changing role of law in the course of revolution and also the logic behind it, we may arrive at the following conclusions.

The old law was *abrogated* less than one month after the outbreak of the upheaval (on November 24, 1917) and the judges were called upon to make their rulings by relying upon their *revolutionary legal consciousness* and the minimal programme of the political parties which then shared power. The courts thus got an opportunity to bring formally unrestricted verdicts as dictated by the most amorphously felt necessities of the place and time, until even the mere *reference* to the czarist statutes and rulings were *forbidden* a year later (on November 30, 1918).

Formal adherence to and reliance on preconceived ideas are alien to the spirit of revolution. Particularly in a heterogeneous empire of such vast dimensions, deeply divided into various areas as inherited from czarism, the seizure, maintenance and consolidation of power, and setting the most ambitious purpose of social transformation are only possible by the mobilization of the masses, by spurring them into self-inspired activity, in short, by the *dynamization of society*. In revolutionary times, therefore, even "laws have only a temporary validity"[4] that can be pushed aside at any time.

This is the reason why it became necessary for those striving for power to use *law as a direct political instrument* and why the immediate political task of winning over the people as well as mobilizing and also guiding them had been carried out by legal means, while purely political considerations had been asserted by the law courts in the discretionary practice of revolutionary justice.[5] This *atypical* usage of law finds explanation in the lack of any foreseeability and stability. Lenin himself felt the necessity to emphasize this in the first half of 1918: "When a new class comes on to the historical scene as the leader and guide of society, a period of violent 'rocking', shocks, struggle and storm, on the one hand, and a period of uncertain steps, experiments, wavering, hesitation in regard to the selection of new methods corresponding to new objective

circumstances, on the other, are inevitable."[6] The unsettledness, i.e. the objective and subjective determination of uncertainty reduces all preconceptions and planning to a relative value, if not to mere phantasmagoria. Only so-called *revolutionary law-making*, which dissolves the generality of any central concept in local specifics, can provide a suitable answer.[7]

Legal development through judicial practice was, in the practice of the Soviets and the courts, determined more by the objective to be reached than by the means of reaching it. Yet, this development took place not only with the toleration of the state, but directly guided by it in the form of an avalanche of orders.[8]

For the executive power not only controlled but also minutiously predefined what was carried out in the name of revolutionary law. Thus, the particularity, born of the autonomy of local implementation, did not result in rendering local practice universal. The reshaping of the *central generality* under the effect of *local individuality* led to a kind of synthesis – or, rather to an *intermediary compromise* – between the central and the local concepts.

Lenin's stand in choosing the non-codificatory path of legal development was not quite doctrinaire. He did not regard what came about *par force* during the accomplishment of the new order as a necessity of the order itself. He did not promote what was temporary into a concept; he did not raise what was a part of the transition to the *conditio sine qua non* of the whole process. As early as July 1918, he clearly marked the limits in respect of the methods to be used in building a legal arrangement, and differentiated between the phases of revolution and consolidation in connection of the paths and methods to be followed.[10]

(It is another question, pointing well beyond the present topic, that Lenin's theoretical approach to and practical handling of law were captive of more instrumentalization from the very beginning. He was interested in nothing but revolutionary breakthrough and the mercyless logic of his wishful thinking resulted in the policy-oriented homogenization of the social

sphere and, eventually, in extremist reductionism. This is why his interest in law was only secondary, in fact, a function of political necessity only. This is why his way of constructing a legal set-up and legal culture amounted in practice to their actual negation, to the practical annihilation of law and legal distinctiveness with all their pathos. Both in the Soviet Union and elsewhere, this is why Leninism could only develop into a theory of social totalization, instead of becoming aware of social totality.)

Nevertheless, while *codification* was made impossible by the temporary necessity for revolutionary law-making, this did not exclude for a minute its taking into consideration as a question of principle. Indeed, as Lenin emphasized, the autonomous local activities paved the way for their codification, their inclusion into paragraphs and for finding "the final *form* in which to put them into effect".[11] Apart from this, some practical measures also indicated that the concept of codification was only premature, but by far not alien to the revolutionary idea cherished by the Bolsheviks. Only one and a half months after seizing power, the divorce law was enacted, matrimony having been emancipated from being a matter of the Orthodox Church into becoming a civil one (December 16, 1917); then, on the next day, this was codified and promulgated as the Code of Family Law, the first code of the Russian Federation. The Labour Code was born under identical circumstances one year later (December 10, 1918); and, within a few days, codification department was established at the Russian Federation's Commissariat for Justice, aimed at the compilation of "the complete collection of the valid laws of the Russian revolution".[12] Doctrinal writings also reveal the temporary contradiction between the desirability of codification in principle and its untimeliness felt in practice.[13]

We cannot accurately reconstruct from the sources available how far the hope for an *early withering away of the state*, the mental anticipation of the immediate transition into a communist society influenced the zigzags of Soviet legal ideology. Neither do we know the exact nature of these ideas, nor the degree of their acceptance; consequently, we cannot measure their

effect, either. In any case, the instruments of oppression called to life by the young Soviet state in mid-1919 (the Red Guard, the Red Army, and the Extraordinary Commission |*Cheka*|) were regarded by some ideologists only and exclusively as creations of the Civil War, as necessities brought about by the exceptional situation, and to be terminated with the end, of the Civil War.[14] They regarded the law as a kind of *half law*, which will be not exhaustively statutorily enacted even though codified in its basic principles. According to this concept, the new law is made up *partly of legislative enactments* and *partly of judicial practice*, ensuring its further development. "During this era when the old society is being destroyed and the new society is being upbuilded, the popular courts have a gigantic task to perform... The laws of the bourgeois landlord system have been annulled; but the laws of the proletarian State have as yet merely been outlined, and will never be committed to paper in their entirety. The workers do not intend to perpetuate their dominion, and they therefore have no need for endless tomes of written laws. When they have expressed their will in one of the fundamental decrees, they can leave the interpretation and application of these decrees, as far as practical details are concerned, to the popular courts in which the judges are elected by the workers. The only important matter is that the decisions of these courts shall bear witness to the complete breach with the customs and the ideology of the bourgeois system; that the people's judges shall decide the cases which come before them in accordance with the dictates of proletarian ideology, and not in accordance with those of bourgeois ideology."[15]

It is rather paradoxical that these typically leftist manifestations, which did not deny expressedly the strategy of Lenin in their final goal, but often sharply diverged from the methods chosen (and not only on insignificant points, influenced precisely by the demand for the direct establishment of communism),[16] eventually provided yet a further argument in favour of choosing the path of codification. They seized upon the social nature of law in its *basic principles*, and this was a synonym with a desire for their codification. Therefore, the

spirit of the era is reflected in the fact that the Guiding Principles of Criminal Law, issued after these views were drafted, put the principles of penal policy into writing, but in a form reminiscent of codes.[17]

Under Soviet revolutionary conditions, the *development of law through judicial practice* and *codification* opposed, but did not exclude one another. Quite on the contrary, they were seen to be practical alternatives corresponding to the various phases and states of social development. Their mission was, therefore, to serve as alternate *preliminaries* and *complements* to one another. Consequently, as conceptualized, their value lay not in themselves, but in their social function, their ability to satisfy the changing requirements of the time. This is why they could be more or less adequate in appropriate phases of social development.

The economic crisis produced by *War Communism* was followed by the introduction of *New Economic Policy*, which resulted in political compromises, and an advance in economic progress. Of immeasurable importance for this policy was the termination of Soviet Russia's international isolation, which brought in its wake the development of foreign trade, indeed, even the encouragement of foreign capital inflow. Well, Lloyd George announced at the preparatory session of the Genoa Conference that the establishing of a known system of legal norms was one of the conditions under which Soviet Russia could engage in economic relations with the Western powers. This episode, mentioned also by the Commissar for Justice of the Federation,[18] must be evaluated as a weighty argument, but, maybe, not as a circumstance which effected internal development.[19]

The New Economic Policy was the product of lengthy planning, and, during this gradual shift, legal consolidation also demanded attention. The shift in emphasis, which turned attention from the making of the law increasingly towards its implementation into practice, pointed in this direction, above all.[20] And so did the attitude, which evaluated the efforts for introducing the New Economic Policy, also as an experiment for stabilizing and codifying the law.[21] And the determination, with which Lenin did away with the handy means of revolutionary law-

making and (while allowing for "a really inevitable difference") substituted it with the need for legality |the socialist variant of rule of law|, declaring that "law cannot be Kaluga law or Kazan law, but... it must be uniform all-Russian law, and even uniform for the entire federation of Soviet Republics", also pointed in this direction.[22] And, finally, so did the preference which he repeatedly accorded to the problems of codification in those days.[23] And apart from all this, Kurskii himself did not consider the demand by Lloyd George as decisive either, but rather the necessity in the internal situation and economics which called for the assertion of "legality" in order to assist the development of the economic opening already initiated.[24]

We can see the difference then: under *War Communism*, the codification idea was not so much a factor of legal unity and security as the ideal guise of law conceived of as a direct means of policy, in other words, an opportunity for *popularizing* it. Its strength lay merely in the condensation of legal contents.[25] Later on, the *New Economic Policy* brought to the fore the classic form of codification and, for this very reason, it proved by and large appropriate for assisting *socio-political stabilization.*

Therefore, regarding the emergence of Soviet codification, we can accept the transition from the revolutionary to the more *consolidated* phases, and within it, the socio-economic need to establish something more similar to a legal system, as the fundamental determinant. Lenin's statement, according to which the pivotal problem of Soviet development by 1922 was that of *legality*, also indicates this.[26] This was what demanded codification, as well as general supervision by the public prosecutor,[27] i.e., consolidated law-making, as well as the control of the law's practical implementation.

Tracing the emergence of Soviet codification, we should not forget an incidental element which was present in the pre-revolutionary past. First, the general codification and compilation practice of the closing periods of czarist regime, and particularly the achievement in the 19th century of the *Svod zakonov*, made these procedures known; and they were also mas-

tered, at least in their technicalities. Secondly, the codification experience of Western European societies was also teachingful. It showed the role codification played as a consolidating factor of social transformation and as the embodiment of social progress. And third, the legal expertise of Lenin and other leading personalities of the bolshevik revolution, as well as their years in West European exile might also have played a part in opting for codification. Their stays in Western Europe helped them to obtain information on the code-law systems of contemporary bourgeois societies in their actual working and also to check in practice the views Marx and Engels had about French codification and legal forms.

As for the sharp contrast between the achievements of the past and the present, the legal set-up of czarism would have been of great interest. The law of *czarist Russia* was obviously left far behind by Western European progress, when the cruel preservation of serfdom, the Byzantine intertwining of state and church, the weakness of the bourgeoisie, the rudimentary state of the proletariat, and, on top of all this, the stupid autocracy of the ruling Romanovs are considered. Yet, at least in one respect, Russia still possessed an achievement that surpassed that of Western Europe: she accomplished the *unification* of the laws of the Empire, albeit with ruthless savagery. Thus the tradition of codifying initiatives could have been more fruitful and its experience more complex. Yet, its lessons were hardly present in socialist codification; these were never as decisive in domestic development as the attempts at feudal law-unification in the Europe of bourgeois transformation. The explanation is obvious: contrary to the bourgeois pattern, even codification resulted in the rationalizing and extension of despotism in Russia, in this petrified form of Byzantine-Tartar absolutism. The new opening in revolution, the wish of total bypass was therefore not a process that could have formed a bridge between the czarism and the Soviet regime. Consequently, one could argue that it is rather the abstract, *technical instrumentality* of law-standardization that was common in these successive codifications. On the other hand, Lenin himself was also conscious of the at least technical analogy. For he laid

down the codification aims of the New Economic Policy in the early drafts, which concerned the setting into codification-consolidation form of some 4,000 normative Acts at the time, as *Svod zakonov sovietskoi vlasti* |Collection of the Acts of Soviet Power|.[28]

Politically, the codes, completed in the year of the beginning of New Economic Policy, were the summation of the course run by the revolution; legally they also opened up a new path. The New Economic Policy meant not only consolidation, but also a tactical change accomplished with new methods.[29] Stabilization could not therefore eliminate contingencies; improvization also proved necessary now. It is due to this that codification in this period was more forward-looking than simply conservative.

Returning the spirit of a jurisdiction dictated by mere revolutionary expediency into the flask of standardized consolidation, forcing improvized discretion back to formal adjudication and executory application of the law, could not occur all at once, without never-ceasing transitions and jolts. The *judges' creative contribution to legal developments* was even acknowledged this time by prevailing ideology.[30] All these circumstances were instrumental in that while codification under the New Economic Policy did away with the ideology and practice of War Communism, it did not make the ones destined to replace them rigid. The new codes allowed a large room for *elasticity*, an opportunity for *self-correction* and *feed-back* in the discontinuity that was straining between War Communism and the New Economic Policy.

In the debate on the tasks of law under the New Economic Policy, the Criminal Code (June 1, 1922) as well as the Civil Code (October 31, 1922) of the Federation were conceived of as milestones in the establishment of a systematic law. In spite of this, the question of the conflict between the *closed nature* of codification and the *openness* of social policy was repeatedly brought up, mainly in connection with the draft of the Criminal Code. It was obvious on the one hand that "we should assist the popular tribunals not by providing fragmentary guidelines, as we have done until now, but a known system of norms".[31]

On the other hand, this could not be done without a transitional step. "There was a norm in the first draft which allowed the apprehension of criminals only according to the letter of the law... But this was completely unacceptable. We live in an era, when there is a need for norms, but only norms, which enable the courts to apply their own legal consciousness increasingly freely."[32] And this attitude did not come about by chance. Lenin himself was one among others calling attention to its importance, when he, by turning his cynism into principle, elevated this concept to being the politically most important basic requirement of the whole enterprise of criminal codification.[33]

Its *temporary* character and *unperfect* nature, reflected in the *renouncing of regulatory completeness* too, was also present in civil codification. In civil law, it assumed the form of making regulation *provisional*. The rather cynical disposition of the Criminal Code which put aside the *nullum crimen sine lege* principle, made it possible to apply the same text to both typical and atypical cases, to a huge and legally uncontrolled variety of situations. In contrast, the Civil code was from the very start regarded as an *experiment*, whose normative force was a function of its political-economic suitability.[34]

Thus, in reality, early Soviet codes played only a most modest intermediary role. They meant only progress from the incidental state of the law of War Communism; typically enough, even the separation of the functions of legislation and the administration of justice were only partly accomplished by them. Eventually, they transformed some elements of preceding 'legal nihilism' into the means of the law's practical adaptation within the system of code-law.

The type of Soviet codification which was developed during the preparatory stage of the New Economic Policy seemed to the contemporary to satisfy the temporary requirements of the transition and, at the same time, also to project future development. To some extent, it had a role to play in the limitation of the plain arbitrariness characteristic of the era of War Communism, in the standardizing of judicial practice, reducing it to a kind of law administration also satisfying the formal requirements of a centrally enacted rule of law. It made this

possible without any shock,[35] and trusted further events and developments to the consistency of measures taken in legal policy.

At the same time, it was also a means which proved its viability over and over again. First, it enabled the *consolidation* of the basic areas of law in codification form.[36] Second, it spread the *experience* of legal construction, gained in Soviet Russia, all over the Federation. Thereby this practical legal imperialism was a major factor in the all-federation level unification of law done already in its formation period.[37] And third, it provided a solid *framework for legal construction* over nearly four decades, a framework, which ensured and assisted the continuity of this practical legal imperialism right up to the recent past.

2. RE-CODIFICATION ATTEMPTS IN THE SOVIET UNION

An unheard of dynamism characterized the Soviet legislature from the start. As soon as the Council of Commissars sanctioned the Civil Code of the Russian Federation, a select committee was set up for a renewed systematization of the law of the area for "preparing the second edition of the code by the January 1, 1925".[38] True to the spirit of Lenin's heritage, the law continued to be regarded as an instrument of tactics of socio-political construction: no attempt was made to make it anymore stable or fixed.

Feverish work began, which lasted through the early thirties and the victory of Vyshinskii's concept. This was the time when the draft of a civil code was prepared under the leadership of Gojkhbarg (1924) and, later, Stuchka and Amfiteatrov (1931). They were characterized by the view that the code should be a unifying-systematizing Act, which covered the whole field of the relevant area |branch| of the law, with authority over the Federation as well as the individual republics.[39] The work on law-consolidation proceeded parallel with the former.[40]

The re-codification attempts failed eventually. The direct reason for this was the fall of Stuchka and other proponents of

re-codification. The underlying reason was that *Stalinism* (for which, in the field of law, Vyshinskii's concept was only synonym) did not encourage the free development of theories and initiatives. Codification as such became an issue by the *centre*, since the once republican competence in codification had already been transferred to the authority of the Federation by the 1924 Constitution (in respect of the Basic Principles of Legislation), and this being further centralized by the 1936 Constitution (extending Federal authority to the whole business of code-making).[41] Consequently, no room was left for any initiative at a republic level. As to the federal level, it was internal events and factors which led to a stifling of theoretical thinking that prevented it from emerging.

The provision of the Constitution making codification a federal affair did not remain a dead letter. A Federal Judicature Act (1938) and various drafts emerged, but the latter did not reach realization. The draft of Ginzburg's economic code (1933), Amfiteatrov's draft of the law of contracts (1934), and also the modified draft of Amfiteatrov and Krylenko for an economic code (1936) suffered defeat in polemic with Vyshinskii (a circumstance that had an effect on the personal fates of the authors as well); and Mikolenko's draft of a civil code (1938) was also rejected later. Later, World War II made codification *ab ovo* untimely; the failure of the draft of the federal criminal code (1939) was sealed by this event, for instance.[42]

After the war, there was another start to reconstruct, systematize and codify Soviet law, parallel with general reconstruction. Systematization soon assumed definite outlines,[43] indeed codification also advanced so far,[44] that a number of politicians and jurists planning the future rightly believed that these reformulations of Soviet law could eventually become the media, by way of which the People's Democracies to be set up after the war would adapt – in continuation of the legal imperialism of disguised Russification – the experience of the Soviet Union.[45]

There is no need to emphasize how strongly Stalin's policies distorted internal developments. Notwithstanding, the fact that re-codification failed to materialize is not such a dis-

tortion in itself; only a consequence of those phenomena which arose in aborting the whole socialist development.

3. CODIFICATION IN THE SATELLITE COUNTRIES

Socialist transformation was everywhere accompanied by the emergence and strengthening of codification efforts. "The law of the people's democracy must *par force* be written and codified in order to cope with the tasks it faces in the system of proletarian dictatorship."[46] This apodictic wording of the necessity for codification gave expression to general efforts which emerged in all related countries.

Above all, it is of interest to note that Soviet Russian experience in codification exerted an effect from the very beginning. This effect reached a country, namely post-war *Hungary of 1919*, where the attempts to build a legal system for a proletarian dictatorship of only a few months' existence were immediately drafted in codification form.[47] And it had an effect in a country, namely *Mongolia* in about the same time, where a so-called popular democratic transformation, which erupted with elemental force, could only achieve the introduction of law and legal culture in their European sense at all by the adaptation of the Soviet Russian example, transmitted by means of codes.[48]

However, the difference of conditions and effects is obvious.

In the case of the *Hungarian Soviet Republic*, the example of the revolutionary forerunner showed more in contents of the world's first successful experiment in forming a self-declaringly socialist legal system.[49] This provided a sufficient incentive for attempting the formation of a legal system through codification in a country which already possessed codification traditions, even if incomplete ones, owing to the lateness of its bourgeois revolution.[50] The Soviet Russian *inspiration*, weak in itself, but intense in its revolutionary ardour, and the domestic *traditions*, which harmonized with it in technical respects, thus proved sufficient for creating an (attempted)

independent form of the socialist type of codification in Hungary, as early as 1919.

The case of *Mongolia* involved a country whose law only consisted of the customary law of nomadic tribes; which had a memory of some written law only from handwritten sources, lost in the myths of the misty past;[51] which possessed no fundamental civilizing achievements such as had already been developed by the peoples of the Near East in ancient times;[52] and which was bound to assist in the completion of a repeatedly postponed historical task. The social role of codification was multilayed here. It was aimed at making the law unified and written while replacing the particularized customary laws of an underdeveloped society; but, at the same time, it also humanized and socialized them as the popular revolution went further on. Or, in other words, it represented the interlocking achievements of providing a *Europeanized* form with an allegedly *socialist change in contents*. In this way, the restatement of the experience of the Soviet revolution in codes became the spur to Mongolian legal reform both in contents and in technical form. It mediated to the Mongolian revolution not only the experience of a socialist revolution, but also the formal organization of law as developed in the wake of European traditions.[53]

The newly born regimes formed after World War II strengthened the conviction that the transformation of law suitable for socialist social construction has to culminate in codification. As we have seen in the previous section, some of the planners in the Soviet Union after World War II already calculated that their own re-codification could relay the Soviet achievements to the regimes which were on the way to be sovietized under Soviet control and/or military occupation and were, thereby, engaged in wrestling with the problems of setting out on the path of their self-declaringly socialist development. The choice of the course of *codification* was not in doubt even for a moment. This was expressed as definite programme: "the old laws may remain in force for a short while, but the creation of the popular democratic legal system and the development of socialist codes must at all accounts be initiated and finished within a few years."[54]

As far as the basic tendency was concerned, the codification orientation of the so-called People's Democracies appears to correspond to codification practice in the Soviet Union. But the deferment in time[55] between the political change and the codified standardization of its achievements indicates a difference in historical conditions. It indicates that cladding the legal expression of the new political aspirations in codification form did not have as much direct socio-political bearing as it did decades before in Russia.

The circumstance that the codification programme was accepted by the majority of the regimes concerned as early as their establishment, but it was only achieved by a process of *complete socio-economic reconstruction* (indeed even afterwards, in some cases), has several causes. Of these, I should like to refer to the fact that some countries had already possessed codification, a technically elaborate legal system, which they could utilize temporarily and in a limited way, subject to the directives of the new regime. But the political take-over in Central and Eastern Central Europe took place by imposition and through a kind of putsch and without the transitional period it did in the Soviet empire. Preparing drastic political change not by armed uprising, but by a determined shift by force in internal political life, also influenced the course of legal change and allowed more protracted (albeit by far not necessarily more careful and more mature) preparatory action of the transformation of law through codification.

When we look at the extreme poles of socialist transformation that took place mainly in Central and Eastern Central Europe, the contrast is extraordinarily great. Nevertheless, socio-political discontinuity did not involve a caesura which could render legal development discontinuous in a formal way. For the provisional, incidental reference to old law was continued: there was *no legal vacuum* where only the arbitrary discretion of the day as concealed by revolutionary legal consciousness might provide guidelines and which would have urged codification in the interest of order.[56]

To sum up, the satellite world of the new regimes set itself a programme of codification though it foresaw its protrac-

tion in time, and this led to a *transitional codification concept*, reminiscent of the Guiding Principles of Criminal Law of 1919 in Soviet Russia. The direction and method of regulating the law of contract and property, for instance, could not be determined in the first few years,[57] and this circumstance, apart from the limited acknowledgement of development of law through judicial practice, prompted the need for a bridging solution mediating between the paths of codification and non-codification.[58]

In the end, *provisional codification* occurred only under exceptional circumstances.[59] They did allow a sufficient transition by independently codifying the General Part (in some criminal codes), or chapters or sections (in some codes of family law and civil law) separately.[60] Thus it became possible to produce *comprehensive codifications* in the first year of socialist transformation. This work advanced so far in some countries that it resulted in the complete codification of the whole body of the law in little more than a year (where the old law was extensively utilized)[61] and elsewhere within a decade (where this was original work).[62]

It is conspicuous, nevertheless, that there are states in Europe, not lagging behind in the dynamism of their economic development, which still lack the enactment of their own, socialist civil codes. One of these, notably *Yugoslavia*, shows great agility in developing internally, has rewritten its constitution three times already, and its intense dynamism and the feeling of the *lack of stability* in its experimenting ventures appear to be one of the hindrances to the codification of its civil relations.[63] – In other countries, the *classic national codification tradition* appears to be an achievement worth preserving, but nevertheless an unavoidable hurdle prevents socialist codification of civil law to realize to this day. We must remember, of course, that it is not the limitation of the acceptance in principle of the necessity of the codificatory renewal of law which is involved here, but the hesitation about the methods of its practical implementation, and the country's own codification past. The fact that the completion of a new, socialist civil code has succeeded fully in countries which did

not inherit any such code from their bourgeois past, becomes significant in this light.[64] – Other states, which had already accomplished this task once in their (semi-feudal and semi-bourgeois) past, under the influence of *classic bourgeois codification* (and this proved, with suitable modifications, appropriate in the initial phase of socialist transformation), still apply these old texts in arranging their citizens' relations.[65]

The incidental delay in the codification of civil law already demonstrates the diversity of the problems of socialist codification. We have to look for its social dimension and the influence of inherited conditions, primarily in the components of the role to be played by codification.

First, this codification appeared not only as the bearer of an allegedly *socialist legal renewal*, but also as the accomplishment of delayed or deferred *bourgeois tasks*. This is how it came about that the same codification completed the century old dream of civil law codification, the substitution of customary regulation of civil law relations, rooted in feudal traditions, together with the purportedly socialist renewal of law, all at a single stroke.[66] And this is how it came about that the liquidation of feudal legal division, the unification of national law (again, simultaneously with the renewal of contents) was also accomplished by the same codification.[67]

These *surplus functions* to be undertaken by this type of codification by dint of circumstances already suggest some anachronism compared to Western European development. However, we can see the maximum scope of the tasks it fulfilled, its use for putting legal development on a new footing as a single instrument, a many-sided panacea, particularly in the case of *Asian* countries. Like other great events of legal transplantation, not only was "socialist law" institutionalized there as a specific type of law at a specific degree of development, radically transforming the political and socio-economic image of the countries involved. They made *"socialist law"* their own not only as a normative reflection of a given social arrangement. At the same time, they encountered *law in a European sense* for the first time as a pre-defined set of patterns of conduct organized into a system, to be formally applied as patterns of

decision both in organizing society and in settling conflicts. Here, the same codification bore a dual image from the very start; it represented some *specific contents* and was also the vehicle of a *specific legal form*.

Parallel with socialist social transformation, this is how the law of a European country became Europeanized in *Albania*, where only verbal traditions, fading into the memory of mediaeval legendary personalities, and primitive customary laws evolved in the everyday lives of mountain tribes completely isolated from one another, had been known before.[68]

This is how codification represented a complete change in the concept of law to those Asian countries, namely in mainland *China* and *North-Korea*, where several thousand years of written legal development had produced systems so different from European ones in function, practice and form, that they were not even etymologically reminiscent of ours but which "serve the repression of law, rather than law itself".[69] Codification named socialist assumed a vast role in the *complete conceptual-institutional change-over* of the legal field, in having the phenomenon of law accepted as an *instrument of social order* which also guarantees *individual rights*, whether it made its apparition either as domestically traditional[70] or as a reflection of external, imperial aspirations.[71] These efforts, even if instrumentally subordinate to the task of socialist transformation, ran parallel with it; indeed, they even competed with it, as can be seen in some aspects of subsequent development.

In sum, the new Sovietized regimes set up after World War II chose codification as one of the *means of socialist transformation*, of changing laws. Code-making had two sources here. First, it was the code that was shown to be the highest order of written law, the most adequate expression of socialist legal contents. Secondly, codification served as the necessary means of finishing the half-completed tasks of former bourgeois transformation. The delay in codification was sometimes the result of the piling-up and the multi-layered nature of the tasks it had to cope with. Wherever codification had to undertake to substitute case-law or customary law, unify national law, in-

troduce written law, or indeed, institutionalize law as an enacted system of norms guaranteeing rights and their exercise, codification called "socialist" had to jump further than bourgeois codification had done. In some instances, it even had to bother with introducing law as such, along with institutionalizing a kind of law adequate to the given socio-economic formation.

It is a known fact that *China* abandoned the development and assertion of her law under consolidated circumstances after 1957, as a result of her policy of the "great leap forward", and this led gradually to the abolition or withering-away of several elements in the political, administrative, and economic set-up which formerly developed under Soviet influence. They *discontinued the stabilization of law through codification* and the reliance upon written systematic laws, and prevented the existing codes from actually controlling the administration of law and justice. In the name of revolutionary dynamism, they returned to Chinese *traditions* they had earlier intended to change, among them, the practice avoiding any reference to fixed, formal laws.[72]

Looking at this phenomenon of retreating from codification in a most general way, there are solid arguments to state that the establishment of a legal system by way of codification is an inevitable concomitant of social *consolidation*. In other words, codification of law is at the same time a *sine qua non* of political, social and economic consolidation.

The *provisional* codes issued during the first phase or revolutionary transformation (relating either to filling the legal vacuum created by the revolution, or just on the contrary, to the transitional utilization of past codification) appear to constitute one of the exceptions. The other exception seems to be tendencies in political development which, after the relative accomplishment of consolidation, *revoke* its achievements; the consequences of such a turn also precipitate the rejection of codification.[73]

At the same time, the fact that *Cuba*, the country which was the last to choose the course of so-called socialist development, started a comprehensive codification and justified it

with reference to the cooling-off of the revolutionary phase in its development and the necessity of working out a consolidated system of law,[74] seems to reinforce the general line of development which I have characterized as the main rule.

4. RE-CODIFICATION IN SOCIALIST LAW

The general task of codification in socialist law seems to be marking out and advancing along the road of socio-economic transformation. Codes seem to constitute the socially and legally decisive segments of the system of law in any consolidated "socialist" society.

The fact that the countries in question strove to build their law into a system by way of codes, to attain a state of codification as complete as possible, finds its explanation in another fact, namely in the official slogan of *"socialist legality"* as a politico-legal postulate that is expected to determine all practical legal working.

But the need for any rule of law does not become accomplished for good by the mere fact that codes exist. It postulates not only the *establishment* of a specific state of legal regulation, but also the *maintenance* of this in the course of the development of both law and society. Codification in the countries of socialist law had to come into existence with the *prospect of re-codification*, with the recognition of the need for its repeated replacement, from the very outset. As is known, the ideal of bourgeois arrangement claims to be of perpetual validity dating from its rationalist-axiomatic past and it also implied an ideological wish for the realization of the tenets of natural law. (Yet, under the sobering effect of further development it fell prey to the other extreme, i.e. to transforming the law into a systematic network of legal solutions to be referred to by judicial law-making.) In contrast to that, socialist codification did not have any claim for immortality. Indeed, it went in precisely the opposite direction. For the ideological background of socialist transformation was provided by the exploration of the motive powers of social dynamism.

And, in this, the experience of the bourgeois revolutions was also reflected, of course, denuded of illusions and traced back to their real resultants.

This is to say that codification in question did not aspire to perpetuate itself in any of its products. It had a conceptual claim simply to embrace the law *enduringly*, but not rigidly. And it found support for this (apart from its technique concentrating on grasping the "socially typical",[75] thus ensuring "dialectic transmission" and interplay between closedness and openness, allegedly appropriate to the requirements of social development)[76] in the fact that, from the very first acts, all products of this codification were *provisional* measures.

As it has already been seen, the first codes to emerge in the initial phase of the Russian revolution were products of a directly revolutionary character. Codifications in Mongolia in the twenties as well as some provisional codes which came into being in the course of socialist transformation in post-war Europe also served revolutionary transmission. Mention must also be made here of the attempted but unsuccessful re-codification aspirations under Stalin, in order to see this type of codification as aspiring to transcend itself in its individual products, accepting re-codification and reckoning with its necessity from the outset.

Re-codification as the *planned need and opportunity for its own transcendence* became for the first time a prototype in the history of codification.

The mere fact of the need to re-codify was, however, present at earlier times as well. It occurred as a means to *correct errors* in the early forms of codification in Antiquity, as well as in the Middle and Modern Ages. Indeed, we cannot fail to notice the particularly heavy occurrence of the need to re-codify in the course of the English-American transplantation of the European codification concept. This need, paradoxically, discredited the American codification movement and was regarded as a proof of its subjectivism.

As a matter of fact, the need to re-codify in order to correct past performance is not identical with *re-codification* which we deemed to be a prototype of this type of codification.

The dividing line is that the *natural* character of the need to re-codify was not recognized in earlier arrangements. These codes were intended to last forever, and when the need to re-codify arose, it was accomplished through judicial practice. In fact, genuine re-codification was forced out, which was considered a consequence of the shortcomings of the earlier work, and was regarded as some kind of ideal reconstruction. Actually, re-codification was seen less as the instrument of progress, and more as a reaction to the deterioration of the present compared to the past. This type of codification is first not only in having made the claim for re-codification general, but also in that the claim itself attained a *positive* character as the *natural aim of codification processes to be realized again and again.*

The claim for re-codification at first appeared in *legal theory* under the guise of the differentiation between various codification phases. Later, when re-codification was not only a future perspective, but became social practice of historical generality, re-codification grew into a theoretical category implied by the codification concept itself. Indeed, the instances of re-codification which gave rise to the practice of re-codification from the fifties, and culminated at the end of the sixties,[77] decisively contributed to the keeping of codified law alive, and to achieving its renewal not by damaging but by reinforcing the very idea of codification; yet the classic codification concept was dimmed. The establishment of their own legal system was in the meantime completed. These codes were destined not to embody the law of a new socio-economic formation, but to *further develop*, change and reform an already established, codified law. Their achievement was not the introduction, consolidation, or systematic arrangement of something radically new. They had a different task: they realized an *adaptation* to the need for further development within the same system. For this reason, they left the basic pillars of the system of regulation, its underlying concept, principles, structure, terminology, indeed a considerable portion of its provisions mostly intact: they moulded a modified and developed – changed or reformed – *variation of the existing one* into a

renewed codification form. "In reality, re-codification is not so much of a re-codification as appears to be the case formally."[78]

Thus, codification in question is a reservoir of changes affecting the body of codified law, but it is also a factor of stability and continuity within the system. At the same time, the circumstance that a codification form is established in the history of codification with re-codification placing the accent decisively on the element of preservation in the dialectics of sublation, cannot remain without consequences for the theoretical concept of codification itself. As is known, the earlier theoretical concept adhered to a considerable extent to radical law-renewing bourgeois codification.[79] This was quite justifiable, since it was dictated by the promise of completing never-realized bourgeois codification ideals in the countries concerned, as well as by the revolutionary act of codifying thereby a new-typed law. Nevertheless, although these views never denied for a minute that "we can and must make a difference between codes and codification created at the beginning of a new social system, and consequently of a founding character, and other codes and codification that became necessary in the development of a particular social system",[80] when the first, foundational codification had already been carried out everywhere and re-codification became the exclusive reality of the present, a shift of accent in practice also marked the same in theory.[81]

In this way, codification in question re-created a *technique of radical legal change* that best ensured the restatement of the law in a unifying system, which first appeared in a classical way as the codification *oeuvre* of the bourgeois transformation on the European continent. Yet it did not get bogged down in the non-recurring declaration of the law and order of the new society as a historical achievement, but soon transcended the bourgeois codification concept. Instead of making the code a mere classification system of the places for judicial references (I termed biblical function, in view of the present practice of the old codes on the European continent),[82] it is *repeatedly renewed* in the course of socio-economic prog-

ress, and thus elevated to a *continually timely and really live part of the sources of law system*. This type of codification achieved that the code is not just the petrified remains of past achievements, a formally valid basis of reference and the store-house of possible legal solutions, but it is also the mould of legal relations.

5. CONCLUSION

Historically, codification in socialist law emerged with the *consolidation* of socialist social and legal transformation. Various factors of that transformation pointed unambiguously towards choosing the course of codification, but only consolidation, the switch to the New Economic Policy in the Soviet Union, brought the displacement of the judicial development of law and the timeliness of codification. Codification was destined to fulfil the requirement of the socialist variant of, and substitute to, the rule of law in the field of law-making, while in that of law-application the building up of the unified supervision by the public prosecutors.

Past Russian codification did not play any considerable part in the codification of Soviet law. On the contrary, it was precisely their past codification that enabled the Sovietized satellite countries to carry out the codification of their legal systems. Due to the *graduality* of their transformation, *no legal vacuum* came about in these countries, which might have demanded immediate filling. At the same time, the circumstance that other functions had also to be dealt with by codification, such as the satisfaction of unfulfilled bourgeois revolutionary requirements, the national unification of law or the institutionalization of law in the European sense, exerted an influence in urging them along.

The prototype feature of this type of codification is to be found in its view of *re-codification*. This means that codification in question does not try to perpetuate itself. Since so-called socialist legality as a politico-legal postulate presupposes not only the establishment but also the continuous main-

tenance of a specific state of legal regulation, codification has come into being in socialist law from the very outset with the recognition of the opportunity and necessity of periodic changes. And this suggests a new element not only in the technique of codification, but also in the new concept of codification phenomenon.

NOTES

1 Examples of this are *State and Revolution* written in August-September 1917 and the address *On the State* delivered on July 11, 1919 at Sverdlov University, which "vicariously" discussed basic problems of law in the context of the state.

2 Lenin's thinking in terms of duality is "the method of conscious experimenting... under circumstances, whose regularity is insufficiently known". Gy. Lukács *A demokratizálódás jelene és jövője* |Demokratisierung heute und morgen, 1968| (Budapest: Magvető 1988) p. 76.

3 See, e.g., Hazard, pp. 64-66.

4 Lenin, XXVII, p. 519.

5 Cf. K. Kulcsár *A politika és a jog viszonya Lenin műveiben* |The Relationship of Politics and Law in Lenin's Works| *ÁJ* XIII (1970) 1, pp. 19ff.

6 Lenin, XXVII, p. 261.

7 Cf. Cs. Varga 'Lenin and Revolutionary Law-making' *International Review of Contemporary Law* 1/1982, pp. 47ff.

8 See, e.g., Lenin, XXVI, p. 261; XXVI, pp. 285-288; and XXIX, pp. 208f.

9 "We have not yet produced anything finished and complete, we do not yet know a socialism that can be embodied in clauses and paragraphs." Lenin, XXVII, p. 575.

10 Apart from note 24, see, e.g., Lenin, XXVII, pp. 244f; XXXIII, p. 73; XXXIII, pp. 305-308.

11 Lenin, XXIX, p. 212.

12 'Ob plane Narkomiusta' |On the Plan of the People's Commissariat of Justice| *SU RSFSR* |Collection of Decrees of the Russian Socialist Federative Soviet Republic| 12/1918, section 171, quoted by Karev, p. 2.

13 Stuchka made the following statement in an article written for the anniversary of the Revolution: "The time has come to strive for codification, to have the whole of the transitionary period's proletarian law summed up in a systematically ordered code. This must be a code which even the broadest mass of the people can easily understand. But can we succeed in producing such a code within the next few months? And even if we do, it is questionable how long will it be effective. For if we thumb through the book of decrees, we see how mercurial, how impermanent the legal institutions and clauses created by the revolution are." Quoted in Stutschka. pp. 38f.

14 See, e.g., Bukharin and Preobrazhensky, sections 69 and 75.

15 Bukharin and Preobrazhensky, pp. 273f.

16 Cf. E.G. Gimpelson *Voennyi kommunizm* Politika, praktika, ideologiia |War Communism: Politics, Practice, Ideology| (Moscow: Mysl' 1973) especially ch. I and IV.

17 There is a spiritual affinity between the work of Bukharin and Preobrazhensky (their Foreword is dated October 15, 1919) and the Guiding Principles of Criminal Law (December 22, 1919) only in so far as both are products of War Communism. The half-law idea of law reflected in the Guiding Principles did not by any means spring from a doctrinaire attitude. Its formlessness and paucity of safeguards were determined mainly by the contemporary understanding of the role of criminal law. Cf. T. Horváth 'A Szovjet büntetőjog kialakulásának első évei 1917-1922' |The First Years of the Soviet Criminal Laws' Development 1917-1922| *ÁJ* X (1967) 4, pp. 502ff, especially at 517ff.

18 Kurskii, p. 71.

19 Hazard, pp. 64ff attributes the switch from the judicial to the codificational development of law exclusively to the stand taken by Lloyd George.

20 See, e.g., Lenin, XXXIII, p. 73; XXXIII, pp. 224-226; XXXIII, p. 303; XXXIII, p. 335.

21 During the preparatory stage of the New Economic Policy (October 1921), Lenin emphasized that "the larger the number of these decisions and the more urgent the need for their formulation, regulation and summation, the more legitimate the interest in such a subject, and as far as I can judge..., this need is now felt very, very acutely". Lenin, XXXIII, p. 83. For, said he a year later, "the whole work of the government... is aimed at obtaining the widest possible legislative sanction for what is known as the New Economic Policy, so as to eliminate all possibility of any deviation from it". Lenin, XXXIII, p. 389.

22 Lenin, XXXIII, p. 364.

23 Cf. e.g., Lenin, XXXIII, pp. 202f; XXXIII, pp. 308f; *Leninskii Sbornik* |Leninian Collection| XXXV (Moscow: Politizdat 1945) pp. 325 and 352.

24 Kurskii, pp. 71ff. This is why he emphasized: "So long as we only talk of socialist legality, without producing any laws, we shall be the richer for poignant words, but for nothing else. We have need of a stable system of norms elaborated in adequate depth in order that we might not only speak of socialist legality, but also in fact introduce it." Kurskii, p. 74.

25 Cf. Reich, p. 113.

26 According to the introductory address to the IXth Soviet Congress of All Russia (December 23, 1921): "The task now confronting us is to develop trade, which is required by the New Economic Policy, and this demands greater revolutionary legality." "The closer we approach conditions of unshakable and lasting power and the more trade develops, the more imperative it is to put forward the firm slogan of greater revolutionary legality..." Lenin, XXXIII, p. 176.

27 E.g. S.A. Golunsky and M.S. Strogovich 'The Theory of the State and Law' |Moscow 1940| in *Soviet Legal Philosophy* ed. H.W. Babb (Cambridge, Mass.: Harvard University Press 1951) p. 396.

28 V.I. Lenin *Pol'noe sobranie sotshinenii* |A Complete Collection of Works| LIV (Moscow: Politizdat 1965) p. 166. See A.N. Yodkovskii 'Kodifikatsiia zakonodatel'stva' |Codification of Legislation| in *Istoriia sovetskogo gossudarstva i prava* II (Moscow: Nauka 1968) p. 451.

29 Cf., e.g., L. Szamuely *First Models of the Socialist Economic Systems* Principles and Theories (Budapest: Akadémiai Kiadó, 1974) ch. IV, in particular at pp. 80ff.

30 "Though we do not identify law with statute, we completely and wholly acknowledge the state as the power which maintains the law referred to and which, for the most part, shapes it," wrote Stuchka with polemical intent, affirming this. Stutschka, pp. 19f.

31 Kurskii, pp. 77f.

32 D.I. Kurskii 'Ugolovnyi Kodeks 1922 goda' |The Criminal Code of 1922| in his *Izbrannie stat'i i retshi* (Moscow: Juriditsheskoe Izdatel'stvo 1948) p. 87.

33 He wrote to Kurskii on May 17, 1922: "The courts must not ban terror... It must be formulated in the broadest possible manner, for only revolutionary law and revolutionary conscience can more or less widely determine the limits within which it should be applied." Lenin, XXXIII, p. 358.

34 "The future will show to what extent the amendments... are effective," said Lenin on the day of the Code's enactment, referring to the economic conditions affected by the Civil Code. "We shall leave ourselves a perfectly free hand in this matter. If everyday experience reveals abuses which we have not foreseen, we shall forthwith introduce the necessary amendments. As far as this is concerned, you are all well aware, of course, that... no other country can as yet vie with us in the speed with which we legislate." Lenin, XXXIII, p. 391.

35 See, e.g., the view held by the President of Chita's Revolutionary Court in Siberia on the application of the Code in its early years: "The bourgeois judge, if he was to present the interests of bourgeois exploitation as objectively valid, had need of voluminous codes and collections of laws. Soviet justice, which serves the interests of the revolutionary proletariat, has a far simpler and easier task. If you look at the Criminal Code, which runs only to 28 pages, the general and the specialized section together comprise 227 articles. Of these 56 compose the general section and the other 171 the specialized section. In reality there are only two of all these which are of importance for us here: Article 6, which defines what is to be considered as a breach of law, and Article 10 which deals with the use of analogy. If something is to be considered as a breach of law in the light of Article 6, it is immaterial that it should also be covered by a separate article in the specialized section... These two articles tell us everything we need to know. The rest was not intended for us. The other articles are intended for the world at large, for those who consider that what matters are the articles, as such, not the essentials." E. Sik *Próbaévek* |Years of Trial and Error| (Budapest: Zrinyi 1967) p. 762.

36 Apart from the Criminal and the Civil Codes (1922), Codes of Criminal (1922) and Civil (1923) Procedure were also enacted; the Code of Labour (1922) and of Family Law (1926) were reformed; moreover, even a Code of State Administration was promulgated in the Ukraine (1927).

37 The codification wave reached the Ukrainian, Armenian, Georgian, Belorussian, Azerbaidzhan, etc. republics by the adaptation of the Russian codes or by using them as a model. Generally, this happened between 1926-1935 in respect of criminal codification and between 1922-1925 in respect of the Civil Code, while the Codes of Criminal and Civil Procedure and Family Law were introduced between 1923-1935, 1923-1931 and 1926-1935, respectively. Indeed, even the Baltic republics were imposed to introduce *Soviet* laws by having enacted *Russian* codes. See Makovskii, pp. 110f.

38 'Chetvertaia sessiia Vserossiiskogo Tsentral'nogo Ispol'nitelnogo Komiteta deviatogo soziva' |The Fourth Session of the Ninth Meeting of the Central Executive Committee of

All-Russia| *Biulleten'* 8, p. 20, quoted by Makovskii, p. 109.

39 Cf. Makovskii, pp. 111ff.

40 The systematic collection of laws in force was published in 1926, and this was followed by a new initiative in 1927, namely the draft of a collection of statutes in preparation for the unification of federal law. The Praesidium of the Central Executive Committee appointed a committee to deal with this. Two years later, the committee concluded that the draft did not serve the goal of socialist construction and, accordingly, rejected it. Cf. Karev, pp. 2f.

41 Section 1, clauses *p* and *r* of the 1924 Constitution; Section 14, clauses *f*, *h*, and *tsh* of the 1936 Constitution.

42 Makovskii, pp. 114ff; Reich, especially pp. 249ff, and 304ff; Ivanov, p. 206.

43 The preparation of the "Chronological Collection" began, on republic level, in 1948. It yielded five volumes in the Russian Soviet Federative Republic (1949), and was later followed by the supplementary series of the "Systematic Collection".

44 The 1947 and 1948 drafts of a civil code, as well as the completely revised 1951 draft, were equally prepared on the basis of the 1940 concept. Pre-codification was then removed from the agenda in 1952. Makovskii, pp. 115f; S.N. Bratus 'Vazhnyi etap v razvitii sovetskogo grazhdanskogo zakonodatel'stva' |An Important Phase in the Development of Soviet Civil Legislation| *SGP* 2/1962, p. 5. In criminal law, recodification began in 1946, but the drafts of 1948, 1949, and the revised draft of 1952, were similarly removed from the agenda. Ivanov, p. 206.

45 The comment of leading Soviet authorities on the first post-war draft of the Civil Code was that "it will not only reflect the civil law of victorious socialism" but also "will be an example to the countries of people's democracies progressing from capitalism towards socialism". D.M. Denkin, I.B. Novickii and Rabinovich *Istoriia sovetskogo grazhdanskogo prava 1917-1947* |The Development of Soviet Civil Law 1917-1947| (Moscow: 1949) p. 6, quoted by Reich, p. 310.

46 Világhy, pp. 227f.

47 For the Judicature Act (May, June, August 1919) and Code of Procedure (July 1919) drafts of the Hungarian Soviet Republic, see Sarlós, in particular pp. 393ff.

48 In *Mongolia*, after the outbreak of the popular revolution (1921) and the transformation into a laicized people's republic (1924), the reform of the administration of justice was accompanied by and led to the Statute of the

People's Court (1925), and the code-like regulation of the criminal and civil laws and procedure (1926). V.I. Titkov *Mongolskaia Narodnaia Respublika* Obshtshestvo, ekonomika, gossudarstvo, pravo |The Mongolian Peoples' Republic: Society, Economy, State, Law| (Moscow: Iuriditsheskaia Literatura 1971) p. 76.

49 Soviet Russia had only a Code of Family Law and a Code of Labour (1918) when the Hungarian Soviet Republic was formed. Demonstrable influence of Soviet Russian law only showed, anyhow, in the ethos of regulation and in the adoption of some partial solutions. Cf. Sarlós, pp. 168ff.

50 At the time, *Hungary* already possessed operative Acts covering bills of exchange, trade and bankruptcy (1840), a Code of Civil Procedure (1868), a Criminal Code (1878), and a Code of Criminal Procedure (1896); yet attempts at a comprehensive civil law codification led to nothing. See Szladits, pp. 551ff.

51 Divided feudal-ecclesiastical rule prevailed in *Mongolia* before the popular revolution. Tribes were loosely linked and particularized customary laws were enforced. The few factors of unity, apart from the general prevalence of the privileges of the high priests and landowners, were, one, the mythical memory of the *Great Yhassa* (about 1218) attributed to Jenghiz Khan and symbolizing the subjugation of conquered peoples, which had in fact only coloured and ideologized local customary laws since the disintegration of the Mongolian Empire; two, the hand-written collection of the *Khalka Djirum* (17th or 18th century) in Northern Mongolia; and three, *imperial laws* that assisted the colonial administration of the Chinese and regulated matters of jurisdiction (mainly the laws of Emperor K'ang Hsi |1696| and the codes subsequently compiled on the basis of these |1789, 1815|). Riasanovsky, in particular ch. I, pp. 25ff. The complex process of socio-political fermentation which led to independent Mongolia under the theocratic rule of the head of lamaist church in the wake of the Chinese bourgeois revolution (1911) and to the emergence of underground socialist efforts after the reestablishment of Chinese occupation (1919) also produced a determined demand for the unification, systematization and rationalization of Mongolian law. The work of producing a systematic collection of laws, planned to be published in 64 volumes, commenced in 1919; almost 34 volumes were completed in due course, but the events which culminated in the popular revolution rendered these obsolete before they could be promulgated. Markelov, p. 9.

52 With its tradition of nomadic tribal stock-herding, Mongolia arrived into the 20th century without any developed agriculture, industry or trade; the country did not have a national currency or an army; the institution of private landownership was unknown as were any permanent struc-

tures, therefore urban settlements did not exist, either. See, e.g., Riasanovsky, pp. 12ff.

53 In this sense, the Criminal Code (1926) and the other statutes had a *deus ex machina* effect on Mongolian progress. This was the first domestic product of legislation, and it borrowed its content from the code considered most progressive at that time, notably the Soviet Criminal Code. Breaking with the past (in which Soviet legal advisers lent assistance in the absence of domestic lawyers) was more in evidence than in Soviet Russia. For Mongolia had no legislative traditions and no revolutionary past in law-making. Thus, codification was the only way open for the revolutionary reform of law, in spite of the absence of domestic roots. G. Ginzburgs and R.A. Pierce 'Revolutionary Law Reform in Outer Mongolia: A Study in the Impact of Soviet Legal Doctrine on a Backward Society' in *Law in Eastern Europe* VII, ed. Z. Szirmai (Leyden: Sijthoff 1963) pp. 231, 242ff. The fact that re-codification by partial reform later occurred at frequent intervals can be attributed to this huge innovation, but also to the lack of roots which caused problems in the code's everyday implementation. The Mongolian Criminal Code was reformed three subsequent times (1929, 1934 and 1942) during the first half of the century. Markelov, ch. I, section 2-4.

54 Világhy, p. 229.

55 Cf. Szabó 'Codification', passim.

56 This characteristic was not unique, however. In February 1945, one of the first acts of Yugoslavia's provisional revolutionary government abrogated the law in force in Yugoslavia before the country's entry into the war. The decrees passed by the Germans and their supporters were declared non-existent. Even though the extraordinary application of the old law was allowed in 1946, a legal vacuum was created formally. Stjepanovic, pp. 224-226.

57 Cf. Szabó *Népi demokráciánk*, pp. 73-75.

58 "This extension in time of the opportunity for codifying gives rise to the idea: might it not be reasonable to use that method in our codification system as well, whereby the general principles in the various fields of law would be codified separately and without delay, thus laying down the guiding principles for the whole field of the law which is at several instances covered by regulation already obsolete. We could thus immediately transform the contents and principles of our legal system, and give practical guidance (in line with these principles) to our courts with regard to the application of the statutory provisions of the past, as well as to the solution of legal debates concerning the interpretation of the new ones..." Szabó *Népi demokráciánk*, pp. 75f. The connection with the Soviet Guiding Principles of Criminal Law is demonstrated not only by the idea of

codifying principles, but also in the intent of its legal-technical functioning. This was the phase for Hungary and for several other countries in the region when the judicial development of law (which was statutorily not forbidden, only guided, and which was considered at the time "the swan-song of customary law, expedient under the circumstances") had not only a positive, but also an officially acknowledged and encouraged role. Gy. Eörsi 'A magyar jog fejlődésének kérdései népi demokráciánk első tíz évében' |Questions of the Development of Hungarian Law in the First Ten Years of Our People's Democracy| *JK* X (1955) 6, p. 336.

59 In Poland, where the division of the civil law into four imposed systems (corresponding to the former occupation zones of the country) was preserved, quasi-codification emerged first in 1945-1946 and was aimed at the unification of law over the whole of the country. It was followed in 1950 by codification that asserted the basic requirements of socialist transformation by laying down general principles of interpretation. Wasilkowski, pp. 187-189.

60 In the codification of criminal law, the advanced codification of the General Part in Yugoslavia (1947), Albania (1948), Czechoslovakia and Hungary (1950) were examples of this. Their completion involved the supplementary codification of the Specialized Part in Yugoslavia (1951) and in Albania (1952), while delays of over a decade resulted in recodifications in Czechoslovakia and Hungary (1961). As for the codification of family law, four acts were organized into a code in Yugoslavia (1946-1947), and only a matrimonial law code was issued in China (1950). In the field of civil law, Bulgaria enacted the law of contracts (1950) and of property (1951) separately; in Czechoslovakia the law of economic relations was regulated separately (1958) from the civil code (1951); and in the German Democratic Republic of that era, only the code of the contract of socialist organizations was enacted as the code of the new regime (1957).

61 Codes of civil and criminal laws and procedure were enacted in Romania in the year of the Constitution (1948) and were supplemented later by a labour code (1950) and a family code (1954). However, the Civil Code consisted of a further modified version of Romania's French inspired code of 1865.

62 Mainly in Czechoslovakia, but in Hungary too.

63 See L. Gerskovic 'Problemi kodifikacije u jugoslavenskom pravnom sistemu' |Problems of Codification in the Yugoslav Legal System| in *Zbornik* pp. 143ff.

64 The civil codes of Czechoslovakia (1951), Hungary (1959) and Poland (1964) are examples, apart from the already mentioned laws of contract and property of Bulgaria.

65 Such as the Austrian *Allgemeines Bürgerliches Gesetzbuch* (1811) and the Serbian civil code of French derivation

(1844) in Yugoslavia; the renewed version of the already mentioned (and also French inspired) civil code (1865) in Romania, and, for a period of several decades, the *Bürgerliches Gesetzbuch* (1896) in the German Democratic Republic.

66 In spite of the codification aspirations which emerged with the bourgeois revolution of 1848, but only yielded results after its fall, *Hungary* was characterized by the perpetuation of feudal customary law as one of the components of her sources of law. See F. Mádl 'Das erste Ungarische Zivilgesetzbuch – das Gesetz IV vom Jahre 1959 – im Spiegel der Geschichte der zivilrechtlichen Kodifikation' in *Das ungarische Zivilgesetzbuch in fünf Studien* (Budapest: Akadémiai Kiadó 1963) ch. II, section 2. The qualification of being "civil law without a civil code" (i.e., a continental law lacking the most general characteristic of the European legal systems, the civil code) as worded by Schlesinger, p. 175, note '*', was paradoxically unique in this connection.

67 The urgency apparent in the early codification of family law in the ethnically and denominationally mixed Yugoslavia was occasioned by the intention to get rid of the earlier legal division. Stjepanovic, p. 230. Similar conditions prevailed in Poland too, particularly concerning civil law. With the exception of the field of regulation of the code of contracts (1933) and the commercial code (1934), the country's territory was divided between the German *Bürgerliches Gesetzbuch*, the Austrian *Allgemeines Bürgerliches Gesetzbuch* and, in respect of the former Grand Duchy of Warsaw, the French *Code civil*. This explains why the "limits of jurisdiction of the regional legislatures were also defined by the old borders that divided Poland" right up to recent times. Wasilkowski, pp. 186ff, the quotation at 187.

68 The last known authorities in the law of *Albania* were Scanderbeg, who is surrounded by mystery, and Dukagjini (15th century), to whom some generally observed traditions are attributed. After them, no organized power evolved among the isolated mountain tribes, that might have ensured central control over the tribes. The mountains were so inaccessible (the first all-weather road across Northern Albania was constructed in 1916 by the Austro-Hungarian army), that even the conquering Turks could only assert control over urban settlements, and were unable to subjugate the mountain tribes. Lacking any centralized administration, even the transfer and development of the customs of mountain communities was by word of mouth at meetings. Decisions were put down in writing from the second half of the 19th century on only. Thus the sanction of customs could not have been other than collective retribution. M. Hasluck *The Unwritten Law in Albania* ed. J.H. Hutton (Cambridge: University Press 1954) in particular pp. XIVff, and 9ff; G. Fishta 'Parathâne' in A.Sh.K. Gjeçov *Kanuni i Lekë Dukagjinit* (Shkoder: Shtypshkroja Françeskane 1933) especially pp. XXVIff. The general |1948| and the specialized |1952| parts of the already mentioned Criminal Code, and a Labour

Code |1955| were designed to introduce written law by superseding customary law. This it accomplished not without success, even though it was only fully asserted in the Southern part of Albania. Among the mountain dwelling people (in Northern Albania, as well as in the Albanian populated Kosovo province of neighbouring Yugoslavia), 15th century customary traditions and their sanctioning by vendetta remained the rule as an unsolved – and, for long, unsolvable – socio-political problem. E. Tedeskini 'E drëjta dokësore e Shqipërisë së Veriut' |The Customary Law of Northern Albania| *Drëjtesia Popullore* XVI (1963) 5, pp. 64ff and S. Pupovci 'Kruna osveta u Albanaca i njen razvoj' |Blood Revenge among Albanians and its Development| *Jugoslovenska Revija za Kriminologiju i Krivicno Pravo* IX (1971) 4, pp. 583-603.

69 "Sie statt Recht, vielmehr eine Unterbrückung des Rechts sind." G.W.F. Hegel *Vorlesungen über die Geschichte der Philosophie* |1833| I, ed. C.L. Michelet in his Werke |Vollständige Ausgabe| 13, 2nd ed. (Berlin: Duncker und Humblot 1840), p. 137. |"It is also felt... that they take the place of law, or rather that they put an end to it." Hegel's *Lectures on the History of Philosophy* trans. E.S. Haldane, F.H. Simon, I (London: Routledge and Kegan Paul and New York: The Humanities Press 1968) Introduction A, p. 120.| – Law as something necessary, but at the same time an evil to be avoided, is characterized in *China* by the famous imperial order: "I desire therefore that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate..." S. van der Sprankel *Legal Institutions in Manchu China*, A Sociological Analysis (London: Athlone 1962) p. 77. – For the Confucian philosophy, which fundamentally defined legal thinking in China from the 6th century B.C. onwards, considered the loose, ethical character of the norms of the *li*, which were determined only by the fundamentals of the concrete situation, to be the preferable natural order in regulating human relations. The concept of fixed norms, which can be formally applied as patterns of decision, was only advanced by the legists. Legists gained political power only once, it the person of Emperor Chin-Shi Huang (246-207 B.C.), who united China. The tablets of Confucius were broken to pieces but in vain, for they still exerted a great effect on the development of Chinese law. Independently of this, law proper was established, of course, as the instrument of imperial administration; but the rules of the *fa* acted as a necessary evil (like a safety fuse), compared to the well-established superiority of the *li*. Thus, any effort to compare the Chinese to European legal development can only result in superficiality and error. For the rules of the *fa*, independently of the topic they covered, assumed penal character both in their sanctions and contents, and this made both the law and its working in procedures (whether they involved suits brought by a plaintiff or merely appearances as a witness) threatening, indeed a danger to all the par-

ties involved. This explains that while law in Europe was increasingly concerned with the securing of rights, the *fa* never became associated with any idea of rights; indeed, the concept of rights never developed in China. Only the threat of deterrent punishment was ever associated with it. Escarra, passim, especially at part I, ch. I, pp. 20ff. We could add that the code of Ta Ch'ing Liu Li (about 1647) drafted 2,852 rules of behaviour as being forbidden by criminal law, and of these it penalized 644 by death. Riasanovsky, p. 181.

70 The first serious attempts to reform law in China emerged in the first decade of our century as a result of an imperial initiative. The transformation of China into a bourgeois republic (1911) made existing legal forms obsolete. A codification movement began, which soon led to enactment of a series of experimental codes reflecting various influences. These included Criminal codes (1912; 1928; 1935), Codes of Criminal procedure (1919; 1922; 1928; 1935), a Civil Code (1929), and Codes of Civil Procedure (1921; 1935). Escarra, ch. II, pp. 106ff. After World War II, China introduced (in addition to her socialist constitutions |1949; 1954|) a Matrimony Act (1950), a model statute for co-operative farms (1952; 1956), and a Labour Code (1957). R. Dekkers 'Les sources du droit chinois contemporain' in *Zbornik* pp. 73ff. The subsequent slowing down of the codification process merely indicated the internal difficulties of socialist transformation and the mass of the socio-economic problems to cope with. The fact that "some people... insist on the immediate enactment of a complete collection of laws" in the first phase of socialist transformation was felt to be "premature and fanciful" as "viewpoints evidently impracticable". *Jen-min Jih-pao* editorial of September 5, 1951, quoted by Stahnke, p. 507. Nevertheless, the making of codes turned from a mere illusion into a more and more urgent and indispensable task for carrying forward the revolution. Liu Shao-Chi came to this conclusion from the dialectics of revolutionary transformation, i.e. from the exigency of the transition from the revolutionary phase to the one of consolidated development. "During the period of revolutionary war and in the early days after the liberation of the country... the principal method of struggle was to lead the masses in direct action... Now, however, the period of revolutionary storm and stress is past, new relations of production have been set up, and the aim of our struggle is changed into one of safeguarding the successful development of the productive sources of society, a corresponding change in the methods of struggle will consequently have to follow, and a complete legal system becomes an absolute necessity." *CPC* I, p. 82. This was cast in concrete form by Tung Pi-Wu, a leading functionary of the judiciary: "The problem today is that we still lack several urgently-needed and fairly complete basic statutes such as a criminal code, a civil code, rules of court procedure, a labour law, a law governing the utilization of land and the like... At present, however, from the point of

view of both the need of and the objective possibilities of building up the legal system, we should gradually complete the structure of our legal system." And, at the same time, he announced that draft codes of criminal law and procedure were ready for approval. *CPC* II, pp. 87 and 94.

71 As, e.g., in the Korean People's Democratic Republic.

72 "Laws, decrees, regulations, institutions, etc., are merely manifestations of the policy of the Party... All laws must be based on the policies of the Party; otherwise, they... will amount to no more than mere scraps of paper... Our laws did not come from the minds or books of a small number of people, but from the experiences of the class struggle and production struggle of the masses and from the creativeness and intelligence of the masses... We adopt the mass line not only in making the law but also in revising the laws, decrees and regulations. The Party and the Government encourage and support the people in abolishing and revising laws, regulations and institutions which are irrational, which hinder expansion of production and which have lost touch with the times." *Cheng-fa Yen-shiu* editorial of 2/1959, quoted by Stahnke, pp. 524 and 507. This tendency was reinforced by the fact that in Lectures on the basic principles of the criminal (1957) and civil (1958) law of the People's Republic of China, published by the Central Politico-legal Cadre-training Centre of Peking, political factors, including, among others, the legal opinions of leading personalities and organs of the Party, the People's Liberation Army, and of the central journal, the *Jen-min Jih-pao*, were listed as the main sources of the law. Stahnke, p. 516. The loosening of legal sources resulted in the complete informalization of administration of justice as well. Social conflicts were increasingly settled by the revolutionary street, suburb, and commune committees, indeed, on occasions, disputed issues concerning foreign trade relations were even solved by *ad hoc* conciliation, uninfluenced by statutes. Cf., e.g., J.A. Cohen 'Chinese Law: At the Crossroads' *ChQ* 53/1973, in particular pp. 141-143. – A similar process took place in the *Korean People's Democratic Republic* during a review of codification policy. They did not repeal existing codes, yet still made them less rigid in practice by broad reliance on legal analogies, and by declaring the judicature to be a direct instrument of the class struggle. In this situation, necessitated, according to official statement, by the extension of the revolutionary phase, any attempt to reinstate the ministry of justice, abolished in Korea as it had been in China, or to re-assert institutionalized law-making and/or law-applying based on codification is rejected as antirevolutionary. Cf. P.C. Hahm 'Ideology and Criminal Law in North-Korea' *AJCL* XVII (1969) 1, pp. 78ff.

73 Codification did not, of course, eliminate the simultaneous existence and struggle of opposing tendencies, as mentioned by Tung Pi-Wu when analyzing practical legal nihilism. Tung Pi-Wu in *CPC* II, pp. 88ff. He found the causes partly in

past traditions and partly in the linking of Party practice to the tactics developed during underground struggle. It was the reason why, in emphasizing the significance of change-over, he had to confirm officially that "adherence to the state law is an intrinsic part of adherence to Party discipline and... violation of the state law is a violation of Party discipline". *Idem*, pp. 91ff, especially at 96. It is on this simultaneous duality that the illustrative exposition relies: namely, based on the ancient duality of the *li* and the *fa*, an "external" and an "internal" model in the evolution of Chinese socialist law is distinguished. The "external" corresponds to the enacted law in its ideal form of codification; this is what became officially predominant after the victory of the socialist revolution. But the "internal" model, the practice of nihilizing the law, did not cease its underground work, and eventually deprived the "external" model of its viability in the course of renewed political struggles, indeed, even informalized it. L.H. Victor 'The Role of Law in Communist China' *ChQ* 44/1970, pp. 79ff, especially at 109.

74 Reporting Fidel Castro's speech on the draft code aimed at unifying the judicial system and on the codification progress in the fields of criminal and civil law and procedure as well as in family law, such were the author's comments in B. Roca 'Zadatshi kodifikatsii zakonodatel'stva na Kube' |Tasks of Codifying the Legislation of Cuba| *SZ* 12/1972, pp. 70f.

75 See V. Peschka *Jogforrás és jogalkotás* |Sources and Making of Law)| (Budapest: Akadémiai Kiadó, 1965) pp. 324ff.

76 Cf. Cs. Varga 'The Function of Law and Codification' in *Anuario de Filosofia del Derecho* XVII (Madrid: Instituto Nacional de Estudios Juridicos 1974) pp. 500f, reprinted in *AJurid.* XVI (1974) 1-2, pp. 274f.

77 I consider the Code of Criminal Procedure of Yugoslavia (1953), the Hungarian Code of Civil Procedure (1954; 1957), the Hungarian Labour Code (1955), the Mongolian Criminal Code (1961), and other initiatives as the first typical manifestations of re-codification. It is the Soviet Union that carried through the most comprehensive experiments in re-codification. Since the Act of Amendment (1957) of its Constitution which divided codification functions between the Federation and the republics, only the basic principles of legislation are assigned to federative level, with the republics being obliged to adapt these to local conditions. In this way, a rather limited amount of room is allowed for the expression of diversity within the unity. See, e.g., V.I. Davidov *Problemy kodifikatsii grazhdanskogo zakonodatel'stva* |Problems of Codifying Civil Legislation| (Kishinev: Shtiintsa, 1973) and V.I. Ivanov *Ugolognoe zakonodatel'stvo Soiuza SSSR i soiuznikh respublik* Edinstvo i osobennost' |Criminal Legislation of the USSR and its Federative Republics: Unity and Diversity| (Moscow: Iuriditsheskaia Literatura, 1973).

78 Szabó 'A kodifikáció', p. 494.

79 Szabó wrote in 1962: "Our concept regarding codes and codification differs, in any event, from those who interpret the arrangement of the rules of a particular legal field, or branch, as codification, i.e., essentially a way of collecting and restating laws in force, including maybe also the formulation of some new intermediary provisions bringing them all together. In our view..., codification is the making of a new law; this modern concept of codification evolved in the continental legal systems, and, to this extent, we set out from this concept of codification... We believe that the essence of codification is always progressive, a striving for what is new, a will to change, the exigency of the opening of a new development phase." Szabó 'Codification', pp. 6f.

80 *Ibid.*

81 Szabó wrote again in 1969: "In reality, the second codification did not and could not mean a complete re-codification; the legislator introduces new elements and sections *into the code, alters some chapters, while he generally* preserves the principal features underlying the original code, i.e. most of the elements of the general part of the code. Indeed, re-codification is *not so much of a re-codification* as it appears to be formally. Nevertheless, such complete *re-editing* |italics here by Cs. Varga| tempts the legislator, or rather the people drafting the code, to alter some words or minor details as soon as he touches the old code; re-codification makes *a general review and alteration of the code* tempting." Szabó 'A kodifikáció', p. 494.

82 Cf. ch. V, section 5.

PART TWO

TYPES AND DEVELOPMENT OF CODIFICATION

IX. POSSIBILITY OF A GENERAL CONCEPT OF CODIFICATION

1. UNITY OF THE HISTORICAL MANIFESTATIONS OF THE CODIFICATION PHENOMENON

Having reviewed the manifestations of codification phenomenon, we have been able to form a picture of its historical expressions in theory and practice. Although this picture has thrown light on the logical sequence of the various forms, it has still focused on the specific codification problems of each historical era and social situation as they arose. The latter have been regarded as more or less independent problem bearers, for which previous codification may have served as tradition, but which still had to solve specific problems and satisfy specific needs there and then. This is the reason why the present study has resembled a series of case studies. Despite its systematic form, it has attempted to treat typical problems within a basic situation in the general development of law. This was done for a particular reason.

My starting point was the recognition that a socio-historical link exists between the various manifestations of codification. This link can in no way be considered, however, as a development along straight lines and maintaining a direct continuity. Neither the historical phenomenon of codification, nor, indeed, the essential problem of codification itself is uniform and homogeneous. Different eras and rates of development lead to constant diversity.

True to a rather widespread theoretical approach, the phenomenon of codification has usually been taken as given, as a

consequence of the normatively conceived requirements of defining the concept. It has been linked with definite ideas or models. The French *Code civil* served mainly as the model. This perhaps most magnificent achievement in the whole history of codification, the one most influential and pioneering, ceased to be its own representation, i.e. a specific creation that came into being under concrete conditions and to satisfy concrete requirements. The fact that it became the originator of a type ensued from its own qualities and historical situation, therefore it could not by itself cause a theoretical distortion. But the circumstance that it was to become at the same time more than this: a pattern of the *modern concept of the code* itself, indeed, the lowest common denominator, could certainly cause such distortion. It does not follow *eo ipso* from the *Code civil* that it should become a pattern for the concept of codes, past and future. It established a form of higher organization of the codification phenomenon, and by doing so, it became the originator of a tradition inspiring further development. But it did not obliterate old and/or different forms. In spite of its historical significance, it remained a particular manifestation; it was not able to relegate other particular manifestations into nonexistence.

Yet this is precisely what happened in theories identifying codification with this developed, but still particular historical manifestation, represented by the *Code civil*. The same tendency also arose in the theoretical concept of socialist codification, which saw in codification the culmination of the late arrival of bourgeois transformation. It is possible that socialist theory grasped its timely legal and political task correctly. But even that cannot alter the fact that it dehistorized the historical concept of codification, distorted its dialectics into dogmatism, when it abstracted its linkage to the past (reasonable from the point of view of legal policy prevailing at that time) into an *exclusively* valid theoretical concept, and rendered it the *only* possible concept of codification. What Engels termed "*ideological* outlook" assisted in supporting this aim. A sequence of deductions, "accomplished by the so-called thinker consciously, it is true, but with a false

consciousness. The real motive force impelling him remain unknown to him..."[1] For the matter was, methodologically, that they postulated a concept of code, and applied this to history as an *absolute* yardstick, something that must be an achieved *sine qua non* in sizing up the code-like features of the historical manifestations of the idea of codification.

The principle of historicity suggests that there is no pattern in the development of codification that could be asserted as an absolute measure. This critical standpoint does not relieve us, however, from the obligation to clarify the concept of the code.

All really historical approach must strive to avoid assuming "concepts" and "matters" as being *ab ovo* given, and only having one task left: to be applied to history and to measure products that came about during the course of history. Any historical approach has to strive to set out from the processes of social development itself, and to identify in those processes the concrete core producing the phenomenon under scrutiny as a more or less adequate solution. What is interesting from the point of view of theoretical study is *the process* by which *the problem* emerged and found expression and which was later solved by working out and applying *means* fitting to one another. Consequently, the means are in relation primarily and directly not with one another, but with the socio-legal situation that conditioned and produced them. Codification phenomenon is never a simple function of another (e.g. codification) phenomenon, but that of a concrete socio-legal situation.

This is the only way to answer the following questions: How is it possible that *identical* codification methods were to be worked out as responses to socio-legal challenges *differing* in their conditions - such as, for instance, the adoption of Roman imperial codification and its fundamental solutions (tailored to the conditions of slavery, alien to the spirit of Christianity, aimed at political conservation) by the Byzantine and European systems of mediaeval feudalism, which professed the domination of Christianity; or the radiation of the *Code civil*, realizing the bourgeois renewal and national unification by the French Revolution, to various countries and cultures including

a number of countries in Europe, in Latin America, in Asia and Africa standing on various levels of development ranging from primitive societies totally alien to European standards to countries that got bogged down at an early level of capitalism? How is it possible that *differing* codification (or non-codification) methods were to be worked out as solutions to processes *identical* in socio-legal conditions – such as, for instance, the Twelve Tables of the Romans and the early Chinese codes as methods in the struggle to get acquainted with the law, or the diversity of the codification methods of modernization through the means of law on the African continent? How is it possible that a codification situation develops whose outcome has to be valued as relevant from the point of view of codification, even when the product shows no external similarity to codes – such as the situation in the practice of *coutumiers* in mediaeval Europe, the compilation of the *ukases* of the czars in chronological collections in Russia or the use of doctrinal works as code substitutes in Britain at the end of the century? Thus the genuine question is which factors can generate codification problems, which conditions can influence codification situations, which technical means can function as relevant solutions. These questions can only be answered by way of the contentual analysis of the socio-legal processes involved.

In general, the emergence of the codification phenomenon can be explained by situations developing in society under the influence of various economic, political, etc. factors, where the law can no longer fill its *service role*, except by the development of a definite method. This is a situation, in which law designed only to have a given content is no longer satisfactory: a specific formal organization of this content also becomes necessary for the adequate functioning of the legal arrangement.

Before scrutinizing the individual components of a definition, we should look at one of the reasons for the complexity of the codification process. There is a *subjective medium* between the need for codification and its solution: the need for codification has to be made conscious as a problem requiring a codification solution. This medium is doubly subjective, in

that it is postulatory to the adequateness of human recognition: it is subjectivized partly by the experiencing of the need, partly by the awareness of its codification character. The importance of the subjective motive is indicated mainly by its objective determination. As Marx puts it: "mankind always sets itself only such tasks as it can solve; since, looking at the matter more closely, it will always be found that the task itself arises only when the material conditions for its solution already exist or are at least in the process of formation."[2]

The need for codification depends in the first place on the way how specific contents are *formally organized* in order to fulfil specific functions. Obviously, we have to consider not only economic, social, etc. factors, but elements of the legal set-up as well, such as, for instance, whether the law is issued from statutory or customary development, whether it is centrally controlled or particularized, whether it is internally developed or transplanted from foreign sources, whether it institutionalizes a new socio-economic system or simply re-asserts the existing one, and so on. The *function* may similarly show considerable diversity. It is enough to indicate that it may achieve various things, from didactic summing-up to securing consolidation, from rearranging legal sources to unifying the law, from enacting a new law to imposing an alien one. These potentialities indicate the diversity of the possible mutual effects and determinations as well. But the formulation of the problem is still abstract, since it does not consider codification in its instrumental and technical character.

The question whether codification tradition developed for the solution of similar problems, and if it did, what was the nature of its organization and how successful was it in fulfilling its function — all these may prove to be very important from the point of view of meeting the need for codification. We have to take into account the institutional and ideological environment which may strengthen or weaken solution or practice of codification and also the institutional and ideological character of neighbouring or influential countries. The methods what tradition developed in the course of solving codification

problems may be decisive in the role to play by codification traditions. For the professional and social appreciation of its success in practice builds the best bridge between codification past and future codification. And the reverse is also true: traditions and methods that reject codification, or socially established beliefs in its practical failure lead most directly to an anti-codification attitude becoming traditional.

In the following, I will give some examples in order that the complexity of definition might be appreciated: examples which demonstrate the connection between various influences.

There was none of the laicization accompanying the strengthening of state organization in ancient *India*, such as occurred in the majority of centralized states in the ancient world. The extreme class division of Hindu society was linked to a traditional, religious ideology, which conceptualized society in line with behaviour in any of the castes. Holy tradition did not tolerate enacted profanization of the law. The counterpart of this traditionalism was a timeless approval of custom. From this great fluidity in customary practice emerged those "codes", free of the "impairment" of any conscious interference. Although they might take a shape as teaching material in the Veda schools, they reflected ideal social conditions so perfectly that, as the centuries passed, they also became the normative reflections of social reality itself. Their emergence was helped by their having been committed to writing. And even though they were never held to have been revealed, owing to their inner values, they could still function as the oldest, indeed the most authoritative normative source of holy traditions, as did the still practised Code of Manu.[3]

The peculiarity of the *coutumiers* in mediaeval European development lay in the fact that while they were products of the regional arbitrariness of feudal particularism, they nevertheless fulfilled a codification function, since they perpetuated the customs as props to memory. However, description as proof of the existence of customs could in practice easily turn into prescription at any time, as it soon did. The *coutumiers* did not bind the hands of regional legal authorities in principle; but they still stabilized the jurisdiction of the feudal lord.

The recording of customs did not enact any law; it merely projected it as written objectivity. Yet, by committing law to writing it still paved the way to its enacting. The text, which in itself had no more force than a private note, became normative in the course of time.

Holland is a peculiar case of historical determination. The fact that it embraced the German adaptation of Roman law during its mediaeval and modern development, gained particular importance in the 17th century, when (owing to progress in manufacture and trade, and to the country's success in colonization), Holland became the model capitalist nation of the age. *Roman-Dutch law* expressed the prevailing conditions with such perfection that Grotius considered it to be not a product of reception, but the natural law of Reason.[4] This was the law that Dutch settlers took with them to *South Africa*, where they established it as national law. It was not simply imported, but made fully their own, since it even survived the annexation of South Africa by the British Empire. The same Roman-Dutch law became the ossification of national traditions, since the mother country went along a different path of development. The Netherlands were annexed by the French Empire during Napoleon's victorious conquests and the *Code civil* came into force *ratione imperii*. The Dutch Kingdom revoked the *Code civil* after the battle of Leipzig; but two decades later an imitation of it was introduced *imperio rationis*. Of course, none of this changed arrangements in the Republic of South Africa, where the law was ossified in its pre-codification state, together with the classical Roman sources and their Dutch interpretations (also abandoned in the mother country). And this occurred at a time when the mere survival of these traditions was endangered by British law. And South Africa, in spite of this danger, prompted precisely by the anti-codification attitude of the British, baulked at codification, and left its law in the chaotic jungle of its native sources of law.

Thus, the correlation between the emergence of the need for codification and its solution is by no means mono-directional. Although the problem generally arises as a purely objective ne-

cessity, past experience invariably colours this awareness, channelling it into a particular mould.

Concerning the role played by *tradition*, we only need to establish the influence of institutional-ideological structures on certain events. There is no doubt that a similar role was played in the emergence of *socialist* codification in Europe by the fact that the European part of the Soviet Union as well as its satellites in Europe (with the exception of Albania) inherited continental traditions; these were applied, with appropriate modification, to the new aims of the socialist transformation. This explains why socialist codification was regarded as the fulfilment of tasks left incomplete by bourgeois transformation; and where there was no need for this excess function, socialist codification frequently did not come about. It is likely that the struggles in the emerging *Afro-Asian* countries, which have all set off on the path of legal modernization, are taking place under the influence of different traditions with contrary effects. In the final analysis, the way modernization is to be carried out will be determined not by purely rational considerations, but by the struggle between their tribal-national traditions, and by those acquired in the course of colonization.

A greater role is given to tradition in other cases. Sometimes leaps occur in codification development. Their causes lie within codification as no specific factor can be demonstrated in socio-economic development that might motivate these.

Mediaeval development provides the most telling example of this. Most elaborate codes came into being in areas characterized by decline or by development from a primitive basis. In the areas concerned, economic conditions were stagnating. But their codification development was determined not by these circumstances, but by the historical accident that they did not have to travel the whole road of codification, since they had the traditions of Justinian's as their own (Byzantium, Bulgaria).

It also occurs that this role becomes manifest in the emergence of codification phenomenon, with tradition being the *sole motive force behind*. The simplest case is when the success of

existing or neighbouring codes proves to be the motive force, which amplifies the feeling of an anyhow existing need for codification, and unambiguously channels its solution towards genuine codification. Its characteristic is that the need for codification, experienced with an almost apodictic lack of any alternative, expresses an objective necessity, but not one that demands unconditional satisfaction. Therefore it depends on the force of tradition whether it will be satisfied and whether it will be in a codification form. A great number of codes came into existence in the regimes of *Central European* modern absolutism, in those tiny *principalities* and city states of Germany, Italy, etc., which although were surprisingly developed, still remained insignificant in their historical contingency, mere copies and imitations of ancient, mediaeval, and/or modern legal relics. They were nothing but petty aids to quench the yearning for prestige of post-renaissance princes, reminiscent of renaissance splendour. They provided for actually existing needs, but the decisive motive for their emergence lay in preceding or neighbouring codification traditions.[5]

A separate case of the role exerted by tradition is represented by situations in which various regional units within an integrated legal system retain their traditional institutional and ideological set-up, indeed, in spite of the anti-codification attitude of their vicinity, they not only preserve the codified state of their law, but also replace it with new codes. *Louisiana* in the United States and *Québec* in Canada survived as continental islands; they consider the same problems their confederates approach with case-law attitude from the angle of the code and see them as cases for codificatory regulation.

Finally, instances occur where the problem felt as a need for codification is the product of *mere subjective consideration*. *Bentham*, the idealist campaigner for the continentalization of Anglo-Saxon law was a prime example of this; and *Field*, who not only wanted to give a codified mantle to American law, but similarly wanted this as the abandonment of Anglo-Saxon tradition. But, according to practice, only a fundamental change could put the routine observance of traditions off their

tracks; situations leading to the substitution of old traditions with new ones can only emerge when it becomes impossible to travel along the same road. And, as is known, there was no economic, political, etc. force in England or in America behind the intent to restructure the system of legal sources that might have compelled codification; neither did Anglo-Saxon law experience the radical law-renewal of a political revolution, or the need for national unification of law: the impulses, amplified by own traditions, gave birth to classical codification on the Continent after a long labour.

As was shown above, the role of experience and traditions in codification may be varied, yet we must not absolutize this effect. We have to see this as asserting itself only as an influence on socio-economic factors and becoming a prominent determinant mainly in critical extreme cases. The fate of traditions depends, in the final analysis, on the objective needs of socio-economic development, its role, generally, is of reaction rather than of determination. Tradition, in other words, can be broken with. It may also happen that a change in direction is not the product of economic development, but that *political factors* are precisely the ones which provoke the liquidation of traditions as the precondition of economic development. In the instance of code-transplantation, for instance, it frequently happens that it is forced not directly by economic development, but is precisely the break with tradition and its codification form which become the precondition and stimulus of later economic conditions.[6] It also occurs that a change in direction of economic development is the naked product of a political measure. This possibility of political determination was particularly the case after World War II, in divided countries which had a common heritage from their past, yet divergent political mights changed the course of their economic and codification progress.[7]

The codification problem which emerges as an amorphous need is essentially determined by what is regarded as the facts of the present. At the same time, in respect of methods of solution, it is influenced by past experience, by the stock of methods and techniques available. In this sense, codification

is a complex socio-legal phenomenon, *determined by the present, yet drawing on the past*. At the risk of simplification, one may even state that, in the first place, extra-legal factors decide its determination, but legal ones its shaping.

Thus "codification" as a concept with *a priori* given, compelling content does not exist. But negation of a generality does not necessarily mean extreme individuality. The point is to realize that the patterns of thinking which elevate what is general in a historical era into the generality of the whole of history, are wrong in principle, since they assert a concept as universal category, though it is only valid at a given place and time. Here, I am emphasizing the necessity to walk around codification phenomenon in its historicity in order to be able to define its very concept genuinely. Only this way can we explore social problems indicative of certain common features, and technical solutions to them which show certain common features. Our task is to define on this basis the solutions which we, in some respect(s), hold to be homogeneous enough to call them "codification".

The conclusion is that common features which are at the same time specific enough to delineate them from others, can be found in the first place in the instrumental aspects of these solutions. Therefore, content elements can at the most be identified and defined through formal aspects of the codification phenomenon. They are conditioned by concrete contents; their function is always in these. At the same time, these concrete contents may be most conflicting. Although they may have common features, they are not suitable for specifying the concept. I guess that it is a concept specified by the common features of codification forms rather than by codification contents present in it as a tendency, about which we can say: "the individual exists only in the connection that leads to the universal," i.e., to "'a universal which comprises in itself the wealth of the particular, the individual, the single' (all the wealth of the particular and single!)!!"[8]

2. THE CONCEPT OF CODIFICATION DEVELOPMENT

Until now we set out to clarify the concept of codification phenomenon by establishing that, historically, it is a function of the need for codification as emerged *in concreto* and become conscious. Its *concrete nature* deserves attention from two aspects: on the one hand, diverse codification manifestations emerged in the course of history which were not only heterogeneous in their contents (as well as in several of their formal features) but which apparently excluded one another, and, on the other, their concreteness had its roots in the concreteness of the need for codification itself.

As a matter of fact, the *form* which carries a tremendous multiplicity of codification manifestations is extremely lean. But no matter how insipid it is in itself, it has an unsurpassable advantage: its *possible functions* are almost limitless. Legal systems of varying types and family backgrounds can attempt to use codification for solving socio-legal problems equally successfully. It was the practical universality of its instrumental suitability that provided an opportunity (indeed a spur) for considering codification as a panacea.

Anyhow, we cannot explore a linear development in legal development. Even though each legal system has its own logic of functioning and development, they yield to varying inner regularities, on the one hand, and they function in various social and economic contexts, on the other; therefore they have to conform to different requirements. The point is that various legal traditions live side by side and that their new products ensue not only from the logic of their own system and traditions, nor merely from their own socio-economic determination, but also partly from coexistence with other systems. It is clear that a certain rapprochement has already taken place between the systems of Civil Law and Common Law at their more or less identical level of development.[9] It is also clear that the modernization of surviving tribal and religious legal arrangements cannot be but the product of the interaction between their own traditions and socio-economic conditions, on the one hand, and the traditions imposed on them, on the other. Returning to the

issue, the concreteness of codification means that different needs for codification may arise in various phases of social development, needs that have no relation either to their own (codification) past or to their own (codification) environment.

As far as the history of codification development is concerned, the question therefore emerges: should we reckon only on a haphazard mass of *ad hoc* codification phenomena? Is there a central core in codification development that may help to arrange them in order? To put it briefly: *is there development in codification development?*

As we have seen, *no linear development* can be seen in the historical sequence of codification phenomena. Not only because the actual products do not show any such development, but mainly because the need for them and its conceptualization vary from case to case and are beyond any linearity. However, the bare fact that codification phenomenon relates to a need for codification in a context of a given legal arrangement and tradition, as well as of given socio-economic requirements that urge its making, is not an argument against the concept of codification development. For alinearity only means that development cannot be expressed in/by the continued sequence of quantitative superpositions on a given thing, conceived of as being continuous in itself. This is not as in Stendhal's *De l'amour*, where the quality called 'love' simply equals to the quantitative sum of the series of superpositions taking place in a crystallization process. Such an arithmetical summing up would be opposite to any genuinely dialectic conception of development. Or, as Lenin noted, "development as is well known is not a simple, universal and eternal growth, enlargement (respective diminution), etc." as "evolutiin has to be understood... as mutual transitions".[10]

This negative stand is only an approach to the problem, but nothing like an answer to it. In Marxist philosophy, several attempts have been made to determine the *criterion of development.* It has been established that, for instance, "if the phenomenon becomes more suited for fulfilling its functions, particularly its main functions, as a result of a change in its structure (becoming simpler or more complex) and, thereby, the

functions themselves can be carried out more successfully by it, then the changes in question can be appreciated as progressive ones, and vice versa".[11] Another school of thought criticized this definition, indeed, regarded it as inadequate. The Asiatic mode of production, for instance, as they argued, "was preserved precisely by the perfectly functioning, despotic economic-political system". The more perfectly the system functioned, the more it preserved the retrograde conditions. "Therefore it is clear that the better fulfilment of functions can in no way become the criterion of development, since functions may be of a progressive as well as a regressive character."[12] It is far from me to get involved here in the philosophical dispute over the concept of development. The only question I am interested in in connection with the subject at hand is how we should conceptualize, and assess the possibility of codification development. And, from *this* point of view, the above criticism seems to have been wrongly addressed, even if it did not miss its target. For the subject of the criticism was its assessment as the definition of the philosophical concept of development and the approach criticized could not withstand it. But it does not follow from this that the same definition is simply useless. This may be a fairly acceptable criterion in a question relevant to development, but in a differing context.

For the *question about development* may have several aspects. It may be raised in a way that we examine a phenomenon in the process of formation with a question directed at ascertaining the *tendency* of this process. We do ask: what is the process like? Does it bring a progressive or a regressive change? The subject of consideration is the process itself here. But it may also be raised so that we do not contemplate the phenomenon in itself, but question it in an instrumental context, linking it to something else. The subject of consideration will then be the *instrumental connection* between two separate phenomena: a connection expressed in the instrumentality of the one to the other. For instance, if we assess whether the process which had led to the despotic economic-political system of the Asiatic mode of production realized development or not,

the answer will depend on our concept of history and on various ideological premises. However, the perfection of the functioning that serves its own preservation and reproduction has no role in the argument. When we assess the level of development of the despotic economic-political system, i.e. its instrumentality in preserving the Asiatic mode of production, the answer will not depend on our view of history and our ideological premises. Instead, the perfection of the functioning will be the decisive factor.

This distinction is important for comprehending the nature of codification development. For the *punctum saliens* of reasoning is the recognition that, on the one hand, codification is a value in itself, which has its own development; nevertheless, on the other hand, it is a *means*, whose value is a function of its suitability for exercising well-defined influence.

In consequence, the direction and level of any *codification development* are measurable from two points of view. Partly from the one of its instrumental qualities, i.e. of its suitability for fulfilling functions. And partly from the one of the attainment of those forms that can be considered development in the course of the historical sequence of the forms of codification manifestation.

For the succeeding forms are indeed more and more *synthesized* in the historical development of codification. They realize increasingly higher levels and, thereby, increasingly enlarged potentialities of exercising a function, with sublating the ones characteristic of earlier forms. Development is considered absolute but in this limited sense. As defined by a philosopher in terms of reflection theory: "The superior of two phenomena is that which reflects its environment in a more differentiated way. In the most general sense, the higher standard of differentiatedness of reflection means the ability of reacting more variedly."[13]

3. THE CONCEPT OF CODIFICATION

The historically concrete nature of codification phenomenon and its consequent diversity only permit of a rather *general concept* of codification. Especially its contents elements and functional motives display a rich variety which, in want of a common denominator, necessarily results in *formal and technical features* serving as elements in a general concept of codification.

As a rule, this problem is not reflected in the literature on codification. Most often you can encounter definitions suggesting clear standpoints. One of the reasons for this is the most surprising lack of any *general* theoretical treatment of codification. However, what is available, mostly has an apologetic or critical edge to take a stand for or against one single variation of codification. By no means does this mean, of course, that till now no attempts have been made to explain the socio-legal contextual bonds of codification phenomenon, even if statements such as "no *a priori* codification concept exists..., therefore the exploration of this concept involves empirical work" may suggest such a view.[14] Indeed, even the opinion has been formulated according to which it is not formal features that define codification phenomena; the job is being done by elements of contents. These elements, however, defy definition as they can only be generalized to a small extent since they vary from one legal system to the next.[15]

According to an analysis of the historical variations of the concept 'code',[16] both the codification phenomenon and its conceptual expression prove a definite *tendency*, apart from the *ad hoc* motives of concreteness. The term *'code'* regained general use around the 13th century. First it referred to the work of Justinian, and later to any similar product. These codes initially covered the whole body of the laws in force, later they became collections of given source(s) of the law, and eventually, in the 16th and 17th centuries, they encompassed the regulatory material of specific branche(s) of the law. The *processing of texts of the law* through codification developed along similar lines: first it stopped at mere quantitative re-

duction (by leaving out normatively irrelevant wordings of the text: ceremonial formulae, quotations, reiterations, verbosities, tautologies), later it extended to solve uncertainties in the text (nebulousnesses, doubts, ambiguities), and finally, around the 16th century, it began to revoke obsolescent laws and to record or enact necessary modifications.[17] The *process* seems to have a definite tendency: the code first encompasses the whole body of the law without differentiation. When a certain differentiation begins, it is first based on the outward form and level of regulation (on the sources of law), to be replaced later by contents of regulation (by the branches of law), until basic substantial needs of regulation will prevail (codes of given branches of law, arranging systematically the regulatory material of primary importance as taken from whatever source). The same tendency is evident in the *methods of processing* as well: codification first concentrates on the law's formal expression, then comes the ascertainment of its logical consequentiality, followed finally by the development of its contents, negatively (by revoking what is antiquated) and positively (by inserting what is additionally modified) as well. The process is indicative of the *shift of emphasis from formal treatment of the texts of law to its transformation in contents*. Or, in other words, "the codification demand relating to legal form is complemented with the demand for reform, which already relates to the content".

An exposition of this kind, however, gets stuck within the historically particular, for, by concentrating on Western European development between the 13th and 19th centuries, it neglects ancient and mediaeval, as well as modern times, on the one hand, and whole problem areas of Eastern European, Anglo-American, and Afro-Asian development, on the other.

So, on this sole basis, one can generalize and state this much: a more or less continuous development can be explored in the historical sequence of both codification phenomena and their conceptualization, which may be the reflection of the increasing differentiation of the need for codification and of the way and depth of its satisfaction.

In this differentiation a leading role seems to have been played by legislation. It was this that produced archaic codes in order to consolidate or restate, extend, modify or replace ancient customary law, and that bound it to written enacted forms in late Roman antiquity, in mediaeval times and indeed in the Afro-Asian legal development of the 19th-20th centuries as well. Those primitive forms of codification could not be anything but *compilations in written form for consolidating the law.* This is the *basic* form of codification phenomenon, onto which several layers settled later. The political and economic necessities of feudal absolutism, strengthened by the ideas of legislation of a rationalist natural law inspiration and of *mathesis universalis*, spurred to establish homogeneous, interrelated groups of regulation, i.e. branches of law, through the practice of codification; to upgrade the shaping of the texts of law with the requirement of organizing them as a system; and, finally, to reform the law in an increasingly rational and purposeful way. In such a way, new qualities of codification i.e. codes as *legislatively enacted* products, which are *organized into an in itself coherent system*, were added to the concept of codification in the course of this process. And development caused a break in the concept of codification as well, by splitting into two the earlier unified concept. Only the most developed one, which forms an enacted system, remained codification proper, while the others were degraded into an auxiliary function of subordinate importance.

The varying weight of legislation in modern systems explains the enigma of why codification concepts characteristic of *Civil Law* and *Common Law* were historically separated. For the development referred to above occurred only in the orbit of Civil Law, where codification was only *one* of the possibilities of comprehensive legislation. In *Common Law*, however, owing to the predominance of precedents, any comprehensive legislation (aimed at the re-establishment of statutory law together with common law and qualified, from the very start, as codification) was not just one of the instrumental possibilities of legislation, but it itself. This explains why Bentham spent all his energies in providing reasons for the practical advantages and

feasibility of codification (as an instrument for simplifying, through unifying, common law and statute law), and not in theorizing about the features of the concept, which crystallized about the same time in the European continent. This is why he did not attribute specific importance to its system-character as he may have considered it simply a co-feature of "simplicity" and "order".[19] This also explains why English and American legal dictionaries still provide unclear definitions;[20] and the motive of systematization crops up only exceptionally as a practical necessity, when it becomes indisputable that the reason for the failure of attempts to adopt codification was precisely the inner lack of order,[21] or as out of theoretical interest, when the definition only relates to codification in Civil Law or aspires to all-embracing generality.[22]

In the wake of the classical model of codification, the *European code concept* emphasizes the novel quality of the *system* motive as a matter of course.[23] And the genetic relationship is also marked by those nominal ventures, which separate from earlier forms the "code properly so-called", one in which "the principles of jurisprudence in their universality, and so in their determinacy, have been apprehended in terms of thought and expressed"; or simply mention "systematic code".[24]

Getting away from the classical period introduces, little by little, further *changes* into the code concept. First, the motive of the quantitative reduction of the body of the law gradually vanishes from it. The system motive amalgamates it by rendering it a latent function, naturally involved in the system one. Secondly, as is known, the classical model was inspired by the revolutionary breakthrough to reform the law. However, the impetus behind this stimulus was by necessity spent in the course of time and the intention of reforming the law through continued codification became an accessory in the historical baggage of the ideology of classical codification. It must be emphasized, on the one hand, that even though it is the revolutionary reform of law that brought into existence the classical model of the *Code civil*, the will to reform the law by codifying it was not generally accepted even in 19th century Europe. Adapting revolutionary codification ideology to Prus-

sian paternalistic conformism, Hegel also voiced the view that "creating a system of statutes which is *new* in respect of its *contents* is out of question; what matters here is the cognition of the substance of existing laws in their determined generality, that is their *conceptual* grasping and, then, their application to the particular".[25] On the other hand, after the classical bourgeois revolutions were over, the identification of codification with radical law-reform survived or was revived only in those societies where the bourgeois transformation had failed to come about and asserted itself as a timely requirement.[26]

Or, the concept of codification even in continental Europe became gradually alienated from its original definitions characteristic of the *Code civil*. Thereby, it lost its specificity. At the same time, it must be remembered too that a huge part of the distinguishing features and solutions, elaborated in the historical process of the classical period, have since been adopted as general features and solutions of almost all legislation. The current concept of codification is transformed into a more general one, merging the classical codification in a unity with its preceding forms.[27]

It is chiefly *socialist* literature that emphasizes the importance of system motive while defining the concept of codification. Accordingly, the code is represented as a legislative act regulating the area of a given branch of the law with relative completeness, comprehensively, and in a systematical arrangement corresponding to the basic structure of that branch of the law.[28] In the majority of definitions, system element figures expressly as an indication of a formally organized logical system. So the code is composed of a coherent, interrelated set of norms of varying generality, which by building a composite network of general principles, rules, exhaustive listings and stipulations of exceptions, breaks down the general wording to a varying range of the particular within the framework of the socially typical.[29]

At the same time, it is to be noted that this feature gains specification mostly in the interest of the definition of the *differentia specifica* only. The usual argumentation, character-

istic of the traditional socialist approach is this: socialist legality presupposes an adequate knowledge of the law. Knowledge of the law presupposes accessibility to the law, and that, in turn, the systematic arrangement of legislation. This can be achieved by either incorporation or codification. Therefore, the only task left is to distinguish properly between these two alternatives.[30] It is due to this simplicistic and rather naive argumentation why it can happen that, apart from such witty opinions as the one according to which incorporation carries out "external", and codification "internal" systematization,[31] some scholars regard the legal force of the act to codification as its basic distinguishing mark,[32] while others see it in the new codifying act critically outdoing earlier legislation.[33] The source of all these atheoretical approaches is the fact that, till now, ideologically patterned analyses have mostly been used to take the products of socialist transformation as *only* discontinuous phenomena separated from their historical antecedents. Carrying matters almost to their own carricature, such pure speculation was, for instance, expressed in the debate which, in the name of Marxist theory, could question the viability of the statement: "the result of codification is the code."[34]

The only justifiable point is that the concept of codification itself is a *historical* product. It has no universal validity as it is also subject to change.

For that matter, it is only *formal* characteristics that are available as features suitable for proper distinction. Accordingly, codification is

(1) *compilation*

(2) in *written* form

(3) for *consolidating the law.* Naturally, new motives could be added to it in the course of historical development, which became fairly stable elements of it as well. Notably,

(4) *formal validity* became a *sine qua non* feature of the oeuvre of codification both, in ancient times, with linking the law to enacted form and, in modern times, with the establishment of legislation as the main source of law. And in recent times,

(5) the organization of legal provisions into a logically patterned *system* was added to this, and soon also became a stable component. This twofold broadening of the concept was naturally accompanied by a contraction in its extension. Those phenomena left out from this conceptual classification were grouped around new concepts.[35]

This line of development seems to point to a very general tendency, but by no means to a universal and irreversible one, delineating or prejudicing the shape, uses, or conceptual grasping of codification phenomena at any time and any place. Conceptual relativism is all the more justified as only legal cultures inspired by the patterns of Continental Europe completed this line of development and even they started doing so only some two hundred years ago, on the dawn of the modern age.

NOTES

1 Engels to Schmidt, p. 493, and F. Engels to F. Mehring (July 14, 1893), in *MESW* III, p. 496.

2 K. Marx 'Preface to *The Critique of Political Economy*', *MESW* I, p. 504.

3 Diamond, pp. 110f; K.R.R. Sastry *Hindu Jurisprudence* A Study in Historical Jurisprudence (Calcutta: Eastern Law House 1961) pp. Vf and 16; David, pp. 485ff.

4 See David, p. 42, quoting the work of H. Grotius *Inleydinge tot de Hollandsche Regtgelertheyt* (1631).

5 See Vanderlinden, pp. 37ff for proliferation in the 18th century, and Szladits, pp. 548ff for its documentary survey.

6 Owing to economic determination asserting itself in the last analysis, it can of course occur that a codification aspiring to exercise economic influence is reversed, and will be itself influenced by obstinately consequential economic conditions. The *Schweizerisches Zivilgesetzbuch* received by *Turkey*, for instance, resulted in such a legal duality that it was doubted for decades whether it had any actual effect. And the Civil Code construed in *Ethiopia* did not even manage this dualism: traditions refused to acknowledge it so that it remained in practice a private affair of the metropolitan courts.

7 An example of this is the *People's Republic of China*, where the bourgeois traditions of modernizing the law by codification was first eliminated in order to substitute them with Soviet-patterned codes; then, in contrast to the Chinese Republic on the island of Formosa, which is a guardian of bourgeois codification traditions, everything achieved so far became destabilized as all kinds of European traditions were rejected, in order to arrive back at the genuinely Chinese traditions. – The common feature of the Chinese and Korean example is that, in line with their political division, their paths in the direction of codification development (and also in applying or revoking their once common codes) have parted. The other way round, examples are also known of the basic codes for a long period of time remaining unchanged. To exemplify such a contrast, the German Democratic Republic holds to the rigorous separation of law-application from law-making, while the *Federal Republic of Germany* sets out on the path of loosening up code-law in judicial practice and, by broadening the possibilities offered by general clauses, applies the same texts of codes with considerations reminiscent of natural law.

8 Lenin *PN*, pp. 361 and 99.

9 Cf., e.g., Friedmann, pp. 370ff; Dainow, pp. 427ff.

10 Lenin *PN*, pp. 255f.

11 I. Stoliarov 'Izmenenie i razvitie' |Change and Development| *Voprossy Filozofii* 1965/12, p. 42.

12 Szabó 'Fejlődés', pp. 595f.

13 *Idem* at p. 597.

14 F. Ermacora 'Les problèmes de la codification à la lumière des expériences et situation actuelles' in *Rapports généraux au VIe Congrès International de Droit comparé* (Brussels: Bruylant 1964) p. 225.

15 Bayitch, pp. 161ff.

16 Vanderlinden, passim.

17 The specification of the task of *Coustumes générales de duché d'Aouste* (Chambéry 1588) in the warrant dated August 12, 1586: *tollir et oster ce qu'est rayé et cancelé*, is an early named example of cancellation, and the report of the letter of privilege of *Code du roy Henry III, roy de France et de Pologne* (Paris 1587): *ont esté adiousthees certaines Modifications* is of modifications. Quoted from Vanderlinden, pp. 322 and 325.

18 Vanderlinden, p. 187.

19 M. El Shakankiri *La philosophie juridique de Jeremy Bentham* (Paris: Librairie générale de Droit et de Jurisprudence 1970) p. 289.

20 E.g. the code is "a collection or system of laws" which "fuses into the new whole the common law" as well. *Dictionary*, p. 399. "A collection, compendium or revision of laws" (*Chumbley v. People's Bank and Trust Co.*, 60. S.W. 2d, 164, 166, 166 Tenn. 35); "Any systematic body of law" (*Wall v. Close* 14 So. 2d 19, 26, 203 La. 345); "compilation of existing laws, systematic arrangement..., and revision to harmonize conflicts, supply omissions, and generally clarify and make complete body of laws designed to regulate completely subjects to which they relate" (*Gibson v. State* 214 Ala. 38, 106 So. 231, 235). Black, p. 323. "A compilation of legal principles, consolidated into a single enactment, and generally having relation to the same matter..." M. Radin *Law Dictionary* (Dobbs Ferry: Oceana, 1955) p. 57.

21 E.g. Terry, pp. Vf and 608-610.

22 E.g. "reduction of the laws customarily observed by a particular people to a more or less permanent, organized, and written form through a comprehensive piece of legislation". E. McWhinney 'Code Laws Systems' in *International Encyclopedia of the Social Sciences* ed. D.L. Sills, IX (no place: Macmillan and The Free Press 1968) p. 214. "|A| statement of at least one particular branch of law that purports to be complete and systematic in form." Seagle, p. 103. "|A| body of general principles carefully arranged and closely integrated," which "achieves the highest level of generalization based upon a scientific structure of classification." Dainow, p. 424. It signifies "enacted law", "from the legislative branch", "contains abstract,general rules", "it is therefore comprehensive in scope and systematically arranged." Bayitch, p. 165.

23 As reflected in some old *Hungarian* examples: "The code of statutes is a systematically edited, in itself complete and sanctioned book (and not collection) of the legal relations among the citizens of the state, and between them and the state." Szalay, p. 24. "A systematic code ... must form a complete whole, and its parts must be coherent, consequential and uniform in the final analysis." Suhayda, pp. 157f. Codification is "a systematically arranged compilation of the positive law in force through a scientific method..., which is given enacted status by those responsible for legislation". K. Mártonffy *A szabatos törvény* A jogszabályok szerkesztése és közzététele |The Correct Statute: The Drafting and Promulgation of Statutory Provisions| (Budapest: Királyi Magyar Egyetemi Nyomda 1932) p. 17.

24 G.W.F. Hegel *Philosophy of Right* |*Philosophie des Rechts* 1821| trans. T.M. Knox (Oxford: Clarendon Press |1942| 1953) section 211, Commentary, p. 135; and Suhayda, p. 157.

25 Hegel *idem.*, elevating the points already crystallized in the debate between Thibaut and Savigny into his system of the philosophy of right. For Thibaut thought of codification in a compilatory sense from the very start (Caroni, p. 125), thus differing from Savigny, who meant it in a systematizing sense. With Savigny, the code "is *not a source of law*, but merely *a mode of expressing* already *existing law*". V. Peschka 'Thibaut és Savigny vitája' |The debate of Thibaut and Savigny| *ÁJ* XVII (1974) 3, p. 368.

26 E.g. in *Hungary* the codification theory of the 19th century reform period ("The code of statutes..., by its nature, aspires to open up a new era by dissolving the tangle of historical element and gradual development." Szalay, p. 24), as well as one of the socialist transformation ("the essence of codification is always to point forward, to aspire to something new, to will change, to herald a new phase of development." Szabó 'Codification', p. 7) produced such views.

27 This is supported by the recognition that the formal restablishment of law is eventually a *sine qua non* element of codification. For codification can be conceived of without substantial change but not without restructuring the law's formal expression. P.M. Storme 'De codificatie van het Belgisch sociaal recht: Allgemene problemen' *Rechtsk. Weekbl.* 1955-1956, p. 1652. According to a theoretical attempt at rendering the concept of codification continuous in Western European legal development, "codification is in essence nothing but a technical procedure intended to facilitate the cognition of the law". J. Vanderlinden 'Les aspects de l'idée de codification' in *Rapports belges au VIe Congrès international de droit comparé* (Brussels: Bruylant 1962) p. 48. Though it is true that "there are ensembles having statutory force, which comprise the law or an important part of it, without the phenomenon having as its cause the will to arrive at a better knowledge of the law", nevertheless, as the same author argues, "we cannot talk of codification when the will towards better knowledge of the law is lacking". Vanderlinden, pp. 224f. For a criticism of this concept, see Cs. Varga 'A kódex és eszméjének formálódása Nyugat-Európában' |The Formation of the Code and its Concept in Western Europe| *ÁJ* XIII (1970) 3, pp. 619f.

28 E.g. *Juriditseskii Slovar* |Legal Dictionary| ed. P.I. Kudriavtzev (Moscow: Gossizdat. Juriditseskoie Literatury 1956) p. 432; Kerimow, p. 88; I. Szabó *A szocialista jog* |Socialist Law| (Budapest: Közgazdasági és Jogi Kiadó 1963) pp. 180ff; etc.

29 E.g. Sominsk, p. 12; A.F. Shebanov 'Sistematizatzia normativnykh aktov' |Systematization of Normative Acts| in *Ossnovy teorii gossudarstva i prava* |Fundamentals of the Theory of State and Law| ed. N.G. Aleksandrov (Moscow: Gossizdat. Juriditseskoi Literatury 1963) p. 400; M. Szotáczky

'A kodifikáció' |Codification| in *Állam- és jogelmélet* |Theory of State and Law| ed. M. Samu (Budapest: Tankönyvkiadó 1970) pp. 478f; etc.

30 Particularly Kerimow, p. 135, note 115.

31 D.A. Kerimov 'Poniatye i formy kodifikatzii' |The Concept and Forms of Codification| in *Voprossy kodifikatzii sovetskogo prava* |Questions of the Codification of Soviet Law| I (Leningrad: Izdat. Leningradskogo Univerziteta 1957) p. 9.

32 E.g. Sominsk, p. 11.

33 E.g. L.A. Steshenko 'Poniatye kodifikatzii i sistematizatzii zakonodatel'stva' |The Concept of the Codification and Systematization of Legislation| in *Zakonodatelstvo i zakonodatel'naia deiatelnost' v SSSR* |Legislation and Legislative Activity in the USSR| ed. P.P. Gurev and P.I. Sedugin (Moscow: Juriditseskaia Literatura 1972) p. 159.

34 A.F. Shebanov 'Nekotorye voprossy teorii normativnykh aktov v sviazy s sistematizatziei sovetskogo zakonodatel'stva' |Some Questions of the Theory of Normative Acts in Connection with the Systematization of Soviet Legislation| *SGP* 1960/7, p. 142 stated, for instance, that the statement of M.S. Strogovich (*Teoria gossudarstva i prava* |Theory of the State and Law| |Moscow: Jurizdat 1940| p. 186) which I have quoted in the text, had lost its validity because of the constitutional division of codification competence between the Union and its Republics, since "the forms of codifying legislation" are now the 'Fundamentals' and 'Fundamental Principles', 'codes' and 'regulations' on the federative level, on the one hand, and the Republics' 'codes', on the other. The debate has for long been continued since then by, among others, Sominsk, pp. 12-18 and I.S. Samoshtsenko 'Nekotorye voprossy kodifikatzii zakonodatel'stva Soiuza SSSR i soiuznykh respublik' |Some Questions of the Codification on Legislation of the USSR and of the Federal Republics| *Pravovedenie* IX (1965) 4, pp. 34ff.

35 A specialist on codification in Hungary at the end of the last century already deemed it necessary to remark that "once" the term 'codification' stood for 'consolidation'. M. Herczegh *Magánjogi codificatiónk hajdan és mostan* |Our Private Law Codification Once and Now| (Budapest: Zilahy 1878) pp. 11f, note 36.

X. RATIONALIZATION AS THE MOTIVE FORCE BEHIND CODIFICATION DEVELOPMENT

1. RATIONALITY AND SOCIAL DEVELOPMENT

"Rationality" and "rationalization" are relatively new categories. Both have been transmitted to our age in their contemporary interpretation by *Max Weber.* He was the scholar who, with a view of the age to come, provided the first comprehensive theoretical exposition of these concepts.

As is known, Weber's social reality was that of the final decades of the 19th century. Unlike Marx, he was able to study capitalism in its more advanced stage, in all its developed administrative complexity.[1] Weber's critics all agree that the categories in question formed some sort of an organizing centre in his sociological concept. This will hold true both when he explains rationality as the ethos of the way of life characteristic of the West (offering an answer to the question: "what combination of circumstances the fact should be attributed to that in Western civilization, and in Western civilization only, cultural phenomena have appeared which |as we like to think| lie in a line of development having *universal* significance and value.")[2] Weber produces evidence for the causal role of the ideological forms equivalent, even superior, to economic life so as to arrive at a series of conclusions in which even the substance of capitalism is but the rationalization of economic and social life, the rational calculability of all phenomena.[3] In any event it remains a fact that otherwise utterly heterogeneous qualities, such as the capitalist mode of production, legal rule (as distinct from charismatic and traditional), or

western development in general, possess one and the same underlying motive force in Weber's theory, i.e. *rational organization.*

Just as the appearance of the product as a power mastering and threatening the producer (i.e. the phenomenon of *alienation*) was the focal problem for Marx, for Weber this role was played by *rationalization,* i.e. the circumstance that the structures purporting to be the extension of liberty became independent and were turned into a power restricting this very liberty itself.[4] The influence of Weber's age on his notion of rationality is to be found primarily in the absolutizing, even hypertrophical, significance assigned to its notional sphere. "The experience of the genesis of bureaucratic machinery in capitalist society... came to be reflected in Weber by the image of the rule, even the *historical* rule, of rationalism."[5] This, and "something of the Prussian enthusiasm for the military type of organization",[6] led Weber to discover the *bureaucratic organization* as the basis of modern economic and social development, which in universal development has also gradually become the basis of ecclesiastical, military, political, and party forms of organization.

This variety of phenomena leads one to suspect that rationality and rationalization are by no means uniform, homogeneous notions in Weber's oeuvre. In one of his most challenging and perhaps most misunderstood writings (where he tried to throw light on certain correlations between the capitalist mode of production and religion and the advance of bourgeois lifestyles), he himself called attention to possible *ambiguities.* As he wrote, "In fact, one may... rationalize life from fundamentally different basic points of view and in very different directions. Rationalism is an historical concept which covers a whole world of different things."[7] At the same time, however, he did little to reconcile the notions of rationality as used in various contexts.

If we compare the elements concealed in the various uses of the category of rationality, we shall find that ultimately, as regards both economic and bureaucratic, as well as legal, organization, Weber draws a line between two meanings of the word

'rationality', namely the *formal* and the *substantive*. As a matter of fact, the economic and the bureaucratic-legal types of rationality bear common traits since they have common roots. They are merely the application of one and the same thing in different fields. At the same time, the formal and the substantive meanings of rationality are homonyms devoid of any theoretical connection. Their relationship often reminds one of mutually independent trends which occasionally run counter to each other. Nevertheless, historically they can appear alternately and even in a mutually reinforcing way. Their occurrence together, however, is never an *a priori*, absolute necessity, but in all cases the product of a concrete historical situation.

Formal rationality in *economic activity* stands for "quantitative calculation or accounting... in which the provision for needs, which is essential to every rational economy, is capable of being expressed in numerical, calculable terms, and is so expressed". On the other hand, substantive rationality is something which is hard to define: it is "full of difficulties". Here "it is not sufficient to consider only the purely formal fact that calculations are being made... In addition, it is necessary to have account of the fact that economic activity is oriented to ultimate ends of some kind, whether they be ethical, political, utilitarian, hedonistic, the attainment of social distinction, of social equality, or of anything else. Substantive rationality cannot be measured in terms of formal calculation alone, but also involves a relation to the absolute values, or to the content of the particular ends to which it is oriented."[8] In both *bureaucratic and legal organization*, formal rationality, too, means "a particularly high degree of the calculability of results",[9] which bureaucratic administration translates into reality by the establishment of "an impersonal order", by the "limits laid down by legal precepts",[10] whereas law does the same by formalizing itself,[11] i.e. by organizing abstract norms within the framework of a closed system, and by deciding upon specific facts at issue through the strict logical aplication of these norms. Substantive rationality here represents rationality "in the sense of observing constant fundamental principles", or "the substantive principles of the so-

cial order, whether they be the carriers of political, welfare-utilitarian or ethical contents".[12] In this sense, even law and administration, in the organization of which formal rationality is missing, may also be rational.

If we set out to clarify the concept of rationality as developed by Weber, we may agree that its gist is contained in *calculability* |*Berechenbarkeit*|.[13] Formal rationality has been appraised in a similar manner by *Karl Mannheim*, who adapted Weber's categories to his own system of ideas. *Functional* rationality, as he calls it, consists of "a series of actions... organized in such a way that they lead to a previously defined goal, every element in this series of actions receiving a functional position and role". Functional rationality will be of the highest order when "it co-ordinates the means most efficiently". At the same time, it is neither necessary that it should attain its goal, nor that the goal itself should be rational. "... we should call this behaviour rational because it is organized, since every action has a functional role to play in achieving the ultimate aim." There is therefore a duality of criteria:

"(a) Functional organization with reference to a definite goal, and

(b) a consequent calculability when viewed from the standpoint of an observer or a third person seeking to adjust himself to it."[14]

The difference in the approaches indicates that Weber has defined this kind of rationalization formally, i.e. as a means in itself. This is clearly in contrast to Mannheim's functional definition considering rationality an organizational activity towards a specific end. At the same time, the difference is merely apparent. In point of fact, the functional approach only conveys Weber's exaggerated formalism. Basically they are the same, namely both formal and functional rationality are in themselves *neutral media with optionally replaceable contents*. This kind of identity was emphasized by the Weberian characterization of their quality as being "formally capable of being applied to all kinds of administrative tasks",[15] as well as by

the Mannheimian endeavour to segregate functional, from substantive, rationalization.[16]

The present analysis brings us to the conclusion that, in Weber's theory, *formal* rationality is *pure instrumentality*. This explains the definitive yet restricted presence of *substantive* rationality: all in all, its role is to become the *antipole of formal rationality*. This is why the role it plays appears to Weber to be a necessary one, without possessing autonomous existence. Indeed, it is necessary for the value-neutrality of formal rationality to be counterbalanced. At the same time, substantive rationality as a counterbalancing motive has no autonomous life of its own in Weber's oeuvre. It hardly goes beyond stressing that formal rationality is devoid of any content. Here we have come to a further conclusion, namely that, in Weber's view, substantive rationality is but the carrier of the purposiveness of formal rationality, i.e. of the social, etc. contents of its functioning. Our conclusion, however, is but a partial one.

Formal rationality and substantive rationality are not necessarily exclusively complementary phenomena. As we have seen, both may occur *independently* of each other, moreover, they may appear in a way that they deny or even destroy one another as antipodes. On the one hand, substantive rationality is not only to describe economic, legal, etc. organizatiional activity, imbued with formal rationality. On the other, owing to the emphasis laid on the purely technical nature and universal applicability of formally rationalized structures, Weber also had to reckon with cases when formal rationality had no substantive rationality whatever as their equivalent.[17]

At the same time, we cannot conclude that *formal rationality* is devoid of contents in a *historically* general way.

Being a category focussed on the technical aspects of a given organizational process, it is true that formal rationality with its direct notional contents is indeed void. However, in order that any formalization might become rational, first the intrinsic properties and regularities of the process in question have to be explored.

Lukács writes: "For the essence of rational calculation is based ultimately upon the recognition and the inclusion in one's calculations of the inevitable chain of cause and effect in certain events — independently of individual caprice."[18] This is the reason why he only formulated a single, uniform concept of rationality. He presupposed a preliminary cognition at the very outset, but still he did not project this as a separate category.

As a matter of fact, it was the powerful growth of monopoly capitalism and its bureaucratic machinery at the end of the 19th century that acted as an inspiration to Weber's theoretical concept. Endeavouring to reflect capitalism and its bureaucracy as ideal types, however, Weber absolutized these historically more or less particular tendencies. Under the guise of formal rationality, he generalized the dominant trends of his age. At the same time, he intended to provide universally valid definitions for his ideal types. In the face of such an ahistorical historicity we should read his epistemologically sceptical lines: "The increasing intellectualization and rationalization do *not* ... indicate an increased and general knowledge of the conditions under which one lives. It means something else, namely the knowledge or belief that if one but wished one *could* learn it at any time. Hence, it means that principally there are no mysterious incalculable forces that come into play, but rather that one can, in principle, master all things by calculation. This means that the world is disenchanted."[19] It means that at the level of the totality of historical processes, he recognized the more conscious and effective appropriation of the world through formal rationalization.

On the other hand, *Lukács*, who saw formal rationalization from the aspect of the organization of economic and working processes, relying on actual cognition and having an alienating effect, treated cognition not only as a natural condition, but discovered one of the roots of *alienation* in the specialization made possible by cognition. "If we follow the path taken by labour in its development from the handicraft via cooperation and manufacture to machine industry," he wrote, "we can see a continuous trend towards greater rationalization, the progres-

sive elimination of the qualitative, human and individual attributes of the worker." "Rationalization in the sense of being able to predict with ever greater precision all the results to be achieved is only to be acquired by the exact breakdown of every complex into its elements and by the study of the special laws governing production. Accordingly it must declare war on the organic manufacture of whole products based on the *traditional amalgam of empirical experiences of work:* rationalization is unthinkable without specialization." The formal standardization of justice, the state, the civil service, etc., signifies objectively and factually a comparable reduction of all social functions to their elements, a comparable search for the rational formal laws of these carefully segregated partial systems. Subjectively, the divorce between work and the individual capacities and needs of the worker produces comparable effects upon consciousness. This results in an inhuman, standardized division of labour analogous to that which we have found in industry on the technological and mechanical plane."[20]

As far as the embeddedness of Weber's types in his age is concerned, it was manifested at two points which, for Weber, signified a new and acute socio-political problem. They were not, however, only relevant to his age: they survive to the present day.

The one point is the *universal applicability* of formally rationalized structures. This means that the structures in question, being created and actuated in a formal way,[21] may operate in diverse ways, serving opposite functions. Although formal definition is implicitly a definition of individually non-defined, albeit concrete contents, it will, by concentrating on formal features, incorporate them as a range of possible subjects as they are given from the very start. All in all, then, formal definition is gradually gaining independence. Its independence is, of course, not simply a burden, but one of its very basic functions. Formal definition will be objectified merely in order that it can be turned against the original contents and made to master them.

The other point is that, historically, with the mass utilization of these structures, a *practically indestructible form*

has come into being, whose objective indispensability and impersonality have meant that, despite considerable politico-economic changes, these structures go on operating as before. "A rationally ordered system of officials... merely needs to change the top officials," writes Weber. As precedents, he only had to take the *coupe d'état* in France or the bureaucracy Bismarck had created, which, while eliminating Bismarck, survived him and went on to live a life of its own.[22]

Universal applicability as derived from formal definition is, of course, a polarized term: it refers to the *ambiguities* of the merely formal which follow from any *vagueness of content*. In any event, universal applicability seems to be an inseparable property of formal rationality, capable of turning it into substantive irrationality.

In this manner, formally rationalized structures are phenomena with considerably much potential, which permits of their use as *continuous* elements in the discontinuity of socio-economic development. At the same time, these are structures which, even though adequate at a given moment historically, are but *static* reflections of reality: they petrify reality and stunt it in its development. Hence, the static nature of these structures will thrust past adequacy, too, into the abyss of certain inadequacy.

The startling fact that formally rationalized structures have started to outlive their original conditions and thus, instead of mediating, have begun imposing themselves upon reality in the teeth of prevailing socio-economic needs and tendencies, caused Weber to discover the *ambivalence* of rationality, i.e. the conclusion that processes of rationalization "combine the specific achievement of modern world and the whole dubiousness of this achievement".[23] This is why Lukács considered formal rationalization to be the *artificial creation of realities*, whose independence as being only partially defined by socio-economic reality is its inherent quality. Incidentally, this independence only appears in exceptional situations, when these structures are shattered. "This rationalization of the world ... is limited, however, by its own formalism. That is to say, the rationalization of isolated aspects of life results in the

creation of formal laws. All these things do join together into what seems to the superficial observer to constitute a unified system of general laws. But the disregard of the concrete aspects of the subject matter of these laws, upon which disregard of their authority as laws is based, makes itself felt in the incoherence of the system in fact. This incoherence becomes particularly egregious in periods of crisis. At such times we can see how the immediate continuity between two partial systems is disrupted and their independence from and adventitious connection with each other is suddenly forced into the consciousness of everyone."[24] Together with the processes of rationalization, situations have come into being in which, as Lukács writes, "men are constantly smashing, replacing and leaving behind them the natural, irrational and actually existing bonds, while, on the other hand, they erect around themselves in the reality they have created and made, a kind of second nature which evolves with exactly the same inexorable necessity as was the case earlier on with irrational forces of nature (more exactly: the social relations which appear in this form). To them their own social action, says Marx, takes the form of the action of objects which rule the producers instead of being ruled by them."[25]

Thus formal rationalization has been turned inside out. It becomes a two-edged tool: a *paradoxical* phenomenon. Formal rationalization has been completed in order to fulfil indispensable socio-economic functions. Its practical functioning, however, leads with inexorable regularity to dysfunctionality limiting the socio-economic need itself.

Weber emphasized that the formal rationalization of the private economy, bureaucratic administration and the law, were the products of feudal absolutism. This was the age when the advance of capitalist production and state bureaucracy (i.e. the mutuality of interests between feudal ruler, the armada of career civil servants and the rising bourgeoisie) made the rule of formally rationalized structures the *conditio sine qua non* of further development.[26]

In whatever acute form the formal rationality problem emerged in Weber's age, the novelty was not the mere appearance of

formally rationalized structures, but their development to *exclusive dominance*, notably the integration of the part systems of formally rationalized structures into the very foundations of the socio-economic system itself.

As far as the appearance and particularity of formal rationality *in the field of law* is concerned, it should first be noted that the historically conditioned nature of the need for calculability has been *counteracted* by several tendencies. Tendencies namely which have their origin in preconceived ideologies and philosophical positions.

This was the case above all with *Nazi Germany*, where the institutions of democracy, parliamentarism, constitutionality and rule of law idea were rejected and, for the sake of a political leadership relying on the *Führerprinzip*, any limitation imposed by formal law was liquidated. For the National Socialist German Workers' Party and the *Reichsführer*, formally rationalized law was simply unacceptable because it kept power within bounds and refined even arbitrariness into systematic oppression. This explains why in 1933 some pseudo-historical ideological statements were formulated in the interests of the law: "substantially, law is conceived by liberalism as a set of legal norms... to define the individual's freedom of action... Individualism strives towards a clear delineation of the boundaries of the freedom of action... For individualism, security in the law is not supposed to guarantee intrinsic justice; what matters to it is only the objective calculability of the series of one's own affairs... For this, security in the law, explicitly defined legal provisions, and regulated fields of law are needed; indeed, the main aim of liberalism is codification, the regulation and consolidation of all overt rights of a people."[27]

The theoretical roots of this and similar ideas drew their nourishment from a tendency which has been widespread all over Western Europe ever since the closing years of the 19th century. It is well known that monopoly capitalist development made the gradual adaptation of the law, once codified in a liberal spirit, an urgent requirement. It was fulfilled through the liquidation of the *exegetic method* of law-application, closely adhering to the wording of the code whilst reducing the

judge's function to one of a deductive machine. This was the genesis of the *free-law movement* as a counterpole, whose historically limited character had not even been recognized by the sociologists of the age. Most of them valued the movement not only as a new achievement, but one that was to be lasting. This was how Karl Mannheim looked at it: "the fundamental principle of formal law by which every case must be judged according to general rational precepts, which have as few exceptions as possible and are based on logical subsumption, obtains only for the liberal-competitive phase of capitalism and not, as Max Weber believed, for capitalism in general." For "the correlations between liberal-competitive capitalism and formal law, and between monopoly capitalism and increasing legal irrationalism are ... historically limited *principia media*."[28]

The development as demonstrated by the free-law judicature of monopoly capitalism was, however, only irreversible in relation to exegesis as the kind of formal rationalization resulting in extremely dysfunctional and substantially irrational issues. Development temporarily denied formal rationality only in order to render possible the detachment from exegesis and the continual adaptation of the law to new needs. What appeared to be the disintegration of the rule of law concept was merely that of a historically limited concept of it. It was the rule of law idea particular to bourgeois revolutions that was in a state of disintegration. After the free-law movement was over, development gradually led to a new, relatively stabilized, though looser, concept of the rule of law and not to an anarchist nihilism.

If we consider legal development in all its complexity, it will become evident that one of its determining tendencies is the effective expansion of formal rationality. Unlike the processes of reification, however, the case here is not one of the self-development of form. We can, in general, say that, in social commerce, the *formalities* as manifested in the institutionalized functions of security, safety, manageability and controllability, have their origin in the need to develop means of standardizing and controlling social conduct effectively.[29]

It will suffice to bear in mind that although the enforcement of political power and its law only came into being with the division of society into classes of antagonistic interests, the *regulatory function* itself (which later became institutionalized as the specific means of law) preceded the establishment of law *as law*. When "examining the complex which is supposed to perform the legal regulation of social activities rather more closely", it becomes evident that "this need emerges at a relatively low level of the social division of labour. The duties of each of the participants have to be regulated as precisely as possible in the event of simple cooperation (hunting) based on the concrete process of labour and on the division of labour that evolves from this (beaters and hunters in the hunt). But it must be remembered... that regulation consists of influencing the participants in order to fulfil the teleological projects which have been allotted to them in the total plan of cooperation".[30] It is this regulatory function which soon achieved its formally most rationalized realization in law. From the cognition of the efforts of social action to their formal prediction by establishing a network of regulatory patterns of conduct, it is law that has got the farthest. It is law that has projected as a formally enacted system of norms the patterns of conduct in which "the measured itself changes into the measure," i.e. "which sets instrumental activity as man's target".[31]

Consequently, the minimum of formal rationality, i.e. *standardization*, appeared in the prototypes of law. But there can be no doubt that this quasi-law in its formally rationalized structure will survive both the state and its law, taken in their class function. For it is beyond doubt that whatever idea ideologists may have of the communist society as outlined by the dreamers of Marxism, they cannot even imagine it without conceptualizing some sort of an exteriorized-objectified system of social norms, i.e. without having structures of formal rationality, working in it.

(In this connection it is worth noting that the almost unanimous positions which tried to prognosticate the future society and eventually declared moral norms the heirs of the

legal organization of society in the wake of the programme approved by the 22nd Congress of the Communist Party of the Soviet Union,[32] have since been revised. The new position relies on the insight that formal rationality will have to be preserved, precisely because of historical experience. It has been recognized that the norms of social coexistence cannot in the main be restricted to moral norms. As has been pointed out by specialists of the *"law and communism"* disputes favoured in the Soviet Union as a substitute to the real study of real problems at that time, "social-organizational", as well as "technical-organizational" norms will have to control conduct also in communism with a normative force, binding on all as formally objectified in a written form.[33])

2. RATIONALIZATION OF LAW IN THE HISTORY OF CODIFICATION

A change of perhaps the greatest moment took place in legal development when law became detached from social practice and became a formal objectification. This meant its reduction to being *formally enacted* in a written form. The transition from custom to statute[34] is the dividing line separating legal prehistory from its history proper. Then a "peculiarly legal-formal process" started, which with the expanding role of the state, has brought about the normative form.[35] Law only truly becomes the regulator of life when it has become *objectified* with an autonomous *"ought"* |*Sollen*| structure as a category wedged between social objectives and actual social practice. By drifting away from everyday practice, law gains an independent existence. Thereby it ceases to be the pure reflection of the conditions of social life.

This has been given expression by the fact that the causal relationship between social conduct and its outcome disappears during the process of objectification. Action, normatively judged as an *appropriate means* of achieving the result, *will appear as the objective*, postulated by the norm instead of the socially desired result itself.

Consequently, law is nothing but the congeries of instrumental conducts postulated as objectives. Indeed, something which is not yet reality, is conceived as possessing existence.[37] In order to translate it into reality, a structure as *mediator* has to be extracted from reality, which is at the same time only a transformed reality, since it is not directly immanent to it. The fact, at the same time, that on the basis of a series of teleological projections one transforms some definite conducts (having an instrumental role only in the interrelations of reality) into independent normative ends, betrays that by establishing norm-structures one has already brought about a formally rationalized structure. For the construction of *norm-structures* brings things or relations not patently interrelated into a normative relationship and makes them calculable. By exploring the regularities of reality, a *second reality* is going to be based on it. This second reality will be based on reality as a sytem of references, which by converting social conducts into a series of positive or negative fulfilments of the normative system, provides the possibility for the calculation of the normative consequences of any conduct conforming (or not conforming) to the conduct normatively judged to be desirable.

As far as the different kinds and possible manifestations of formal rationality in the development of law are concerned, we have to begin with Weber's ideal typology.[38] There are two *substantive* types: first, the *irrational-substantive* (which can hardly be discovered in historical forms of law, being mostly closed to the despot's arbitrariness), and, secondly, the *rational-substantive* (which embraces the early practice of the Hindu, Islamic, etc. sacred books; the traditional Chinese, Japanese, African, etc. procedures of conciliation; and the attempts at converting political will directly into law, e.g. administration of justice relying on mere 'revolutionary legality'). At the same time, there can be no doubt that even Weber considered *formal law* to be *law proper*, having a prospect of development. Formal law likewise has two ideal types. First, there is the *irrational-formal* (which means formally circumscribed irrationality as appearing in the administration of

justice by revelation, prophecy, etc.), and, secondly, the *rational-formal* (represented by the French *Code civil* and its practice, patterned on the "school of exegesis").

This is nothing but a logical scheme, covering realities that cannot be equated. What is referred to by the ideal types has no necessary correspondence to reality itself. Therefore it is only good for revealing that, apart from its rational-formal type, law also had *other* potentialities. It says nothing of the true historical dimensions of these potentialities, nor of the fact that among them there was one which, step by step, permeated all others until it became the one to survive.

Indeed, even in the development of Antiquity and the Middle Ages, each step towards the objectification of law, i.e. towards its embodiment in statutory written form and thereby towards the reduction of the *ius* to the *lex*, eventually prepared the way for formally more and more rational structures of law.

We can ponder on the apparent lack of antecedents for the advanced cultures which sprung up in the Near East. Nevertheless it remains a fact that the *first* formally rationalized structures of law were also the *earliest surviving relics* of any written law, i.e. reform codes, which as the result of accelerated economic development, bear testimony to the law-centralizing tendencies of the early empires. These latter embarked on territorial expansion and translated the conscious legal change into reality by enacting written law alongside customary law. In the course of subsequent development, objectification of law with its rationalizing effects took place in a similar context, i.e. they were the achievements of strongly centralized, consolidated, *absolutist regimes*. Naturally, it should be remembered that these were regimes where the need for a uniform administration and judicature had to be defined both politically and economically. These were also regimes where for the performance of governmental tasks an army of civil servants had to be organized which, for its part, became a claimant for, and at the same time the propagator of, such rationalized structures.

At the same time, however, we have to bear in mind that the creation of formally rationalized structures in law was not the

exclusive privilege of absolutist regimes in the development of either Antiquity or the Middle Ages. Where the economic or political need for them emerged, albeit there was no power to advance their establishment, they were brought about as *oeuvres of doctrine*, while their practical enforcement was entrusted to the self-assertion of these economic-political needs. This was the proper role of various private codifications in feudal particularism (inter alia, many unofficial draft-codes, which were subject to royal command but never received its seal, or the analytical and systematizing doctrinal works of lawyers), in other words, of all *quasi-code* products which lacked both statutory form and formal validity. These were products which, just as the 19th century textbooks and other kinds of theoretical codification of the Common Law, in practice, filled the codification vacuum with the available *theoretical objectifications*, most appropriate for operation as quasi-codes.

The significance of codification characteristic of Antiquity and medieval history was twofold. First, it was both the offspring and the begetter of the rise to domination of a *conscious legislation* which claimed creative power and advanced its victory by formal rationalization. Secondly, in itself it represented a qualitative progress. It was characteristic even at the beginning that such codes had organized norm-structures within the framework of some sort of a mutually interrelated *system*. Their system character, perhaps purely contingent, could manifest itself in a set of historically superimposed 'systems' in a casuistic sequence or in a mere quantitative amalgam seemingly void of any 'system'. But they still indicated qualitative progress. Their 'system' character manifested itself in objectively synthetizing the norms which were hitherto atomized by virtue of their being in mutual isolation from each other.

The rationalizing effect of the early codes, also considered by Weber,[39] should not, however, be overrated. They performed codification functions and prepared the path for modern codification, and they explored the element of *formal rationality* in law *as the conditio sine qua non of any conscious, planned, willed and controlled social influencing.* Formal rationality

only gained an independent existence concentrated on calculability in a new type way in the course of bourgeois development.

The category of formal rationality became predominant when history made its core, *calculability*, the virtually indispensable structural element of *economic development*. It can thus be stated that development in the professional rationalization of law is but one of the consequences of "the economic rationalization growing in the soil of the competitive market and the freedom of contract".[40]

In the calculatory forms of economic organization, not only was the rising bourgeoisie interested, but the totality of social movements was instrumental well before the coming to political power of the bourgeoisie, so that the calculatory form of legal organization was not the particular class interest of the bourgeoisie either. First, "bourgeois interests demanded a law ... operating *in a calculable manner*, ... free from irrational administrative arbitrariness and the irrationality of real privileges". Secondly, since "the rise of both the formal equality of rights and the positive formal norms met with the ruler's interests as opposed to feudal privileges", the "alliance of interests between the ruler and the bourgeois strata was the most potent driving force behind formal rationalization of the law". As complementary reasons there was, on the ruler's side, the need for a concerted functioning of the army of civil servants and, on the side of the latter, the demand for the "manaageability" of the law as well as "the technical needs of administration". Thus Weber understood the impersonal system of norms of the bureaucratic *Herrschaft* in a rather generalized way.[41]

Feudal absolutism nevertheless came to naught. This was because, despite the partial assistance absolute rulers extended to bourgeois interests, they remained the principal obstacle to capitalist development and brought to light their historical limitation in every form of rationalization dictated by their *own* interests. Thanks to monarchical benevolence and complacent enlightenment, extreme rationalizations were created which were symbolic of "the cosmos of legal obligations: the universality

of damned duties and obligations", and turned the rationalism of calculability inside out.[42]

That kind of alliance of interests was in fact the vehicle of any preparatory work on codification. *Modern codification* as a new type of formal rationalization of the law was brought about by bourgeois revolution, when the new political establishment permitted the formation of a superstructure reflecting the needs of the economic structure.

As regards the ideological and technical antecedents of modern codification, they also had their roots in the needs of the *bourgeoisie*. Modern codification introduced something qualitatively new into the idea of codification by laying the stress on the reorganization of legal norms within the framework of a coherent and interrelated system instead of their merely quantitative consolidation. So the antecedents of modern codification were provided by the idea of *mathesis universalis*, the axiomatic tendencies of natural law and by the analytical work done by lawyers preparing the reception of Roman law, i.e. by the theoretical anticipation of the idea of system later to be embodied by the codes.

Hence, *calculatory* structures, patterns of thought and ideologies underlying the economic-political struggle of the bourgeoisie assisted in the preparation of modern codes. These forms of thought were themselves defined by the same socio-economic factors which, within the process, invested them with the special function of bringing about formally rationalized structures in law. Consequently, Weber's thesis, according to which "it is (material and ideal) interests and not ideas that directly control human activity. And yet frequently, like pointsmen working the switches, the images of the world, created by ideas, define the course which activities, motivated by the dynamics of interests, will run",[43] is short-circuited. Determinant images of the world, created by ideas, are for their part defined by common roots.

"It is anything but a mere chance," writes Lukács, "that at the very beginning of the development of modern philosophy the ideal of knowledge took the form of universal mathematics: it was an attempt to establish a rational system of relations

which comprehends the totality of the formal possibilities, proportion and relations of a rationalized existence with the aid of which every phenomenon – independently of its real and material distinctiveness – could be subjected to an exact calculus." This explains why *mathematics*, as well as the *axiomatic system idea* within it, has become the methodological pattern of modern thinking. "For the way in which their axioms are related to the partial systems and results deduced from them corresponds exactly to the postulate that the systematic rationalism sets itself, the postulate, namely, that every given aspect of the system should be capable of being deduced from its basic principle, that it should be exactly predictable and calculable."[44]

The theoretical possibility that *law* should be treated as the subject of exact *logical calculation*, and that logical operation with propositions concerning legal rules and relevant conduct should constitute the framework and the stepping stone of all legal reasoning, are both rooted in bourgeois development. Historically, the possibility of any logical view of law came about at a time when *Roman law* had shed its national characteristics and, by virtue of the analytical and systematizing work of jurisprudents, gained an *in itself consistent structure* in order that it might be adapted and applied, as some sort of a European universal law, to the exchange relationships characteristic of bourgeois development.[45] On the other hand, *laws* came to be constructed purely *as mental anticipations*, laws whose background was provided by the methodological and ideological postulates of universal mathematism and natural law. Whole systems of *doctrinal law* were thus built up by an axiomatic deduction which departed from general principles and arrived at particular provisions. According to prevailing doctrine, natural law was more original and universal than positive law, and its rationalist variant tended to support the political struggle of the bourgeoisie, ideologically, by deducing (as the Law of Reason) the social order desirable for the bourgeoisie from a few artificially elaborated basic principles. In order that formally rationalized structures might afford a guaranteed basis for calculation, a formal-technical desire for, and a

whole ideology of, inalienable rights and their equality developed, with a critical edge aimed at feudalism and its privileges. And the extent to which natural law was imbued by the way of thinking characteristic of *universal mathematism* is indicated by the fact that even with the rejection of natural law as an ideology, its methodological conclusion escaped unscathed. "Of the tenets of natural law the only one to survive was the idea of the unbroken continuity |'lückenlosiger Zusammenhang', i.e., properly, 'a connection without gaps' – Cs.V.| of the formal system of law," as stated by Lukács with reference to the prevalence of bourgeois positivism abandoning natural law.[46]

As far as the concrete social background and historical necessity of the formal rationalization of law, and codification as its means, are concerned, even Weber came to the conclusion that "conditions of life, and also bourgeois interests in a 'calculable' law..., might be guaranteed just as well or often even better by a formally empirical law tied to precedents".[47] Here Weber was undoubtedly right. For the *English-American* and the *Continental* bourgeois transformations, even though they took place in different ways and at different times, did not lead to any distinction which might have altered the fundamental bourgeois demand for calculability in economic, etc. organization. And yet the historical continuity characteristic of the development of Common Law must have harboured something within it which prevented it from following the Continental path.

Consequently, it seems as if everything we have said about the economic and social need for calculability, about the ideological forms promoting its establishment, etc. were by itself too little to produce truly rational forms of rationalization.[48]

Weber's reply, however, that the decisive incentive for both reshaping law by logic and systematizing it by codification was "provided by the intrinsic intellectual needs of legal theoreticians and the literary 'erudition' prevailing in the domain of law",[49] can hardly be accepted as satisfactory. For the unique feature of European legal development above all lays in the consequences of feudal particularism, namely the *dismemberment* of law and the *lack of legal unity*, which increasingly hampered the socio-economic advancement of bourgeois civiliza-

tion. This was the *milieu* which made possible and even necessary the *'de-nationalization' of classical Roman law*, i.e. the doctrinal work in consequence of which law became, in a formal sense, a set of norms organized into a logical system and, with respect to its contents, a common European law regulating barter conditions in a manner more appropriate and predictable than anything else before. It was this lack of unity which, in the age of feudal absolutism in Europe, led to experiments in the renovation of law by way of codification and then, as a result of the French Revolution, to the creation of the ideal basic type of formal rationalization of the law.

The same act which had created formally rationalized structures launched these on to the path of an *autonomous* development. In order that formal rationality might be consolidated, there emerged a need for an ideology according to which "law is henceforth to be regarded as a formal calculus, with the aid of which the legal consequences of particular actions ... can be determined as exactly as possible". The need for exact calculation involved a further ideological demand, namely, that "the legal system should confront the individual events of social existence as something permanently established and exactly defined, i.e. as a rigid system".[50]

And here we have before us in a rounded and complete form the classical law of the classical society of formal rationality, which for the very reason of its being a formally rationalized structure, detaches itself from the socio-economic conditions which gave birth to, and are reflected in, it as a *second reality* and lives a *life of its own*. The formal, rigid structure underlying exact calculation strives for *exclusiveness* and *completeness*. Calculability means universal applicability: it can have no limits. It must receive a definite reply to any conceivable relevant question. On the one hand, the structure which has to reflect the needs of a dynamic complex reality clearly cannot be merely formal and rigid, both exclusive and complete. On the other hand, the structure serving as a basis for calculation is *expected* to be regarded as such. And what is factually impossible will nevertheless become normatively possible. Although lawyers are aware of the fact that

law does not dispose of these properties, they act *as if* the structure in question were in reality invested with them. Fiction will be apparent in both the practical application and the background ideology of these structures. As a by-product of their application, a separate reality will appear, which assumes the form of *postulates*. According to Weber, "contemporary legal work at the highest level of methodological-logical rationality, sets out from the following postulates:

(1) Any concrete legal decision can only be the 'application' of some abstract provision of the law to a concrete factual issue.

(2) From the abstract provisions of the law in force, a decision has to be derived for each concrete factual issue with the means of legal logic.

(3) The positive law in force has to be a 'gapless' system of legal provisions, overtly it has to incorporate such a system or, at least for its application, it has to be considered as doing so.

(4) Anything that cannot be 'constructed' legally and rationally cannot be legally relevant. And, generally,

(5) man's social activity has to be conceived of as either the 'application' and 'enforcement' or, alternatively, as a 'violation', of the provisions of the law."[51]

What is of prime interest in this arrangement is that its existence is not merely ideological, like a false reflection. This is *not only postulated as* some kind of *separate, second reality*, but is *even applied as such* with greater and lesser consistency. The transplantation of this postulated reality into actual social practice entails its own becoming a social fact: it becomes truly active, as well as re-active, factor in social processes. In this way, even the social existence of law acquires a peculiar duality which results in a duality in the concept of law itself.

Summing up the main consequences of these developments, I venture the statement that the creation of formally rationalized structures as a means of social transmission and mediation is an indispensable condition of any conscious, planned, willed and controlled exercising of social influence. Such influence

was present in the early phases of the history of mankind, but only acquired a determining and autonomous significance in the course of capitalist development. In their most elementary form, they were a means of controlling social life. Primitive structures of this type emerged in the first relics of written law. Nevertheless, strictly speaking, formal rationalization of the law took place at a time when the legislator had in Europe, as heir to both the mathematical-axiomatic way of thinking and the experience of system-creation in natural law, organized positive law within the framework of a logical system.

It is a conclusion expressing world-wide experience that "legislation is ... the characteristic of mature legal systems, the final stage in the development of law-making expedients".[53] Now *codification* seems to have brought about the technically most developed *legislative law-making expedient*. Codification in its modern sense has reestablished law as a relatively *autonomous* system. It is the objectification of law through a *structured* system which is most in line with the need for calculability: hence it is the realization of formal rationalization of the highest order. This is the recognition which, based on the practical need for rule of law and the citizen's knowledge of the law, has also been implicitly shared by the socialist theorizing about law. Most of its specialists consider codification to be the most appropriate form of law.[54] At the level of comparative history (borrowing Eörsi's challenging expression[55]), we might add: the case of *Common Law v. Codified Law* (1970) is only partially reminiscent of the one of *Common Law v. Codified Law* (1500). Since then many of its social, etc. components have changed, and to all appearances Codified Law seems to have won the day.

Yet none of these statements can be made absolute, or taken for granted from the outset. In point of principle, the appraisal given here relies on the methodological postulate of formal rationality, therefore its social validity is limited. Consequently, its social validity is the function of the postulate of formal rationality, as well as of its *concrete socio-historical appropriateness* to the consequences issuing from it.

3. UTOPIAS OF RATIONALITY IN THE DEVELOPMENT OF THE IDEA OF CODIFICATION

In the development of codification, the *ideal of perfection* has manifested itself in multifarious ways. It we want to enumerate the most typical variants in the interests of a thorough investigation, we have to differentiate between quantitative and qualitative types. The *quantitative* ideal of perfection permeates the concept and/or practical elaboration of codification in two general historical directions. It does so wherever codification is designed to cover a specific field of regulation in a minutely elaborate, complete, and thorough manner. It also does so when codification is pervaded by a belief in, and a wish for, its permanence, by a desire which is expressed in the form of a prohibition: that it cannot be superseded or impaired by development. The *qualitative* ideal of perfection, on the other hand, does not refer to the existence of a complete set of norms but to their reorganization in a novel way in order to produce new effects. In the guise of an ideal of perfection, a form of codification often appears which is capable of covering the whole range of law and which is still just a collection of rules arranged in one book. This book, through its infinite simplicity and its unequivocal nature, laicizes the law, i.e. briefs citizens on ways of settling their own affairs, and on legal ways of judging other people's.

Codification illusions that strive after the ideal of perfection in a variety of ways, are worth probing first of all because they are rooted in, reveal and actually develop, tendencies that are inherent and active in the development of codification. An analysis of them might lead to a better understanding of certain phases in the history of codification, since they represent the latter in its most uncompromising, unrestricted and consistent form.

The *quantitative ideal of perfection* is not only a treacherous mental game but is the basis of actual codification measures and serves as their main leverage. The completeness and permanence of ordering may appear, together or separately, as requirements of an abstract ideal of perfection. As is proved

by a historical investigation, *Justinian*'s dual desire for both completeness and permanence derived from an exaggerated imperial will to take over the unchallenged mastership over, and preservation of, the law, which, apart from personal prestige, was further increased by the fact that it originated from an economically and politically declining Empire. The illusory but normatively and ideologically supported completeness of regulation in the case of the *Allgemeines Landrecht* grew out of a patriarchal despotism which made concessions to local Prussian absolutism. It was reinforced by Frederick's obsession with having a hand in everything. With respect to the *Code civil*, the belief in permanence was the result of a rationalist natural law ideology consolidating bourgeois transformation, combined with the euphoria of the victorious French Revolution and faith in the universality of the new social order. These and other examples of the quantitative ideal of perfection were the most extreme forms of actual codification. The *qualitative ideal of perfection* seems to differ from the above in one conspicuous respect: it never actually materializes, even as an abortive attempt. It remains a mere dream, a mental driving force, serving only to bolster codification expectations and not actual works of codification. Its appearance is but a mental anticipation, its existence utopian. Therefore, historians have not concerned themselves with the latter; it is our task to analyze it now.

During the explication of the subject, one will see that this *Utopia*, like any mental product, is not abstract, autogenous or self-generating. Being a dream of something to be realized, it tends to be associated with actual proposals for codification. Owing to its facility and popularity, universality and idealism, it provides intellectual support for, and popularizes, the codificational movements in question. On the other hand, in the process of realizing the latter, it is defeated when confronted with reality, and so is forced to take on the ideological cover of Utopianism.

Thus the qualitative ideal of perfection forms a homogeneous unit, different from the quantitative ideal. Its manifestations are not self-sufficient, are not objectified and do not

assume an externalized autonomous form of existence; at the same time, they seem to bear substantial common determinants and structural features. This is relative, of course: I refer to the instrumental determination of the framework and structure which, depending on different socio-economic determinants, lays the foundations of mental constructions widely differing in their social nature but still having a great deal in common in other respects. This instrumental-structural feature is mainly related to the problem of the rationalization of law, of which, as an illusion of the fulfilment of rationality, it represents an extremely consistent (*therefore* utopian) type. This explains our attempt to analyse these forms and to elucidate (through utopian rationalizations of the law) the essentials of the processes of rationalization, as well as, due to their intrinsic contradictions, their limited nature.

With respect to all the Utopias of codification that fall within the scope of analysis, the magic number *one* keeps cropping up: namely, the desire for one easily comprehensible and conceivable body of universal law. In other contexts, it was to be expected that, merely by virtue of its distant fame, classical Roman codification should have become the shining example, not only of codification as such, but also of written legislation (proving the very *possibility* of the latter) in the British Isles.[56] It is not unlikely that the survival of this tradition (added to lack of experience in the actual practice of codification and, through this, the transference of the whole problem to the hazy realms of ideas) has nad something to do with the *Anglo-Saxon* way of contemplating codification as an epitomization of the whole system of law within a single code. Codification as such, namely '*The Code*' (with a definite article and with a capital letter C) still *is* to the Anglo-Saxon way of thinking a single piece of legislative work, e.g. a Code summing up the laws in force in Justinian's Empire. This is suggested by the most common definitions of the concept. Thus, writers talk of the "|p|rocess of collecting and arranging the laws of a country or state into a code", or "the collection of all the principles of any system of law into one body after the manner of the Codex Justinianus..."[57] The extent and effect of

the ideal of 'one volume' in thinking about legal codification is clearly demonstrated by the fact that the Resolution of the House of Commons of June 21, 1650, unequivocally decreed of codification "that it be bound up in one volume".[58] Even in France in the middle of the 19th century, half a century after the completion of the classic *Code Napoléon*, there were theoreticians of law who said: "Mais, après tant d'efforts, l'oeuvre de la codification unique, toujours désirée, reste toujours à faire," because "un corps de droit complet, ce recueil toujours demandé et jamais obtenu" was not created, not even by Napoleon.[59]

The 'one volume' epitomization of the law cannot serve as a substantial or sufficient explication of the qualitative perfection-ideal of codification. It can only be a kind of archetype based on numerology or a tradition symbolizing or embodying simplicity in a popular way. In its written form this tradition, ever since the origin of the Twelve Tables described by Livy as *corpus omnis Romani iuris*,[60] has become the constant object of codification concepts and desires in successive ages.

Let us look at Utopias of codification of a more complete form, in three most characteristic aspects: at their genesis, their role in society, and at the lessons they yield within the scope of, and through, their controversial response to rationality.

#1 As regards the first category, the codification Utopianism in Bentham's theory of codification and in the early movements of codification in the United States expressed ardent, subjective faith and expectations.

An obsessed, almost fanatical apostle of the cause of codification, *Bentham* exhorted governments and nations to codify, without himself ever having even tried his hand at the practice of codification or having acquired any kind of experience in it. The services he offered, the messages and appeals he sent out world-wide, were full of enthusiasm and redemptionist faith and, accordingly, were favourably received in many countries, mainly in those which were short of expertise and experience in codification themselves.

Bentham's calls gave rise to echoes, among others in the *United States*, whose only tradition was the anti-codificational English system of precedents, as imported by the English immigrants. The main endeavour in the United States, however, was to institutionalize a law which was to be distinct from British law, full of historically developed technical and material over-refinement. The simplicity they were longing for was supposed to help the puritan sectarian-communal traditions to meet specific economic requirements and to adjust to the conditions of territories gaining independent statehood.

It was partly a sort of naivety combined with keen expectations, and partly utter inexperience in codification which served as a basis for the airy subjectivity of the Utopias. The ideal of codification achieved a perfection of its own through the lack of any preliminaries of codification and also because belief in the creation of something new was interwoven with certain illusory expectations; furthermore, establishing a new alternative in a distinctly anti-codificational ambience moved it to a form of expression verging upon polarized and extreme modes of formulation. We may recall Jeremy Bentham's beautiful prophecy: "'Citizen,' says the legislator, 'what is your condition? Are you a father?' Open the chapter 'Of Fathers.' 'Are you an agriculturist?' Consult the chapter 'Of Agriculturists'."[61] In Montana, where the attempt to create law could be considered as a puritan, civilizing substitute for the rough and ready law of the Sioux Indians, trappers and gold diggers, jurisdiction postulated codification or, more precisely, involved the transplantation of experience gained by more advanced fellow-States through the creation of their own legal set-up (consolidated in codes), and also its social acceptance and domestication.[62] Accordingly, an ideal state of affairs would mean that: "A citizen of Montana who has but little money to spend on books, needs to have lying on his table but three: an English Dictionary, the Book of the Law (codes), and the good old family Bible."[63] Only in the State of California, a year before adopting Field's Code of Civil Procedure, had a State Senate Committee rejected what it termed "the chimeras of ignorance and folly", the very popular view that the law can be

epitomized "within the compass of a common-sized spelling-book – so that every man might become his own lawyer and judge – so that the farmer, the artisan, the merchant, with this '*vade mecum*' in his pocket, at the plough, in the workshop, or in the counting-house, might be enabled at a moment's warning, to open its leaves and point directly to the very page, section and line, which would elucidate the darkest case, solve the most abstruse legal problem, clearly define his rights, and prescribe the remedy for his wrongs".[64]

#2 In *France*, it was the ascendancy of the Revolution, the succession of events from the revolutionary victory to the Jacobin dictatorship that gave rise to utopian ideas. This is the period which comparative revolutionary theoreticians term the 'honeymoon of revolutions'.[65] The latter phrase describes the euphoric state after victory has been achieved and power has been acquired, when everything seems to be easy and radical ideas about *starting all anew* and illusions about *everything being possible* render these periods so extreme that it is as if – to use Marx's striking metaphor – "men and things seem set in sparkling brilliants; ecstasy is the everyday spirit".[66] This radical and illusion-ridden character was partly the inevitable concomitant of revolutionary ascendancy and partly a mere potentiality, concretized by socio-political and ideological tendencies which, in point of fact, were already asserting themselves.

In their concrete nature, these tendencies were extremely complex. They shared exuberance and boundless *rationalism* and a conviction in their immediate and unlimited *realizability*. "Our aim is to ... realize the promises of philosophy,"[67] said Robespierre, and he meant it literally in the immediate sense of his words. The Realm of Reason that they thought they were realizing was not only intended to rid society of its inherent laws, but at the same time to transform human nature. "France standing on the top of golden hours / And human nature seeming born again," wrote Wordsworth, a contemporary, voicing the victory of idealism in the euphoria of the honeymoon. In conclusion, one can say with Hegel that "the world stood upon its head ... in the sense that the human head, and the principles ar-

rived at by its thought, claimed to be the basis of all human action and association".[68] But, says Hegel, "Never since the sun had stood in the firmament and the planets revolved around him had it been perceived that man's existence centres in his head, *i.e.* in thought, inspired by which he builds up the world of reality."[69]

The components of the French utopian revolutionary concept of codification must be sought in many directions. First and foremost, it represented a passionate *rejection* of the legal arrangements of the Ancien Régime. As frequently happens, the revolutionaries identified the technicalities of the law with oppression itself and, accordingly, in their innovative revolutionary zeal, they set out to eradicate these technicalities. By first, taking as their slogan "La jurisprudence des tribunaux n'est autre chose que la loi," they advocated an overall limitation of the application of law and, then, insisted on the elimination of a separate, professional judiciary administration of justice. Going back to absolutist precedents, they passed a law concerning the *référé législatif*, which, in case of a need for interpretation of valid law, was to refer the judges to the legislative body.

At the same time, there arose an extreme demand for complete *laicization* of the law. This was to be founded on the construction of extremely simple codes translating the Law of Reason into the language of law, which, through their utter *simplicity*, would lead to a lay administration of the law devoid of the agency of career judges or advocats. On April 8, 1790, Sièyes was to demand codes accessible to natural intelligence and also that ordinary juries could make judicial decisions in questions of law.[70] This is expressed in his draft, in the demand for utmost simplicity (*"la plus parfaite simplicité"*, section 32) and, as far as procedure is concerned, in the need for all citizens to be men of law (*"tous les citoyens* to be *connus aujourd'hui sous le nom de gens do loi"*, section 86). However, Utopianism had to strive for consummation. On June 17, 1790, Chabot announced that the lawyer's day was done, as was that of despots and aristocrats. In his contribution he went so far as to demand the proscription of judicial administration of

justice: "Décrétez qu'à un jour où les travaux du peuple sont suspendus, toutes les affaires seront discutées et jugées par des arbitres dans une assemblée générale des citoyens." The basis of a lay administration of justice could only be lay law. This is a law comprehensible to all, and it is the natural consequence of harking back to the laws of nature in the Realm of Reason. "Les lois d'un grand peuple ne peuvent pas être simples, a dit Robespierre. Moi je prétends que le chef-d'oeuvre de la nature est cette unité, cette simplicité dans les mouvements. Je prétends qu'elle a de même consacré le principe du l'unité des lois, pour toutes les nations, dans cette maxime simple: Ne fais pas à autrui ce que tu ne voudrais pas qu'on te fît à toi-même. Certes, si l'opinion de Robespierre était fondée, il faudrait renoncer au système républicain."[71]

The fact that Utopianism in codification is based on the postulates of pure reason is shown not only by the unprecedented simplicity of codification endeavours, but also by their boundless *universality*. Chabot's contribution made it clear that simplicity and unity alike are given in nature. The Rule of an Empire built upon the Laws of Reason is not to be restricted to a given time or place: it is its very universality which proves that it is based on nature. When speaking about the realization of the promises of philosophy, Robespierre did not suggest that it was to have been an exclusive objective. He also said, "Our aim is that ... France ... become the paragon of all nations."It was in Cambacérès' draft code, tabled on August 9, 1793, that the claim for universality was first extended to law: "Voyez le Code de Lois civiles que la Convention prépare pour la grande famille de la Nation comme le fruit de la liberté. La Nation le recevra comme le garant de son bonheur; elle l'offrira un jour à tous les peuples."[72]

When revolutionary illusions are confronted with reality and utopian ideas are stripped of excesses, that is, when the real harvest of the revolution is reaped during its *consolidation*, men once more have to acknowledge, with a sense of resignation and moderation, the complexity of law, and not only the necessity for professional judicial administration of justice but also its creative contribution, which cannot be elim-

inated by any legislation. Last but not least, they once again have to recognize the national, tradition-bound and deeply rooted nature of the technicalities of legal codes.[73] This is a time when the violent spirit of revolution must be restrained, but also a time for the practical, day-to-day utilization (with a view to stabilization) of the benefits brought by its momentum. In this period of partial political setback, Portalis, the architect of the Napoleonic *Code civil*, who thought maturely in terms of solid compromise, of subsuming naive revolutionary zest, was to transcend the ancient popular desire that the code be simple, lay and universal, as follows: "Nous avons trop aimé, dans nos temps modernes, les changements et les réformes; si en matière d'institutions et de lois, les siècles d'ignorance sont le théâtre des abus, les siècles de philosophie et de lumières ne sont trop souvent que le théâtre des excès."[74]

#3 Let us finally remark that the *socialist revolution* was not exempt, either, from producing illusions of codification in its buoyant pre-consolidation period. Above we alluded to the evident duality of actual legal practice and the illusions which evolved collaterally. We should make it clear right away that the ideological and practical preliminaries to the codes-to-be of the proletarian revolutions were being shaped from the very outset; this, however, did not preclude elaboration of the shape of a utopian future, which was then deemed an immediately feasible option.

Now we must consider a peculiar ideological aspect of the honeymoon, an imaginary rush forward. The guise of codification illusion is again the *rejection* of the old technicalities of law. A *simplification* again appears which involves the complexity of the institutional structure of law being seen as the contrivance of class oppression, and yet this complexity is thought to be related to the anarchy of the superseded social order.

It should be noted, however, that the negation of the formal technicalities of law, the rejection of the judicial advocate-assisted application of the law does not simply follow, as in the French example, from the Utopianism of the new society. As a crucial element of the problem, one has to discover that,

in this case, codification Utopianism recanted its very *antecedent in codification:* it turned around and, basing itself on the old code, marked off for itself its practice and subsistence. The most typical (and the most considerable, through the effect it exercised) specimen of old reality was the German *Bürgerliches Gesetzbuch* with all its complex technical apparatus, and the deceitful, pedantic, '*Generalklauseln*'-mongering jurisprudence which became more and more autonomous and self-generating. The latter developed in this manner so that the code in question could adapt itself to the ever-changing conditions of monopoly capitalism.

The codification Utopianism that took shape in the socialist transformation denied the present any past. While the driving force of the French Revolution was the urge to smash feudal privileges and inequality and to create the unlimited Rule of Reason, the specific driving force of the proletarian revolution was the wish to eliminate the "anarchy" of the old social order and mode of production and the high hopes that, by eliminating "class oppression", law would be reduced forthwith to mere semi-law. The more law was to lose its independent forms and technicalities, the more directly popular its formulation as a code and its practical enforcement became. Hardly a week after the proclamation of the *Hungarian Soviet Republic*, the legal profession stated: "The lawyer's work was the characteristic outcome of the oppressors' class rule and of the anarchist mode of production of capitalism, and together with this system, this profession shall fall, too."[75] In mid-June 1919, when both intervention by the successor states and internal conflicts were threatening the very existence of the Hungarian Soviet Republic, when, in a surprisingly expeditious move, they set out to codify and even had some drafts ready, this very same small and, otherwise, insignificant body of revolutionary lawyers outlined a codification idea with oversimplified interconnections. They set out to explain that it had been "the anarchic mode of production" in capitalist society which had brought about "complicated legal relations" and that these had led to an "intricate" legal system. In contrast to this, "the mode of production of the communist society will be planned,

simple and unsophisticated and, accordingly, it will have a crystal-clear legal system. Extensive, Talmud-like codices will no longer be needed, only clear-cut principles which are so worded that everyone can understand them. The detailed consequences can easily be deduced by anyone looking for guidance in his conduct or when judging the affairs of other proletarians. Thus a general obligation to know the law will become a reality, and neither the caste of lawyers nor that of professional judges will be necessary any more."[76]

Similar views in *Soviet Russia* were propagated mainly by leftist Communists who were urging more and more radical transformations and who, while following Lenin's strategy, increasingly opposed his tactics. One of the most popular and widely-circulated propaganda leaflets of the twenties read as follows: "The laws of the proletarian State have as yet merely been outlined, and will never be committed to paper in their entirety. The workers do not intend to perpetuate their dominion, and they therefore have no need of endless tomes of written laws. When they have expressed their will in one of the fundamental decrees, they can leave the interpretation and application of these decrees, as far as practical details are concerned, to the popular courts in which the judges are elected by the workers."[77]

Some years later, mainly as a result of Soviet Russia's initiation of its New Economic Policy, the groundlessness of these views was revealed. Through their dysfunctionality they were soon to endanger the very achievements of the revolution. It then became a condition of survival, i.e. of consolidation and further advancement (urged, incidentally, by Lenin) that anything reminding of the rule of law (i.e. 'socialist legality') be guaranteed and socialist law, in an *appropriate form* with an *appropriate technical apparatus*, be worked out as a new system. Opposition to, indeed the total rejection of, the radical views mentioned above, became imperative and more and more general. It is no accident that Vyshinskii, who institutionalized the new law and also adapted it to the theoretical needs of Stalin's rule, saw red when quoting early Soviet theoreticians in his devastating works: "Acts of legislation and admin-

istration, in becoming operative tasks, retain in their composition only a very small percentage of legal, that is formal elements."[78] "There are red Speranskys among us who enact laws. When will red Voltaires appear to burn them up?"[79]

Consequently, when we are looking for generic distinguishing features and for the lessons to be drawn from Utopias of codification, it seems expedient to reexamine these Utopias in the light of philosophical and sociological theories of the phenomenon.

Landauer's view seems to point to something very important in the dialectics of historical development and in the relation between ideology and reality. He takes the view that, whenever the social *status quo* is shaken, revolutionary Utopias always appear. The revolution, for its part, inevitably develops new Utopias, which result in instabilities, and new Utopias again, generating an endless cycle.[80] This explanation cannot, however, include codificational Utopias, their essence being that they are never realized and that they are not dependent on their immediate socio-ideological sources. – From a historical overview, Utopias of codification, as such, have a lot in common. *Mannheim*'s famous definition states that, among ideological processes of thought receiving their impetus from concepts that are non-existent, those which serve the purpose of glossing over, or stabilizing, existing social reality are *ideological*, in the narrow sense of the word, and those which inspire reformist collective activity are *utopian*.[81] Such transcendent reality is undoubtedly indicative of the social functions of Utopias of codification, but it is not conducive to knowing more about their specific features. – If we consider *opposing the established order* (i.e. the circumstance that utopian intentions do not clearly materialize as a positive definition of what they really wish, but rather become concrete by negating what they reject),[82] there is an evident coherence between affirmation and negation. It is through this very coherence that the various Utopias of codification demonstrate common characteristics, not only with the socio-legal environment from which

they arise but also with one another. General theories of Utopia, however, do not throw light upon the essence or nature of this coherence. – The words of the wool-gathering *Lamartine*, "Les utopies ne sont souvent que des vérités prématurées", are as poetic as they are vague, allowing for the partial truth they represent. Thus the explanation has to be found in the specific codification elements of the Utopias in question, in the internal trends operating within codification.

The solution seems to lie in the element of formal rationality as the *abstract motive force* behind codification. Whatever substantial rationality is under consideration, rendering it practical, implementing it and endowing it with life, all this necessitates a historically defined degree of formal rationality. The efficiency of social organization calls for the moulding of formally rationalized structures, which mentally anticipate, in a formally rationalized manner, the socially organized content. Codification, and especially its qualitative conception which organizes law into a coherent system of rules, is only an attempt to implement structures of formal rationality in a legal objectification.

The idealist character of Utopias of codification manifests itself through the tendencies and particularities inherent in the formal requirement of rationality itself. These may appear in an entirely *pure* form as a result, for instance, of a lack of experience in the practice of codification (English and American examples), or rationalist illusions generated by the revolutionary honeymoon (French example), or the opposition of revolutionary illusions to the over-sophisticated and complex crisis-producing nature of the preceding codification (the example of socialist revolutionary transformation). They may remove all obstacles that have hampered the final consummation of formal rationality. This purity and boundlessness, this uncompromising assertion of its own self leads to Utopianism by virtue of its utter conclusiveness.

In theory, the *extreme consistency* of formal rationality may be twofold. On the one hand, it may take an endless path of *foreseeing and regulating everything*, which is bound to swing over to its opposite at a given point, thus annihilating itself

as a formal rationality. This path, as we have already seen, may tempt only absolutist political endeavours; and its extreme nature is punished by it being doomed to failure. On the other hand, the ideologies we have examined are invariably expressive of utopian social and historical conditions which correspond to an intention to transform the particular into the universal, to eliminate social institutions and processes as discrete, externalized systems of objectification and to hand them over directly to the people, in order to render them truly popular. This uncompromisingly pure, indeed extremely impractical desire to *eliminate discreteness* can divert the impartially exclusive consistency of formal rationality into another direction. "For the more Ease, and clearer understanding, of the People," as the House of Commons Resolution of 1650 declared, they have in mind a code which, freed from hitherto existing obstacles of formal rationality, enables rationality to evolve in a crystal-clear and simple way. This rationality tries to liberate itself from former lack of organization (English and American examples), the entanglements of feudal privileges (French example), or the superstructural consequences of the anarchic mode of production of an earlier society (the example of socialist revolutionary transformation); however, its inevitable result is the negation of the very nature of justice, of the discrete objectifying and institutional character of law. This also expresses itself in its opposition to the legal profession, made plain in the demand for law for and by the people, and in its aversion to the technicalities of law.

The concepts dealt with are utopian, for they do not take into consideration the *optimum* requirements of formal rationality. They do not seem to acknowledge that formal rationality only becomes functional in *moderation*, that not only insufficiency, but also excess may hamper the practical efficiency and implementation of any given regulation. To put it in another way, Utopias we have considered conceived of rationality in an abstract manner, as being functional always and under all circumstances. They did not recognize that formal rationality is only the mode of organization of given contents under given circumstances: it is *formality per se*, and it can only play an

ancillary role in the complex texture of social and legal determinations. The utopian illusion of formal rationality always starts with the false image of its self-sufficiency and omnipotence. That is why it is possible, in its own context, to reduce or eliminate the formalities, technicalities, the objectivational and institutional nature, of law and, as its most conspicuous and most alienating consequence, its separate professional judicial application, assisted by advocates. Formal rationalization presents itself as a *self-asserting panacea* to Utopianism, heeding only the inner potentialities and impulses of formal rationality.

When judging the ways and options for transforming law, Utopianism appears extremely *subjective and doctrinaire*. This is the point conservative critics of the revolution latch onto when they describe the ideals of the French Revolution, for example, as "the revolution of doctrine and theoretic dogma", or as "ideocracy".[83] The limitation and functionalization of the Utopianism of a given society will be brought about by later developments, when ideals, worded as issues of daily practice, are confronted with actual potentialities, possibilities and stumbling-blocks. It is here that they get rid of their utopian handicap and, by compromising with practice, are elevated to the status of actual social facts, capable of influencing real practice.

Finally, we can state that illusions about codification are false and distorted reflections. But they *are* reflections of *something*: the vehicles of existing tendencies and characteristics. They do not mock reality as do illusions whose motifs are borrowed from reality; their organization and structure, however, have nothing to do with reality. Codification illusions are utopian, that is, their relationship to reality is *false and distorted*, *because* they prove to be *extremely conclusive* in assessing existing tendencies. Their Utopianism lies in their reflection of the instrumental possibilities inherent in formal rationalization as accomplished facts, and in their transcendence of historical reality by pushing to extremes the roles they should play. They are not formations that unconsciously claim an existence of their own, such as those of which

Marx wrote: "It will ... become evident that the world has long dreamed of possessing something of which it has only to be conscious in order to possess it in reality."[84] In both cases, it is a question of non-real things. Marx here is speaking about motifs unconsciously modelling and anticipating reality, while the Utopias of codification we have been discussing seem to suggest that, although based on certain elements of reality, they still negate reality as a whole, and that their *ideological* element, in the orthodox Marxian sense, will prevail. Adorno, too, may have been thinking about the transparency of the dialectical transformations between real and non-real, and of their power to grasp reality, when he argued that: "Contemplation on utopia should not be such that we form judgement on some existing or non-existing concept. We should think of utopias by taking into account the impossibility of making them explicit; however, we should also emphasize the necessity of thinking about them."[85]

NOTES

1 J.P. Mayer *Max Weber and German Politics* A Study in Political Sociology (London: Faber and Faber 1944) pp. 43f.

2 Weber *Capitalism* |Weber *Aufsätze* p. 1| p. 13.

3 Cf. Lukács *Zerstörung*, ch. VI, section 4.

4 Löwith, pp. 77-79.

5 K. Kulcsár: *A szociológiai gondolkodás fejlődése* |Development of Sociological Thinking| (Budapest: Akadémiai Kiadó 1965) p. 383.

6 J. Friedrich 'Some Observations on Weber's Analysis in Bureaucracy' in *Reader in Bureaucracy* ed. R.K. Merton, A.P. Gray, B. Hockey and H.C. Selvin (New York: The Free Press 1952) p. 31.

7 Weber *Capitalism* |Weber *Aufsätze* p. 62| pp. 77-78.

8 Weber *Theory*, p. 170.

9 Weber *Theory*, p. 309.

10 Weber *Theory*, p. 302.

11 "Formally every formal law is at least relatively rational. Law is 'formal' in so far as externally unequivocal general signs of facts at issue are observed in substantive, as well as procedural, laws." Weber *RS*, p. 102.

12 Weber *RS*, p. 247.

13 J. Dickmann *Max Webers Begriff des "modernen okzidentalen Rationalismus"* (Düsseldorf 1961).

14 Mannheim, p. 53

15 Weber *Theory*, p. 309.

16 Mannheim, pp. 58f.

17 The question may be raised whether this is what is meant by the irrational-formal type in Weber's ideal typology of law as explained by Freund, p. 223, this type being characterized by formalized irrationality, such as an administration of justice relying on pure revelation or prophecies.

18 Lukács *HCC*, p. 98.

19 M. Weber 'Science as vocation' in his *Essays*, p. 139.

20 Lukács *HCC*, pp. 88 and 98f.

21 In this connection, he writes: "The broad masses of those guided acquire merely the external, technical and, in view of their interests, practicable issues to adapt themselves to them (in the same way as we 'learn' the elements of arithmetic, or so many lawyers the technicalities of the law), whereas the 'idea' contents originally issued remains irrelevant to them. This is what the thesis wants to emphasize: rationalization and rational 'order' revolutionize 'from the outside', whereas charisma, the other way round, from the inside." M. Weber *Wirtschaft und Gesellschaft* II, ed. J. Winckelmann (Cologne and Berlin: Kiepenhauser und Witsch 1964) p. 837.

22 Weber *Essays*, p. 229.

23 Löwith, p. 88.

24 Lukács *HCC*, p. 101.

25 Lukács *HCC*, p. 128.

26 E.g. Weber *RS*, p. 249.

27 H. Lange *Liberalismus, Nationalsozialismus und bürgerliches Recht* (Tübingen 1933) p. 5. It should be noted that although Lange's standpoint has hardly ever been denied, it must have been considered an exaggeration usual with neo-

phytes. Officially, National Socialist constitutional law formulated the same thesis regarding the question about how to offer a resolution to the conflicts between statute and law. "In the 'völkisch' ... constitutional state ... the exercise of rights has to result from fixed norms within the boundaries of the national living order, and legal regulation for the individual 'Volksgenosse' will become calculable therefrom." However, any guarantee inherent in formal standardization will be dissolved by the fact that "in a National Socialist constitutional state, the idea of law rather than any form of law will be decisive. Law comes first, and then the statute". O. Koellreutter *Deutsches Verfassungsrecht* 2nd ed. (Berlin: Junker und Dünnhaupt 1935) pp. 14 and 15.

28 Mannheim, pp. 180, 181.

29 Cf. H. Lévy-Bruhl 'Réflexions sur le formalisme social' *Cahiers internationaux de Sociologie* XV (1953), pp. 53ff.

30 Lukács *Ontology*, p. 208.

31 M. Makai *Az erkölcsi tudat dialektikája* |The Dialectics of Moral Consciousness| (Budapest: Kossuth 1966) pp. 136 and 153. Also cf. Cs. Varga 'The Preamble: A Question of Jurisprudence' *AJurid.* XIII (1971) 1-2, pp. 108ff.

32 E.g. S.I. Viln'ianskii 'Pravovye normy i inye sotsialnye normy v periode razvernutogo stroitel'stva kommunizma' |Legal Norms and Other Social Norms in the Period of the Developing Building of Communism| in *Sovetskoe gossudarstvo i pravo v periode razvernutogo stroitel'stva kommunizma* |Soviet State and Law in the Period of the Developing Building of Communism| (Kharkov 1962) p. 16; S.S. Alekseev 'O perarstanii sovetskogo prava va sisteme norm kommunistitsheskogo obshtshezhitiia' |On the Transition of Soviet Law into a System of Norms of the Period of Communist Coexistence| *SGP* 1962/5, p. 21; A.V. Mitskevitsh 'Nekotorye tsherty vizaimodeistviia prava i nravstvennost'i v period perekhoda k kommunizmu' |Some Traits of the Correlations of Law and Morals in the Period of Transition to Communism| *Pravovedenie* 1962/3, pp. 21ff.

33 E.g. O.E. Leist 'Normy prava i pravila kommunistitsheskogo obshtshezhitiia' |Legal Norms and the Rules of Communist Coexistence| in *Razvitie marksistko-leniniskoi teorii gossudarstva i prava XXII s'"ezdom KPSS* |Development of the Marxist-Leninist Theory of State and Law by the 22nd Congress of the Communist Party of the Soviet Union| ed. N.G. Aleksandrov and S.N. Bratus (Moscow: Gossizdat. Juriditsheskoi Literatury 1963) p. 136; O.A. Krasavtshikov 'Juriditsheskaia nauka i kommunizm' |Jurisprudence and Communism| in *Pravo i kommunizm* |Law and Communism| ed. D.A. Kerimov (Moscow: Juriditsheskaia Literatura 1965) pp. 178-179.

34 "At a given, very early stage of social development there arises the need to subject the daily recurring acts of production, distribution and exchange to a common rule in order that the individual submits himself to the common production and exchange conditions. This rule, at first custom, soon develops into a *law*." F. Engels 'Zur Wohnungsfrage' in K. Marx and F. Engels *Ausgewählte Schriften* I (Moscow: Verlag für fremdsprachige Literatur 1951) p. 592.

35 I. Szabó *Les fondements de la théorie due droit* (Budapest: Akadémiai Kiadó 1973) p. 109.

36 V. Peschka *Grundprobleme der modernen Rechtsphilosophie* (Budapest: Akadémiai Kiadó 1974) pp. 46ff.

37 G.W.F. Hegel *Die Phänomenologie des Geistes* (Leipzig 1949) p. 426.

38 The ideal types of law are enumerated here on the basis of Freund's interpretation (p. 223). Naturally, another typology might equally be gleaned from Weber's work. See, e.g., J. Grosclaude *La sociologie du droit de Max Weber* Introduction et traduction (Strasbourg 1973) pp. 57-98. This, however, seems to be less convincing. It does not even satisfy certain requirements of logic.

39 E.g. Weber *RS*, p. 253.

40 Weber *RS*, p. 100

41 Weber *RS*, pp. 249 and 250.

42 Here Weber (*RS*, p. 259) offers a description of the *Allgemeines Landrecht*.

43 Weber *Aufsätze*, p. 252.

44 Lukács *HCC*, pp. 129 and 117.

45 Weber *RS*, pp. 101 and 256-257.

46 Lukács *HCC*, p. 108.

47 Weber *RS*, pp. 257f.

48 It should be noted that this need has also been met in Common Law, however, by paths defined by traditions and therefore circuitous, more expensive and less efficient. At the same time, this solution of the calculability of results has been achieved by irrational structures and methods.

49 Weber *RS*, p. 258

50 Lukács *HCC*, pp. 108 and 97.

51 Weber *RS*, p. 103.

52 For more details, see Cs. Varga 'Quelques questions méthodologiques de la formation des concepts en sciences juridiques' in *Archives de Philosophie due Droit* XVIII (Paris: Sirey 1973) pp. 215-241, in particular at 224ff, and Cs. Varga 'The Relative Autonomy of Formal Rational Structures in Law: An Essay in the Marxist Theory of Law' *Eastern Africa Law Review* 8 (1976) 3. As to the re-formulation of the whole problem on the basis of Lukács' posthumous work, *Zur Ontologie des gesellschaftlichen Seins*, referred to in note 30, see Cs. Varga *Formal Rationality of Law in the Light of Lukács' Ontology* (presented at the international seminar on "Rationalitet och rationalisering i lagstiftning och rättstillämpning") |mimeo.| (Lund: Lund University Department of Sociology 1977), reprinted as 'The Concept of Law in Lukács' Ontology' *Rechtstheorie* 10 (1979) 2; furthermore Cs. Varga 'La question de la rationalité formelle en droit: Essai d'interprétation de l'*Ontologie de l'être social* de Lukács' in *Archives de Philosophie du Droit* 23 (Paris: Sirey 1978), as well as Cs. Varga 'Geltung des Rechts — Wirksamkeit des Rechts' in *Die gesellschaftliche Wirksamkeit des sozialistischen Rechts* ed. K.A. Mollnau (Berlin: Institut für Theorie des Staates und des Rechts der Akademie der Wissenschaften der DDR 1978) pp. 138-145.

53 Allen, p. 410.

54 See, above all, Szabó 'Codification', pp. 18ff.

55 Eörsi, pp. 542ff.

56 It was around 731 that Bede wrote about '*exempla Romanorum*' in connection with the *Laws of Aethelberht*, even though there were no substantial aspects in common and Roman codification was not directly known to Bede. Cf. ch. III, section 1, note 13.

57 Black, p. 324 and *Dictionary*, p. 400.

58 *Journals of the House of Commons* (1650), p. 427, quoted from Vanderlinden, p. 358.

59 Malapert, p. 13.

60 Livy III, 34.

61 J. Bentham as quoted in Seagle, p. 277.

62 Massachusetts House of Representatives |1836|, *Report* No. 17.

63 H.M. Field *The life of David Dudley Field* (New York: Scribner 1898) p. 92, quoted in Lang, p. 161.

64 *Report on Civil and Common Law*, February 27, 1850, in Appendix, 1 Cal. 588-604, 591 (1850), quoted in D. Melinkoff *The Language of the Law* (Boston and Toronto: Little, Brown and Co. 1963) p. 263.

65 C. Brinton *The Anatomy of Revolution* (New York: Norton 1938) p. 111.

66 Marx, p. 401.

67 'Sur les principes de morale politique qui doivent guider la Convention nationale dans l'administration intérieur de la République' |février 5, 1794| in M. de Robespierre *Textes choisis* III (Paris 1958) p. 113.

68 Engels 'Socialism', pp. 115f.

69 G.W.F. Hegel *The Philosophy of History* |Vorlesungen über die Philosophie der Weltgeschichte {1840} IV {Berlin 1970-76} p. 926| trans. J. Sibree (New York: Dover 1956) p. 447.

70 Séance du 8 avril 1790, réimpression de l'ancien *Moniteur* IV, 74, *quoted in Esmein 'L'originalité', p. 6.*

71 Séance du 17 juin 1793, réimpression de l'ancien *Moniteur* XVI, 677, quoted in Esmein 'L'originalité', p. 7. It is worth noting that, although utopian in other respects, Robespierre's views on codification were realistic. He replied to Chabot in this way: "Nous faisons des lois pour un peuple dont les moeurs sont loin de cette simplicité qui rapproche l'homme de la nature; son Code civil ne peut être que très compliqué." *Ibid.*, quoted in Esmein 'L'originalité', p. 8.

72 Fenet, I, p. 11.

73 It is to be remarked that the dream of a world-wide unitary codification of natural law (i.e. a Universal European Code) was to re-emerge with Napoleon. Cf. Las Cases, III, p. 298; IV, pp. 153 and 297. However, this idea of universality, far from being a world-improving Utopianism, was to cover up a simple ambition to dominate the world. Cf. Limpens, pp. 93ff.

74 Fenet, I, p. 482.

75 A. Östreicher 'A jogvédelemről' |On Legal Aid| *Proletárjog* 1/1919, March 29, p. 8.

76 I. Földes 'Laikus bíráskodás és anyagi jogszabályok' |Lay Jurisdiction and Material Rules of Law| *Proletárjog* 7/1919, June 14, p. 50.

77 Bukharin and Preobrazhensky, pp. 273f.

78 E.B. Pashukanis as quoted from an unidentified writing of his by A.Ja. Vyshinskii 'Voprossy prava i gossudarstva v Markse' |Questions of the Law and State at Marx| in Vyshinskii, p. 27.

79 P.I. Stuchka as quoted from an unidentified writing of his by A.Ja. Vyshinskii 'O nekotorykh voprosakh teorii gossudarstva i prava' |On Some Questions Concerning The Theory of State and Law| in Vyshinskii, p. 404.

80 G. Landauer *Die Revolution* (Frankfurt am Main: Rütten und Loening 1919) pp. 16ff.

81 K. Mannheim *Ideology and Utopia* |Ideologie und Utopie, 1929| (London: Routledge 1954) pp. 173ff, also his article 'Utopia' in *Encyclopaedia of the Social Sciences* XV ed. E.R.A. Seligman et al. (New York: Macmillan 1959) p. 201.

82 *Utopie* Begriff und Phänomen des Utopischen, ed. A. Neusüss (Neuwied: Luchterhand 1968).

83 E. Burke *Reflections on the French Revolution* and Other Essays (London: Everyman's Library 1955) p. 288 and H. Leo *Studien und Skizzen zu einer Naturlehre des Staates* (Halle: Anton 1833).

84 K. Marx's letter to A. Ruge, September 1843 |from the *Deutsch-Französische Jahrbücher*, 1844| in *MECW* III, p. 144.

85 T.W. Adorno *Negative Dialektik* (Frankfurt am Main: Suhrkamp 1966) pp. 209f.

XI. TYPES OF CODIFICATION IN CODIFICATION DEVELOPMENT

1. FUNCTIONAL TYPES OF CODIFICATION

At the debate about Hungarian legislation which was held in 1954 and had the authority to outline the avenues of future development, codification was accepted as the only possibility for socialist law. In the intellectual climate of Soviet-exported Stalinism, an attempt was also made to secure the unequivocal support of Marxist theory for the decision. "Like any phenomenon, legal provision also has two sides," it was declared, "content and form. The form of a legal provision corresponds to the content, it depends on it and expresses it. And since ... the law itself is also form, relating to economic development and order of society, which depends on the (economic) basis as content ..., we can draw the consequence that ultimately the basis, the economic order of society, determines not only the content, but also the form of any legal provision."[1] This is a strikingly simplifying interpretation of any relation between 'economic basis' and 'legal form'. As was emphasized in the course of the debate, "whether the law is written or it is unwritten customary law, is not *per se* the question of development governed by changes in the economic basis. Written and unwritten law is encountered randomly in the most varied phases of social development... This question cannot be handled separately from the whole complex of law as a superstructure. The written or unwritten nature, the external appearance of the law ... cannot be regarded as the form of the law... It is evident that either of the two may be equally able to serve the most

varied economic bases... The written or unwritten character of the law in itself is an indifferent motive from the aspect of the superstructure; it can only present itself with a superstructural character in the indivisible unity of the whole phenomenon of law."[2] This answer, by the way, on behalf of a practitioner to a professor of law, has also meant that no line of determination can be direct. Our analysis also concluded with the lesson that it was only the *concrete totality of socio-economic definitions* that could drive legal development towards objectification in code form: totality, among whose components the needs of the economic basis may be decisive as it happens but not in themselves; they can only play a role in conjunction with other factors.

And yet this *indirectness* is also manifest in reverse, from the side of codification, in that *one and the same means* of codification may be more or less adequate expression of *different* needs of *various* socio-economic formations. This *multi-functionality* indicates the inner neutrality of instrumental phenomena. It indicates that they are vehicles of various (often contradictory) potentialities, which become actualized only when they are used for concrete goals in given contexts, that is in interaction with other factors.

Thus, the emphasis on indirectness indicates the multi-factor nature of the determinant chain on the one hand, and on the other, the *instrumental openness* of codification phenomenon. But a connection demonstrably exists between the socio-economic challenge and the codification response (or, vice versa, between the codification challenge and the socio-economic response) in all instances, and therefore the socio-historical analysis of the conditions leading to codification as well as of the functions that may be fulfilled by it remains fruitful, indeed, theoretically indispensable.

The motive forces behind codification phenomenon and the diversity of the technical solutions embodied in it and of the roles it fulfils, as well as the historically established typical features of their interrelations, all these attracted attention as a possible foundation for investigation a long time ago. As a matter of fact, the *classification of codification*

phenomena into functional types can contribute to the exploration of its essential features. At the same time, it also indicates the views of the classifier, since he necessarily betrays his own ideas in the process.

Most attempts to classify codification pehnomena accept the extent and quality of the changes codifications have brought about as a principle of division. - An approach regards codification principally as the work of preserving the law through its systematic arrangement and holds the view that codification can be

(a) *gradual*, consolidating various isolated areas (such as British-Indian or British part codifications);

(b) *historical*, aiming at mere standardization on the basis of existing law (such as the Justinian, French and German codifications, or those attempted in the state of New York); and

(c) *philosophical*, having in view the creation of radically new systems (such as the utopian illusions which emerged during the French Revolution).[3] This division not only misunderstands the fundamental trend of codification development, but also interprets the examples quoted one-sidedly. – The following proposition is much better: the division should be based, with particular respect to England, on

(a) *Anglo-Saxon* types of codification, associated with Sir Thomas Erskine Holland and Sir James Stephen, which reshaped old laws in a systematic form in a manner quantitative-pragmatic;

(b) *Continental* type which, like French and German codifications, established merely the conceptual bases of law and judicial practice; and

(c) *natural law* types that endeavoured to regulate everything and were associated primarily with the name of Bentham.[4] As it may be seen here too, the thinking characteristic of the Common Law grasps the essence of the difference between natural law and classical codification in the fact that the one narrows down the role of the judge and the other leaves it intact. – A grouping providing a more complex description seems to be more comprehensive historically and more sensitive towards Civil Law development: according to it, codification can be

(a) *digestive* (such as the Justinian or the American Restatement of the law);

(b) *natural law* inspired (such as the Prussian and the Austrian codifications of the enlightened absolutism); and, finally,

(c) *revolutionary* (like the classical codification of the French Revolution).[5] – And, finally, a classification tracing all types back to their ultimate essence differentiates only between

(a) *static* types, i.e. codifications only issuing in legal-technical reforms (which is characteristic primarily of the Common Law) and

(b) *dynamic* ones, primarily embodying socio-political changes (characteristic chiefly of the Civil Law).[6]

There are other attempts at grouping as well. These are less logical, having as their primary aim the identification of types in the history of the phenomenon itself. One of these attempts looks for points of stabilization in codification development. Accordingly, there are (a) codes institutionalizing new law on the basis of *religious* (or pseudo-religious) sources, (b) others which serve as vehicles of *transition to written law*, (c) codes meant to revolutionize the law in the service of *social transformation* and, finally, (d) codes which came into existence as a result of *bureaucratic-autocratic* interests in order to meet the need for stability, security and certainty, i.e. to reduce the will of all to carry out the legislator's single will.[7] The merit of this division is lessened by the fact that it groups the Talmud and the Koran together with the National Socialist *Volksgesetzbuch* as well as the Soviet codes among instances of the first group; indeed, it is thought-provoking by the fact that here the work of Justinian is cited as a universal example that fits all four of the types given. And yet, this is the first grading by type that I know of to really draw from history (this, at least, being its intention). – A more recent attempt uses even more complex criteria. According to this, codification can

(a) *replace* customary or judge-made law,

(b) *consolidate* (or incorporate) existing law,

(c) establish *unity* of the law over a given area,

(d) be consequent to conditions of a state becoming *independent*,

(e) implement the *modernization* of law,

(f) spring from *ideological* (or political) tendencies (such as natural law codification in the modern age or nazi codification of the recent past),

(g) stabilize accumulated *changes* of the law,

(h) result from the needs of international *integration* (such as the recently uniformized laws of exchange, copyright and shipping law),

(i) express the influence of one country on another one by *legal transplant* and, finally,

(j) embody *revolutionary* changes in the law.[8]

The most spectacular solution would be, I believe, to line up *some* types which would provide an exhaustive characterization of the whole wealth of codification development. This would be the consummation of the old ambition of the *axiomatic idea:* to find the common denominator applicable to any sum, the universal principle that orders everything; to solve any codification problem from every aspect and yet under one single principle by elevating it to one of the branches as mere embodiments of the central concept. Alas, however attractive this idea seems to be, it cannot be realized.

Codification is such a complex historical phenomenon that it can at best only be *described*, but not classified exhaustively by tracing it back to a few basic variations. The most we can contemplate is a historical description which shows variations in adequate depth, even if it fails to provide any unitary classification.

(1) If we seek, as a first approach, the basic variations of codification roles in the *dialectics of change and preservation*, we can differentiate between the following types. There is one in which

(a) the *change of contents* is coupled with *formal change* in the position it occupies in the system of the sources of law (as demonstrated by the archaic reform codes); there is one in which

(b) the *preservation of contents* goes hand in hand with *formal change* (as exemplified by the ancient Chinese codifications, those reflected in the myth of origin of the Twelve Tables, or the first Germanic codes); and there is one in which

(c) the *change of contents* is carried out while the *preservation of ~~the~~ form* (as exemplified by the *Codex repetitae praelectionis* of Justinian). It is apparent that this logically consequential typology also demonstrates a trend of development. The early forms of codification, as well as the formation of classical codes, were determined by the joint requirement for the reform of contents *and* form. After this pattern was established, the use of codification for the mere recording of necessary changes of contents or for the systematic arrangement of already introduced changes only meant the acceptance of codification as a normal method of legislation. Accordingly, basic types of codification are the coupling of *changes of contents with formal change* and *with the preservation of form* respectively. The coupling of preservation of contents with formal change is only exceptional, as a transitional state. However, due to particular conditions (e.g. the struggle for recording the law in ancient times, the necessity for putting customary law into writing and, later, for overcoming particularism, by transforming it into statutory law in the Middle Ages, as well as the periodic need to consolidate law in modern times), it could serve the technical restructuring of law. The other possibility is that codification is basically meant to implement changes in the law.

(2) By focussing on the *processing of law* in codification, we get the following types, each of which transcending and encompassing the previous one. These are

(a) *recording* of law (in the most ancient reform codes),

(b) *compiling* the law (in the ancient Chinese codes and the Law of the Twelve Tables),

(c) *ordering* the law (in the Roman *Edictum perpetuum*), and

(d) its *organization as a system* (in the products of feudal absolutism for the first time in history). Between the types of the objectification in writing of the law, its exclusive embodiment in such objectification, the development of its inner

cohesion, and, finally, the deductive-logical organization of this cohesion, there are important differences. One has to bear in mind that while the first three phases were completed within two millennia, it needed another two to reach the fourth. This seems to indicate that these stages of development were *not of equal weight* in history. Indeed, there were but two changes that resulted in new potentialities in the technical shaping of the law: its *projection as written objectivation* and its *organization as a system* having axiomatism as its ideal.

(3) Classification can be carried further. We may inquire into the *role* codification has *in the system of the sources of law*. Here I can quote nothing but examples. It can be meant to be

(a) the *reform of customary or judge-made law* while preserving them as sources,

(b) their *consolidation*, or

(c) *unification*,

(d) the *reform of statutory law*, its

(e) *compilation*, or

(f) *unification*, or

(g) representation as the *exclusive embodiment of the law*, and, finally,

(h) the carrying out of the various normal tasks of *legislation* (or, in general, of written law-making). This approach has only one point to emphasize, namely that codification may take place in all the functions that are conceivable for written law-making at all.

(4) By narrowing down the *function* of codification, we get a rather complex picture of its historical variety. Accordingly, codification can serve the purpose of

(a) the *ascertainment of the law* while preserving its contents and sources (the archaic reform codes). Its function can be

(b) a simply *technical compilation* of the law in view of either (b.1) securing its *knowledge and certainty* (the ancient Chinese codes and the Law of the Twelve Tables), or (b.2) *putting it into writing* as the law of a new state formation (early Germanic codes). Its function can also be

(c) a *reform-intended compilation* of the law by a new initiative arising from (c.1) the *exportation* of law (Roman *leges datae*, British colonial codification), from (c.2) the *importation* of law (the world-wide transplantation of the French *Code civil* and of the codes of New York), or from (c.3) some *revealed source* (the ancient Jewish code, the Koran).

(d) *Politically inspired compilation* can be carried out for the sake of (d.1) political *conservation*, (d.2) *terminating* a given way of *legal development* (*Edictum perpetuum*, and the Justinian), (d.3) consolidation of the political *status quo* or some class compromise (codes born of feudal class struggles and the *Tripartitum* of Werbőczy), or (d.4) the *standardization* of law in order to assist both memory and the law's manageability (compilations of customary law in the Middle Ages, in Africa and Asia, as well as Common Law textbook-writing and U.S.A. *Restatement*). There are finally

(e) compilations for *complex* functions, characteristic of the classical type of codification: codes which (e.1) organized *new legislation* in a *systemic* form *(Allgemeines Landrecht)* and which (e.2) amalgamated the idea of *system inspired legal innovation* with *national unification* of the law (*Code civil*). And the development phase, in which

(f) codification becomes the *normal* method of *legislation*, forms a separate group in this classification. Here, codification can be filled with almost any content, since the distinguishing feature of this type is precisely the incidental adaptation of any of the functions of legislation.

(5) If we also examine the complexity of codification from the point of view of its *socio-political role*, we arrive at a series of characteristic occurrences which only become convincing in the light of historical examples, having no affinity with logical classification any longer. In its most ancient development phase, codification has

(a) a mere *ad hoc*, instrumental significance, being but a form naturally given by the invention of writing. It becomes

(b) the medium of various *independent* ambitions only when it is already acquired and known in its instrumental character. This is when codification is lifted out from its neutral medium

in order to become a political ambition *per se*. The first sign of this is (b.1) the endowment of the earthly representative of divine power with a *prestige* due him (Code of Hammurabi). Its first developed example is (b.2) the political struggle for *recording and making public the law* (ancient Chinese codes, the Law of the Twelve Tables). The prestige value soon enters the political realm with (b.3) *dreams of empire* (Justinian's codification). The code is (b.4) the herald of a *new legal technique* (Laws of Aethelberht); later it becomes (b.5) an instrument in the struggle for both *feudal division* and *centralization*. Codification also fulfils a mere technical task in the period of feudal absolutism, such as (b.6) the *ordering* of the law (*Nueva Recopilation*, 1799) or (b.7) its mere *publication (Svod zakonov)*; but it may also play a role as a means of (b.8) national *unification* of the law (French *ordonnances*), or even of (b.9) the *planning of rational state life* (*Allgemeines Landrecht*). The classical type of codification serves (b.10) the *revolutionary transformation* of the law (*Code civil*) and may also give inspiration to several copies only reminiscent of the original revolutionary ardour (the National Socialist *Volksgesetzbuch*). Codification has been used extensively as a means of

(c) *legal transplant* in modern times. It may assist (c.1) the primitivizing *adaptation* of a society's own law (North American codes in the colonial era) and may equally well serve the purpose of (c.2) *legal export* (British colonial codification). It may be the medium of (c.3) Europeanizing *modernization* (the *Code civil* in South America); the means of (c.4) *rationalizing changes in legal techniques* (Field's code plans); or (c.5) a simple *filler of* some *legal vacuum* (the North American adaptation of Field's codes).

(d) The complete change of the structure and substance of the law so that the code is the medium of *new technique and ordering* (Japanese, Chinese, socialist Mongolian and Albanian codes, Afro-Asian adaptations) is obviously a more complex function. It is also a complex task when codification is aimed only at

(e) the *separation of law from its traditional media* (Hindu and Islamic codification from sacred texts; mediaeval European

and present-day Afro-Asian codification from customary roots). Finally, it may also serve

(f) the *politico-legal consolidation* of any new social system (socialist codes).

The common feature of all these examples is the multi-layered nature of codification. Paradoxically speaking, it is not identical even with itself, since it may also turn out to be the medium of other contents, pointing beyond its direct technical-legal existence. The codification need produces examples where the change embodied in the act of codification is at the same time the symbol and embodiment of total social development. In such instances, codification is not only a means but the relative end-result of hard political fights. In other instances, when it becomes an accepted method of legislation, codification loses any special overtone and lives on as the *habitual paraphernalia of everyday legal life.*

(6) Thus, just as multi-functionality was seen in the relationship of codification to existing law, it must also be seen with regard to its political orientation. As a matter of fact, codification may support

(a) *centralizing* and

(b) *particularizing* political forces, and it may serve

(c) the *consolidation* of domestic law as well as

(d) *expansion* by the export or import of the law.

But this multi-functionality raises a question: how is it possible that a work born in a socially and economically determined way can go beyond the conditions that have determined its establishment and gain application in new politico-legal media, in the interests of fulfilling new political and legal functions? How is it possible that Justinian's codes, which were compiled at the time of the disintegration of the slave-holding Roman society as the conservation of an already anachronistic law, could have become the example *par excellence* of early legal recording in a developing feudal society, surviving not only in the Byzantine laws, but also beginning its renaissance with the growth of trade and exchange relations at the dawn of the bourgeois transformation, and finally becoming the legal model of a liberal-capitalist economic policy in the 19th centu-

ry? What explains the phenomenon that an organic product of centuries of domestic legal development such as the French *Code civil*, which embodied unity of the law and a new revolutionary start, could also become the subject of an expansionist legal transfer (in Belgium, in German and Italian provinces, etc.), of quasi-colonialist legal influence (in Egypt, Japan,etc.), indeed of modernizing "national" legislations (in South America) and with such a formative power that it could even be integrated into some socialist legal system (in Romania, Serbia) as well?

If we want to give a really historical answer to this question, then we find that the kind of codification problem posed by given socio-economic arrangements is always defined concretely in history. Any *a priori* statement (that, for instance, a given form of codification is to "correspond" to a given socio-economic formation "by necessity") does not follow from this, however, except to a link that can only be explored by concrete analysis of concrete processes. Consequently, all factors of conditioning (ideological traditions, past arrangements in or near the particular society, etc.) can also play a role. In consequence, the fact that the Justinian or the *Code civil* could be embodied in such diverse contexts and functions does not contradict *historically concrete conditioning*. Indeed, it rather says something new and substantial about the secondary factors and *possible multi-functionality* having a role to play in codification. On the other hand, multi-functionality does not tell us anything about the possible arbitrariness, or unhistorical anachronism, in its application. However, it seems that this is not a historical burden, but a peculiarity of codification. At a general level, it is a feature that arises from the *relative autonomy of the means of social mediation*.[9]

It would of course be of interest to explore the features of the codification instrument that are meant to assist application in various functions and under changing conditions. But that would go beyond the limits of the present subject. It would be the analysis of the code as a well-structured technical phenomenon.

2. CODIFICATION AS A QUANTITATIVE AND AS A QUALITATIVE TREATMENT OF THE LAW

The task undertaken above was to characterize the relationship between codification and its impact on social reality and thus omitted to evalute the achievement of codification itself. For there was a fundamental change in the history of codification which also signalled a decisive change in the "technology" of the treatment of the law. I refer to the transition from the *quantitative* to the *qualitative* "technology" in the treatment in question, to the point where *reconstruction of the law in depth* came to replace the *merely extensive comprehension of the law*. As we have seen, the immediate technical aim of the early forms of codification was to encompass the law in one unit. This involved the quantitative reduction of the volume of the law; yet it left the way of organizing its provisions intact. Even if a certain arrangement of the rules led to the exclusion of some of their dead, self-contradictory or repetitive provisions, it did not organize them into components of a coherent and consistent system. It helped to exclude unreasonable inconsequentialities, but it did not create a genuine system out of the crude quantitative aggregate that formed one unit from the chaos of the historically incidental sequence of law-making.

Thus, the extensive comprehension of the law in one body of enactments is merely external, and dependent exclusively on what has been enacted before. This is what the new concept of codification with the qualitative treatment of the law has superseded. This is a *technological restructuring of the law* which is to replace the incidental coexistence of norms with their conceptually coordinated hierarchical arrangement, with their organization into a system of norms of varying depth and generality, and with a logical sequence that is to arise from the complex of their contentual relations. Although the structure of this system is not meant to be determined in a formal-deductive way but basically by contentual relations among the regulation contents and their technical solutions, this does not alter the fact that the aggregate of norms thus gained establishes a system suitable for logical consideration.[10]

Its *system character* involves definite requirements. The system is more than the total of its components. The components also share in this "excess" by virtue of their belonging to the system. It is in the system that the principles of regulation and their inner correlations will prevail. This is the system where the *completeness of regulation* arises as a conceptual requirement: for the accidental aggregate of isolated norms either did or did not have a norm applicable to some problem. Within the boundaries of a *quantitative* treatment of the law, this question was itself merely of a quantitative character, just as pointing to a gap in law could be simply a question of fact of only incidental interest, since the incidentality of the whole aggregate of norms could not be changed even by filling scores of gaps in it. In contrast to this, the *qualitative* treatment of the law is expected to lay down a series of the principles of ordering and also to provide an increasingly more detailed partial regulation as it proceeds towards the particular. On the one hand, it completes specified regulation, and on the other, it sets the demand for regulatory completeness by consequentially laying down the conceptual bases of ordering its principles and also the outlines of its structure, even if detailed provisions are often left full of gaps. For the existence of gaps in law is no longer a simple question of fact here. The system has to provide answers in principle to everything which comes into its orbit. Therefore, the consideration of the mere fact that a certain norm does not exist necessarily involves the other consideration that, according to its own principles, the system *should* dispose of such a norm. While the filling of gaps usually involved some arbitrary process in the case of quantitative codification, incidental from the point of view of the aggregate of existing norms (trial by combat, the *ad hoc* decision of the sovereign, etc.), it remains wholly within the orbit of the system of norms in the case of qualitative codification. This will invariably remain a question of breaking down the general principles that used to be the foundation of the system, and of adjusting this breaking down as closely as possible to already broken-down partial regulations. This is the reason why the breaking down in question may be as-

sisted by the quasi-logical means of analogy.[11] The filling of the gaps left by quantitative codification is just as extraneous and incidental as the aggregate of norms actually comprehended by it. In contrast, filling gaps in the framework of qualitative codification is context-bound, moreover, it is predetermined in content, since, in point of principle, it introduces nothing new in the system on the general conceptual plane of regulatory ordering.

Be that as it may, *codification development* was not as devoid of intermediary forms as this simplifying description might infer. Reviewing the role the *idea of formal rationality* played in legal development, we recalled forms that indicated the appearance of structures of formal rationality at a relatively early stage of development. Partial systems realizing a certain degree of formal rationality could be observed even in archaic forms of codification as a result of intuitive recognition of its need (conceived almost as an aesthetical exigency); filling the gaps could have involved conceptual aspirations in the juristic work of the late Roman Empire; indeed, the intention of organizing norms into a system could arise under the effect of the conceptualizing-formalizing tendencies of scholastic thinking before the idea became an *idée fixe* and, later, an organizing medium of the dominant world outlook in *mathesis universalis*, supported also by the rationalizing efforts of the bourgeoisie; but none of these changes made codification development discontinued. On the whole, it produced two basic types with the second sublating the first; and it appeared fully armed on the stage of history, when the social total process of development required the domination of structures of formal rationality in every field of organization as an indispensable condition of progress.

Indisputably, the transition to this second type of codification represented a progress in the absolute sense, because it brought into being more synthetized forms by sublating earlier ones. Of course, this progress occurred through the accumulation of quantitative changes. The reduction of the volume of the law, freeing it from its most striking contradictions, repetitions and platitudes (which was one of the main functions

of quantitative codification) grew into a task crying for a solution and tolerating no delay. The growth of industry and trade and the advance of the bourgeoisie faced the state with new problems by demanding rationally functioning administration and bureaucracy. This necessitated regulations in new fields, organized in a manner conducive not only to clarity and comprehensiveness, but also to predictable and calculable decisions in the practice of mass administration of justice and of the law by a huge machinery. Quantitative codification could not deal with this if only because of the sheer mass of regulatory material. The means at its disposal proved unsuitable for a satisfactory treatment of such a quantity of laws. In other words, it could no longer have a rationalizing effect under the given conditions.

The new type of codification became the symbol and inspiration of the complete technologic-structural transformation of the law with the assertion of structures of formal rationality, and this was followed by an appropriate shift in legal thinking.

Neither did concentration on *creating a system* eradicate the main function of the earlier codification type, the *quantitative reduction of legal material.* This function survived. But since it was practised at a higher level as part of a complex process, the emphasis shifted to these higher functions and not to their sublated part-motive. It also remained as the principal function in certain fields and, as such, became the property of distinct forms independent of codification: consolidation and revision of the laws, and so on. These forms of arranging and ordering legislation are extensively used even nowadays, and mostly not in opposition to, but parallel to qualitative codification.

The same must also be said about the other peculiar function of the surpassed codification type: the *extensive comprehension of the law in one enacted body.* This is also a natural component, as one of the by-functions of the new codification type, although it is a part-motive of a complex process and not autonomous. When qualitative codification organizes the norm-material of law as elements of a system consistent in itself,

it brings about a product which is the reproduction, at a higher level and as a new quality, of the previously enacted total sum of legal provisions. It comprehends the actual volume of the law by breaking it down into a hierarchically organized and deeply structured system. Owing to its systematic organization, the new body in question includes in principle rules which are not expressedly posited by it, but are derivable from it according to the system rules.

Thus qualitative codification realizes formal rationality at the highest known level and therefore seems best to conform with the political, social and economic requirements which are the motive force of conscious, planned and controlled social influencing.

3. THE COMMON CORE OF CODIFICATION PHENOMENA

Having come to the end of our inquiries, we have to answer one more question: what is the quality common to all kinds of codification phenomena, pointing beyond mere technical aspects in the direction of some contentuality?

In the course of examining the historical forms of codification phenomena, we could not fail to notice certain *analogies* between the forms of the *technical shaping of the law* and of the *politico-economic organization of society*. The circumstance that the evolution of modern economic organization and bureaucracy has conditioned the transition to the new concept of codification is particularly striking. The political-economic need for organizational structures of *formal rationality* was presented as the common root of these phenomena.

As far as the organization of society by legal means is concerned, we had to recognize that the development of norm structures, i.e. the *objectification* of the law, already constituted formal rationalization *per se*. Naturally, the separation of ancient customs from the organic unity of everyday practice as law made it predictable and calculable only at a primitive level. Yet it still played a role in developing law as a *mediating category* wedged between social goal and social

action, i.e. as a relatively autonomous factor in regulating societal life. This is why formal rationality is considered the *sine qua non* of all conscious, planned and controlled social influencing.

Accordingly, the establishment of a minimum of formal rationality and its reinforcement at increasingly high levels is a general motive force behind the development of codification. And we can also state that, in its historical line of development, codification is the most widely spread and the most effective means of the law's formal rationalization. However, no conceptual significance is attached to formal rationalization by this; it cannot even be advanced as a component of its definition.

If we now look at codification not simply as a technical instrument in the formal organization of law, but as a means of *the political power of the state to assert a central will uniformly in the whole of the community*, then we can explore yet another feature generally characteristic of codification. In respect of its ultimate effect, codification is nothing but a means for the state to assert its domination by shaping and controlling the law.

As a matter of fact, codification is the means, and also the product, of the transformation of law from its role being an agent of preserving the traditional framework of everyday life to being an agent to formulate and also to assert the arbitrary will of the ruler, effective by its formal enactment and open to further development in any direction through formally controlled processes. In the course of history, codification has completed a course at the start of which law was based on the life of the community with an almost supernatural permanence, until it became a willed, planned and controlled means of social influencing in the hands of the possessor of power, drawing its long-term potentialities from the needs of socio-economic progress, although in fact it was, at least formally, merely the act of sovereign will. Inspired by the felt needs of imperial administration, the ancient reform codes of the East were the first to become the means of the dissemination of a central will, maybe the first formal instance of *mediation* in

history. Mediation developed and played an important role principally where development brought about deeply structured machineries of administration, where a wide field divided the possessor of power from his subordinates and into which a structure brought to life to be the vehicle of mediation between the possessor of power and the subordinates had to wedge itself.

Marx writes that "just as in despotic states, supervision and all-round interference by the government involve both the performance of common activities arising from the nature of all communities, and the specific functions arising from activities between the government and the mass of the people".[12] Accordingly, the functions of the state can be divided into general organizational and class-bound organizational functions within the boundaries of the political activity of the state (as distinct from its social political activity).[13] As instruments of the state's political activity, two fundamental institutions were developed: *administration* and *law*. As sub-systems equally subordinated to political power, they are in a relationship of mutual influence. Therefore, if we view them from the point of view of the organization of political rule over society, it is no accident that the landmarks in legal development are parallel to ones in the development of administration. The deepening consolidation and sophistication of political power arose first, in the field of law, in making the norm-aggregate of law relatively complete and well-arranged and, in the field of administration, in establishing an appropriate institutional machinery, together with legislation and administration of justice as integrated into the state machinery itself. Since codification proved to be the most suitable means of making the law relatively complete and well-arranged, the local points of *codification development* frequently coincided with the *progress of administrative organization.*

Whether we look at the ancient Eastern despotisms, classical Roman development, the feudal absolutisms, the coming of the bourgeoisie to power in Europe or the experiments of socialist transformations: in each instance we see that the development of the administrative structure went hand in hand with

the one of the codificational organization of the law. Namely, imperial administration of the empires in ancient times, the concentration of power in one hand in feudal absolutisms, or social construction realizing a new order in the wake of bourgeois or socialist transformations were all responses to a given historical situation. In its own way, all these historical formations created their own codifications fulfilling perceived needs. What all of them had in common is the fact that – compared to the period prior to codification – they realized a more efficient, more comprehensive and deeper political dominance. The parallelism between political dominance and legal codification is particularly striking where codification embodies an attempt to reduce the *ius* to the *lex*, enacted by the ruler (i.e. where the ruler, in his determination that he alone should control the law, makes the code its sole embodiment). Such codifications (doomed, by the way, to failure from the very start) were in most of the cases accompanied by absolutist trends in the administration, aimed at a machinery functioning mechanically, uniformly, lacking any creative qualities (as manifest in the practice of Justinian, the Byzantine and Russian rulers, Frederick the Great, etc.).

A variety of codification tendencies can thus be brought into relation with the tendencies towards increasing political dominance. But it does not follow that we can conclude from the lack of the former to any lack of the latter, albeit whole periods in which the *lack of codification tendencies* is related to the *underdevelopment (or disintegration) of centralized power structures* are also known. Communities, which eschew formal procedures and solve their conflicts by means of *conciliatory processes* are prime examples of this. The law of *feudal particularism*, where the ruler cannot assert his rule of law though he aspires to it, also belongs to this category.

They are arrangements where political power is undoubtedly strong and comprehensively organized, but where *no means of codification* are utilized. The reasons for this may vary widely. In the first phase of *Islamic legal development*, for instance, a vigorous all-encompassing organization developed on a theocratic basis, founded on the requirements of a military empire.

This structure was well-suited for the static law based on revealed sources. Thus, the law was all-mighty and efficacious indeed. However, owing to its sacred character, it was also immutable. Therefore the ruler only controlled the law but could not shape it. Consequently, not even the question of codification could arise.

A very complicated administrative structure, based on inherited privileges and highly demanding special education developed in *traditional China*. It proved to be suitable for implementing a centralized imperial policy in a creative yet uniform way. However, law in the European sense did not develop. What the Emperor had enacted as law only served the purpose of deterrent punishment in instances where the local solution of conflicts failed on the basis of local customs. Thus something else filled the role codification was to play in Europe and there was for long no codification.

England also arrived at the turn of the 20th century without codification, although it pioneered in building up an efficient administrative organization and particularly a uniform national law. In ideal terms, this law was the law of the Empire and the trustee of the Empire was the ruler, but he did not shape the law even though he *controlled* it. The complex but still extant structure into which even legislation was integrated from the last century was based on centuries-old material produced by the judicial administration of justice. Thus the forum to produce law is widely extended, and it is precisely the lack of concentration of law-making competences under one authority which has prevented codification.

If we want to examine more closely how much the wish or need of centrally shaping and controlling the law was a motive force in the development of codification, we must first look at two aspects of it: *making the validity of the law "positive"*, on the one hand, and *formally enacting it as the "will of the state"*, on the other.

As to the genesis of law, we can hardly formulate more than mere guesses. From the findings of archeology and anthropology, we may reconstruct a more or less organic unity of social norms dividing into quasi-legal, quasi-religious and/or quasi-moral

norms. Equally embedded in traditions and customs, they are rather static or, more precisely, organically attached to the hardly perceptible, slow development of the conditions of life of the community and the praxis reflecting it. Their efficacity is due to their traditional character, as well as to the parallel sanctions, taboos, and fear from factors believed to be supernatural. All this is exemplified in our earliest written relics by the image of worldly rulers empowered by the divine law-giver, only mediating his laws. Economic development, as well as deepening interior conflicts and expansion into empires force early societies to separate law. The discovery of writing may also give them an adequate opportunity to do so. The transformation of customary law into laws enacted by the ruler gradually results in real reform legislation, which slowly dissolves the sacred nature of the law.

But progress is still fraught with contradictions. The ideology of reducing law-making to the manifestation of the eternal law lives on in ancient, indeed even mediaeval times. The legislator's primary duty is either *revelation* of the divine law to be converted into positive law or *reformation* of positive law in order to return to divine law. Even though the king, considered to be acting under direct divine mandate, had been laicized into a sovereign lord, his sovereignty was for a long time circumscribed – as exemplified by the defiance of Antigone[14] – by the limits of divine law. The *attachment to divine law*, which originally underpinned the legitimacy of the law-giver and his laws (from Hammurabi to Moses and further on), later found its profane form and was transmitted as "*tradition*". It might contribute both to preserve political achievements or the *status quo* (the legend of origin of the Law of Twelve Tables, Chinese codes) and to use the glory of past as a political weapon (e.g. the Justinian); but ultimately it ensured *legal continuity that pointed beyond positive law.*

There were several initiatives in ancient times (and here I only recall Greek treatises on tyranny[15] and the pragmatic experiences of Roman legislative practice[16]), that could have paved the road towards the emancipation of law. But, its attachment to some divinely ordained idea was still prevalent in

the Middle Ages. In continuation of old traditions, Christianity also rendered earthly law a pale reflection of divine natural law so strongly that even reform legislation was conceived of as a return to *"good old laws"*, as their restitution or remedication. In this age, "any ambition to consciously improve and reform the political and social order is completely unknown".[17] Law, which was considered independent ("valid" and "good") of the existence of man from the start, could only be "found" or "distorted", but not created or annuled.[18] Therefore the idea of *formally enacting laws in order to make them formally valid*, which started to develop in ancient times, gradually lost its meaning and disappeared. The slow progress of feudalism was mirrored, and also served, by stabilizing tendencies. The particularism did not make independent legislation possible anyhow. And for lack of the development of national laws, the Roman law tradition became common law (*gemeines Recht*) of Europe. Although the Reformation did shake existing power structures, paradoxically, it had a rather anti-emancipatory effect on law.[19]

This placid concept of law only changed with the obsolescence of the feudal formation, when centralized agencies for controlling social relations were established with the increased recognition of bourgeois interests. The germs of *legal positivism* developed in the philosophy of rationalism from the ideological seed of natural law. The new concept viewed the law as the ruler's order which can be freely enacted and enforced in possession of power. It provided arguments to any act of any ruler, but in the long run still paved the way to making the law a means of social influencing and establishing rational legal arrangement. The concept resurrected the idea of formal validity and made it the exclusive criterion of the law. *Auctoritas non veritas facit legem*, says Hobbes in his Leviathan,[20] and this is also what Spinoza emphasizes arguing that the value of abiding by the law is only obvious when the law is normatively enacted. Every action "brings in its wake reward or punishment consequent not to the necessity and nature of the act performed, but solely on the basis of the pleasure and unconditional order of the ruler".[21] This was a polarized anti-

concept. But law became truly an objectification, and, once enacted, an autonomous phenomenon. It is its boundlessness in contents to the account of which contemporary political theory ascribes its being the prototype of the voluntarism in law: an autonomous power, in which "even the motives of the legislator become irrelevant in the face of its imperative character".[22]

Codification played a role in these processes by expressing them in a most concentrated manner and stimulating them with its own means. The instrumental potentialities and advantages evident in committing the law into writing made codification an outstanding means from its early development, and made it an *independent political target* both in the case of the Twelve Tables and the Justinian.

Owing to its instrumental values, codification also became an independent political aim in the Middle Ages from the moment Germanic tribal laws were recorded in the one way possible. Whether we think of the centralizing attempts of early feudalism, the recordings of the *status quo* that reflected the bargaining between the ruler and the Estates of the Realm, the mnemonic collections of customs recording particular customary laws or the law-books indicating the emancipation of the urban bourgeoisie from feudal trusteeship, the circumstance that these always bore the hope of *maximum political dominance attainable over society* by codification was a common feature in each instance.

With the advance of bourgeoisie, codification became an outstanding instrument for the *emancipation of law* in the modern age. The efforts to establish legal systems based on natural law by breaking down the Rule of Reason into an axiomatic system became so general that they left their mark on practically every piece of legislation of the era. They turned tendencies confronting one another in lethal struggle also into *à la mode* forms: even specially administrative measures of city principalities were permeated by their spirit.[23]

The desire for having absolute control over the law (i.e. that the ruler can reduce the *ius* to the *lex*, formally enacted with an arbitrary content) not only arose in absolutist legislation. Remnants of this wish were carried over into revolu-

tionary French legislation by institutionalizing the *référé législatif* and even survived in the ideology of the exegetic application of the *Code civil*. But the absolutizing one-sidedness of legal positivism which developed in the shadow of philosophical rationalism was basically curbed in the 19th century.

As for the *reduction of legal validity to the law's being formally enacted*, it is common knowledge that this curbing also declined when there was no longer a need for the exegetic application of the *Code civil*. For the monopolizing development during the second half of the 19th century made exegetic administration of the law and justice dysfunctional, and changed it over by its opposite, *dissolving the purports of enacted laws in judicial practice*. This movement resulted in a more flexible concept of rule of law which not only allows the creative contribution of judicial practice to the formation of the law, but also guarantees its assertion within certain limits, through the open and (to a certain extent) also the closed channels offered within the system of the *Code civil*.

(And as far as the wholly free and even arbitrary development of legal contents was concerned, sociological investigations have by now pointed to the factors conditioned by socio-economic development, within which a formally enacted legal content may gain *social* validity and the question of *legal* validity itself can be raised in a socially meaningful way. The point is simply that law can become an instrument of mediation backed by social validity only provided that it exerts an influence within the sphere of the recognition of what is going on actually in socio-historical reality and of what are its perspectives of development realistic enough for necessities to assert themselves in the life of community in the long run.)

The analysis of codification development will reveal that its main motive forces, *formal rationalization of law*, on the one hand, and *centralized state control over the law*, on the other, are historically related to one another. At a given level of social complexity, legal influencing can be made efficient only through the integration of its structures into one body having a relative autonomy. Efficient political rule in

our age presumes socio-economic influencing, which, on its turn, is only conceivable by the establishment of the relatively autonomous, and formally rationalized, systems of law and state administration. The practical elaboration of such systems took place at the dawn of the modern age. In order to make law a proper means of social influencing, it was torn off from its archaic-traditional roots and transformed into a set-up freely shapable by a competent state body at will. The association of centralized state control over law and the need for a comprehensive regulation in depth was most completely carried out in codification, i.e. by a form which meets these new requirements most radically. These codes aspired too to completeness within the sphere they were to regulate, and by now they could do this in the only possible way allowed by the extreme width of these spheres, i.e. in a way which deliberately presupposed (and, indeed, made indispensable) creative judicial contribution when being applied to concrete cases: they achieved completeness in an intensive sense. Organizing legal provisions into a coherent system hierarchically broken down presupposed the technological restructuring of the law as a new quality. This was such a vast task (demanding as it did a breach with all earlier institutional-ideological conditions) that it seemed to several generations it could only be realized by an "enlightened, paternal despotism".[24]

Social relationships requiring legal control, as well as economic relations themselves, are increasing in complexity in our era, characterized as one of the scientific-technical revolutions. This brings inevitably in its wake the progressive growth of the organizing activity of the state. Growing legal and administrative tasks require the further development of the means available. Law is assuming increasingly differentiated forms, apparent primarily in the advance of its *system-organizing* role. The movements urging either codification or efficient surrogates to it in the Common Law and the Afro-Asian systems, which formerly opposed codification, may also partly be attributed to this. Its effect is manifest in the tenacious adherence to existing codes in a Europe too tired to start re-codification as well. And, at least at an ideological level as a

substitute to genuine performance, it is this that seems to be asserted in the socialist systems which undertake more or less systematic re-codification.

Therewith we have outlined the place of codification among the legal methods of social influencing. And yet all we have said about it in general terms was ultimately specified only from a *technical-instrumental* aspect. We can, however, affirm at this level of generalization that neither formal rationalization of, nor centralized state control over, the law is value-bound in itself. Like techniques of social influencing in general, these may also be vehicles of varying contents. Their social content and historical value depend therefore on to which purposes, in what context, how and with which effects and by-effects they are used: on their suitability *as means* for achieving concrete socio-historical and political aims.

NOTES

1 Világhy, p. 218.

2 P. Jankó's contribution to Világhy, p. 249.

3 Lang, pp. 5-8

4 Pound, p. 282.

5 Friedrich, p. 2.

6 Bayitch, pp. 173ff.

7 Pringsheim, pp. 304-306.

8 S. Grzybowski 'Les lumières et les ombres de la codification à l'avenir prochain' *Archivum Iuridicum Cracoviense* II (1969), pp. 86-90.

9 Lukács *Ontology*, ch. II, section 2.

10 Varga 'A kódex', especially at pp. 282-290; Varga, pp. 299ff.

11 Cf. Cs. Varga 'Kodifikáció - joghézag - analógia' (Codification – Gap in the Law – Analogy) *ÁJ* XII (1969) 3, pp. 566ff.

12 K. Marx *Capital* III (Moscow: Progress 1966) p. 384.

13 For the conceptual distinction, see M. Samu *A hatalom és az állam* |Power and the State| (Budapest: Közgazdasági és Jogi Kiadó 1977) ch. IV, section 1 and K. Kulcsár 'A szervezet mint társadalmi alakulat' |Organization as a Social Formation| *A Magyar Tudományos Akadémia Gazdaság- és Jogtudományok Osztályának közleményei* I (1966-1967) 3-4, pp. 304ff.

14 "I did not suppose that your decrees had such power that you, a mortal, could outrun the god's unwritten and unfailing rules. For their life is not of today and yesterday but for ever, and no one knows when they first appeared." Sophocles *Antigone* 455-460, ed. A. Brown (Warminster: Aris and Phillips 1987) p. 59.

15 Cf., e.g., Á. Szabó *Sokrates és Athén* |Sokrates and Athens| (Budapest: Szikra 1948) pp. 68ff.

16 Cf., e.g., M. Villey 'Abrégé du droit naturel classique' |1961| in his *Leçons d'histoire de la philosophie du droit* (Paris: Dalloz 1962) pp. 116ff.

17 J. Huizinga *Herbst des Mittelalters* (Munich: Drei Masken Verlag 1928) p. 46.

18 Cf., esp., A.J. Gurevits *Kategorii srednevekovoi kultury* |Categories of Mediaeval Culture| (Moscow: Isskustvo 1972) p. 150.

19 J.W. Allen *A History of Political Thought in the Sixteenth Century* (London and New York: Methuen, and Barnes and Noble 1960) pp. 21ff and 65ff.

20 "For the legislator is he that maketh the law ... and therefore the sovereign is the sole legislator. For the same reason, none can abrogate a law made, but the sovereign; because a law is not abrogated, but by another law, that forbiddeth it to be put in execution." T. Hobbes *Leviathan* or the Matter, Forme and Power of a Commonwealth Ecclesiastical and Civil Code |1651| ed. M. Oakeshott (Oxford: Blackwell, no year), ch. XXVI.

21 "Adamus illam revelationem non ut aeternam et necessariam veritatem perceperit, sed ut legem, hoc est, ut institutum, quod lucrum aut damnum sequitur, non ex necessitate et nature actionis patratae, sed ex solo libitu et absoluto imperio alicujus principis." B. Spinoza *Tractatus theologico-politicus* |1670| ed. G. Gawlick und F. Niewohner (Darmstadt: Wissenschaftliche Buchgesellschaft 1979) pp. 146-147.

22 J. Freund *L'essence du politique* (Paris: Sirey 1965) p. 237.

23 As an example, see *Verordnung wegen Ausbesserung und Reinhaltung der Gassen* (Rostock: Christian Müller 1779).

24 M. Aucoc quotes Lord Macauley's complaint during the parliamentary debate of the Indian codes in a generalizing manner in his 'Observations sur la codification des Lois' off-print from *Bulletin de la Société de Législation comparée* (Paris: Cotillon 1874) p. 1.

XII. CODIFICATION IN PRESENT-DAY DEVELOPMENT: CONCLUDING REMARKS

Committing laws into written forms and recording them in collections – hence, the whole process we have analyzed in the foregoing as codification phenomenon – was invented and gained an increasingly developed form and decisive importance as law came into prominence as a factor in shaping social behaviour. Even in its elementary early forms, codification meant two things. One, law gets objectified as a pattern of conduct and decision as being embodied in, and thereby reduced to, a given objectification. Two, this development is not isolated, or limited to some of the law's components. Objectification becomes the law's form of existence that also determines its particularity. Law is to become a means of social mediation by virtue of the fact that it breaks away from the factuality of everyday practice and becomes the measure, the normative pattern, of this practice, confronted to it as its model asserted by the force of its special validity. This is a pattern of conduct previously recorded and enacted in due form, so that it offers a reference for modelling (foreseeing in its consequences, and thereby planning and selecting) a conduct to be followed. At the same time, this is an objectification bound to being formally enacted. It is freely shapable as it is a function of the act of its enactment.

From the point of view of traditional Marxism, law may be said to be the expression of economic relations and the given state of class struggle. Accordingly, its development is to be characterized mostly by its changes in contents and by the ef-

fects it exerts as a brake on, or accelerator of, the total socio-economic process. However, considering the fact that the law's forms of organization are the vehicles of any specially legal functioning, the study of the development of *legal forms* is of an equal importance, even if instrumentally interrelated to the contents of their functioning. According to the arguments set forth in the present paper, the general outcome of any development as to law as a form is the increase of the *formal rationality* of the patterns of conduct and decision concerned, and thereby the possibility of ensuring unambigousness, manageability and calculability to their practical use at increasingly higher levels with the increasingly complex ensemble of the legal means of influencing society. Formal rationalization is not an aim in itself: it underpins the efficiency of power.

The development of law as a form may take two directions. First, it gets *objectified* in a linguistic form in order to set up identifiable patterns. This form is the vehicle of not merely incidental contents. Step by step, the wording itself is going to be considered the embodiment of law itself. The identification of the law with its wording will finally be expressed in a manner recognizable from external signs by reducing law to what has been formally enacted. Two, the form the law has taken is *structured*, organized and conceptualized in a manner ensuring formal rationality. The aim is to render law recognizable and manageable in a way that results in uniform standardized practice even when being applied to a mass of cases.

This can be achieved by giving a formally rational structure to the *form* that embodies the law. Generally speaking, this is the better alternative. In this instance, it is the enacted normative legal objectivation that gains a formally rationalized structure. On the other hand, it can also be achieved in a way that, in addition to the enacted normative legal objectivation, a *separate* objectivation is established as its formally rationalized organization. In this case, legal objectivation and the formal rationalization of its contents are separated from one another. The latter has no formal valid-

ity at all; it may only gain a persuasive force and a kind of social validity exclusively by its contents. Such a solution is preferred mainly when there is insufficient power to enact laws (e.g. in feudal particularism); if exaggerated adherence to forms already known does not allow their replacement by more rational ones for reasons dictated by tradition (e.g. precedents in Common Law); or when inertia sticking to the line of least resistance prevents to overcome old forms (e.g. the stagnation, or only partial success, of codification in Afro-Asian law-modernization processes, or its deflection along doctrinal paths in present-day Scandinavian development). Finally, formal rationalization of law can also be carried out in *compromise* forms. The most common of these is when the old form maintains its authority, but gets at the same time duplicated as an element in a more comprehensive system, which displays already a certain degree of formal rationality (e.g. consolidation, compilation, etc. in Continental Law and Common Law).

Social demand for the law's formal rationalization is considerably broader than the opportunity to legislatorily ensure it. When there is no such opportunity, the necessity felt may find other ways to pioneer a path for itself. These are the instances when the *"formless" forms* serving the operation of the same function (albeit in a roundabout way) develop.

Two great alternatives of legal rationalization through codification arose in the course of history. One of them is the consolidation of all legal norms in one body of laws. A normatively objectified *objective* unity of norms is achieved by this: the re-enactment of individual norms as elements of a *common* objectivation covering the *whole* field of the law. This is only the summation of the normative material of the law in a *quantitative* sense, since, beyond their co-enactment, no new quality is added to the norms and their relationship. Its only effect is the mere chance of not to re-enacting again contradictory, repetitive, or purely ceremonial formulations. It is only through this that it may reduce the quantity of law to a certain degree. In contrast with this, the other alternative is the re-organization of legal objectivation as elements of a logically arranged coherent system. The objectivation of the

normative material of law as a system presupposes a complete "technological" restructuring, together with all of the institutional, ideological,etc. consequences of this. Here norms are also enacted as components of a normatively established objective unity with the by-effect of quantitatively reducing the normative material to a certain degree; but all at a *qualitatively* higher level.

Historically, two social forces were at play in the qualitative restructuring of the law. First, the rising *bourgeoisie*, which demanded structures guaranteed (i.e. predictable and calculable) by the law for an economic organization based on rational capital calculation. Second, the absolutist *ruler* who had risen above feudal division by calling to life an efficient bureaucratic organization of the state, in order to back up the exercise of his own rule and deal with its increased (financial, military, economic, etc.) tasks. And, only in a loose function of them, development in the modern age in any case demanded changes in law, also in formal sense. On the one hand, the national *unification of the law* was in the interests of both bourgeois strata and the ruler. On the other, accelerating socio-economic development demanded the *deepening of legal control* and also *its expansion* to new fields. In this situation the merely quantitative methods of formal rationalization could no longer have a rationalizing effect to the sufficient depth. Both socio-economic impetuses and the intellectual heritage (Cartesianism, the axiomatic concept of natural law, the methodological idea of *mathesis universalis* and the system-creating ambitions apparent in ideal constructions and doctrinal treatments of the law) paved the way for the qualitative renewal of the body of all the law in codification.

This approach, as the ideal type of objectifying, structuring, etc. the law, generated new requirements and a new institutional set-up and ideology for the practical implementation and application of law. Objectifying the law as a system raised also the question of regulatory *completeness* as a new quality. Going beyond the earlier quasi-mechanical concept, a feature of the quantitative approach was one of the most general features of this new quality. Exegesis in the first half of the 19th

century proved to be a great paradox to serve as a transmission to the new type, as exegesis had as its ideal a kind of "mechanical" law-application.

Classical codification ensured an adequate dialectical interplay between the closedness and openness of regulation, making it possible to adapt to changing circumstances. At the same time, as codification remained a non-recurring movement historically, the new requirements broke new ground for themselves outside the code. This was the practical dissolution of the strict application of code through judicial practice in Continental Europe.

Socialist codification was born in continuation, and as a completion of classical codification. It has developed some new features. One of them is the reference to directly social values. And the other is its claim to be born by a social revolution which consciously accepts dynamism. It is claimed to have no ambitions to perpetuate and ossify existing relations, but to be the changing product and means of social planning and influencing. Thus it accepts re-codification.

Considering the most general lessons of codification development, we can only state that social development seems to proceed towards increasing complexity. Legal mediation fulfils increasingly differentiated functions in the sphere of economic organization and social relationships. It is to become an increasingly independent organizing and influencing factor. This is to say that it gets increasingly socialized. It results in the growing specificities of the law's function, structure, etc. and also in the rising importance of the social demand for its organization and implementation as a system. There is an apparent contradiction here. For with the increase in the relative autonomy of law, the social demand for its more direct and flexible shapability also increases. Therefore, the tendency towards its increasing differentiation is to a considerable extent counterbalanced by its tendency towards increased flexibility and sociability.

Keeping all these considerations in mind, some general conclusions about codification can be summarized as follows:

First, *socio-economic development* ultimately produces *codification*, but codification is not a direct function of any definite level of socio-economic development.

Secondly, the idea to have a *"general code"* that embodies the whole body of the law is simply utopian. For law, which is expected, in its own way, both to reflect and advance the dynamism of social processes, cannot be based on a system with axiomatic organization and rigidity.

Thirdly, legal structure must be developed rationally notwithstanding. And, considering that law itself is a particular social objectivation, it may be desirable that a *rational structure* shall be developed in *legal objectivation* itself.

Fourthly, codification can be used for compiling comprehensive units of the law's normative material in *one textual body*. But in itself this will only be a framework, and not the exclusive body, of the law.

Fifthly, not the entirety of the law, but *only* its *areas* specifically suitable for this very special kind of objectification is to be codified. Or, the mere fact that codification has been carried out in given fields does not exclude the reasonableness of quasi-codification methods (consolidation, revision, etc.) or other forms of rationalization in respect to other fields of the same system.

Sixthly, any process of codification is only valuable within the accepted *dynamism* of the law. For the aim of the modern methods of codification is not to stiffen the law, but to give it a referrable structure, by elevating the mass of principles, rules, exceptions and other provisions that make up the regulatory body of law from casual incidentality to the level *of a well-arranged system*.

Seventhly, there is no longer a sharp opposition between *code-law* and *judge-made law*. The spectacular polarity between Civil Law and Common Law, characteristic till the end of the 19th century, has since been superseded by development. As is known, the classical contrast between anarchy and planning in economy has since also been replaced by substantially more differentiated, more complex forms, that ensure feed-back mechanisms. As to codification, I have argued for the establishment

of codes as the most developed method of formal rationalization under prevailing conditions, but not to be meant as a panacea for reducing law to rules enacted in the work of codification. Codified (statutory) law and judicial (case) law may nevertheless continue to characterize the fundamental directions of Civil Law and Common Law. But neither of these is asserted any longer in their original purity. And, what is even more significant, theirs is a mere competition, where a knock-out is out of the question; it is a *competition for primacy* within mutual influencing.

Codification, in its factuality, is pure *form:* a means for organizing and objectifying given contents. Therefore its shape is to a large extent a function of the *social need* it is expected to meet. Its historical types, instrumental components and future destiny depend, therefore, on the need to fulfil the particular function it is able to and on the total movement of society that ultimately conditions it.

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POSTSCRIPT

CODIFICATION ON THE THRESHOLD OF THE THIRD MILLENNIUM*

I. CODIFICATION NOW

What are the developments of the past quarter of a century in the field of codification?[1]

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[*] In its first version, a postscript to Csaba Varga *A kodifikáció mint társadalmi-történelmi jelenség* [1979] 2., jav. és bőv. kiad. (Budapest: Akadémiai Kiadó 2002), pp. 379–403. In English, cf. {as abstracted in *Law and Politics – In Search of Balance* Abstracts: Special Workshops and Working Groups [IVR 21st World Congress] ed. Christofer Wong (Lund: [Media-Tryck] 2003), pp. 207–208} in *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–117 {& <http://www.akademiai.com/content/cv56l91505t7k36q/fulltext.pdf>} & in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 189–214. In French, cf. 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800 {& as 'Codification et recodification: Idées, tendances, modèles et résultats contemporains' in *Studia Universitatis Babeş–Bolyai* Iurisprudentia, LIII (iulie–decembrie 2008) 2 [*La recodification et les tendances actuelles du droit privé* Bălţi, 9–12 octombrie 2008], pp. 11–29 & <http://studia.law.ubbcluj.ro/articole.php?an=2008>}.

[1] As antecedents, cf., by the author, *Codification as a Socio-historical Phenomenon* [in its original version in Hungarian, 1979] (Budapest: Akadémiai Kiadó 1991) viii + 391 pp. and 'A kodifikáció és határai' [Codification and its limits] *Állam és Igazgatás* XXVIII (1978) 8–9, pp. 702–718 as well as, in a recent summary, 'Codification' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland 1999), pp. 120–122 [Garland Reference Library of the Humanities 1743]. Cf., as reviews on previously published chapters of the monograph, Gérard Conac in *Revue internationale de Droit comparé* 29 (1977) 4, pp. 861–862; М. А. Супатаев [M. A. Supataev] in *Советское Государство и Право* [*Sovetskoe gossudarstvo i pravo*] 1978/12, p. 148; in *An Overview of Sociological Research in Hungary* ed. Tamás Szentes (Budapest: Akadémiai Kiadó 1978), p. 86; in *Strane pravne zivot* [Belgrade] (1978), No. 98, pp. 26–28; Jörgen Dalberg-Larsen in *Retfaerd* [Copenhagen] (1978), No. 8, pp. 86–93; Braun-Otto Bryde in *Rabels Zeitschrift für ausländisches Privatrecht* 42 (1978) 3, pp. 587–588; Karl Eckhart Heinz in *Archiv für Rechts- und Sozialphilosophie* LXV (1979) 1, pp. 146–148; María del Refugio González in *Boletino Mexicano de Derecho Comparado* XII (1979), No. 34, pp. 300–302; on the monograph in Hungarian, in *Jogtudományi Közlöny* XXXII (1977) 4, pp. 233–240; Fausto E. Rodríguez in *Boletino Mexicano de Derecho Comparado* XII (1979), No. 35, pp. 672–673; Péter Malonyai in *Magyar Nemzet* XXXVI (1980) 199, p. 4; Antal Visegrády in *Állam- és Jogtudomány* XXIII (1980) 3, pp. 534–539, F[erenc] Majoros in *Revue internationale de Droit comparé* 32 (1980) 4, pp. 873–876; J[ózsef] Szabó in *Österreichische Zeitschrift für öffentliches Recht* 32 (1981) 1, pp. 123–128; L[eonard] Bianchi in *Právny Obzor* [Bratislava] 64 (1981) 1, pp.

The practice appears to have been following without disturbance the paths already covered, driven by its own impulse. At the same time, while setting new targets by re-dreaming thousand-year-old dreams, whether European or commonly shared, in response to the present-day policies of the European Union, theory seems to be ready to revise and even reverse earlier perspectives that were apparently thoroughly established and conventionalised, and hopes now to beat new paths. Debating policies and methodologies in terms of codification is fashionable again: it is in the focus of discussions and its dilemmas appear vital as regards our decisions on the future.

Considering the distinctive episodes of the recent past in terms of mere data, more than fifty codes have been promulgated since the end of the World War Two. The complete re-drafting of the classical civil codes in Portugal (1967), the Netherlands (1992) and Quebec (1994),[2] of the penal codes in Spain (1995),[3] France and Belgium, as well as the civil law re-codification in Louisiana, Germany (for the law of contracts) and the Central and Eastern European region, Russia (1996), and in preparation in Poland and Hungary (supplemented also by re-codification of criminal law in the latter), all represent developments of the recent past.[4]

60–63; Stefan Šipoš in *Universitate Babeş-Bolyai: Iurisprudentia* [Cluj] 26 (1981) l, pp. 76–78; in *Реферативный Журналь по общественные науки за Рубежём* 4: Государство и Право [*Referativniy zhurnal po obshestvennie nauki* Gossudarstvo i Pravo, Moscow] 1981/4, pp. 26–29; György Bónis in *Századok* CXV (1981) 6, pp. 1325–1327; Endre Nagy in *Állam és Igazgatás* XXXII (1982) 6, pp. 506–514; Vera Bolgár in *The American Journal of Comparative Law* 30 (1982) 4, pp. 698–703; Georg Brunner in *Rabels Zeitschrift für ausländisches Privatrecht* 46 (1982) 3, pp. 579–580; Imre Szabó in *Magyar Jog* XXX (1983) 7, pp. 592–603 and in his *Ember és jog* Jogelméleti tanulmányok [Man and law: studies in legal theory] (Budapest: Akadémiai Kiadó 1987), pp. 94–106; János Frivaldszky in *Jogtudományi Közlöny* LIX (2004) 8, pp. 260–262; on the monograph in English, *International Review of Social History* 38 (1993) 2 in <http://www.iisg.nl/irsh/38-2-bib.php>; Denis Tallon in Revue internationale de Droit comparé 44 (1992) 3, pp. 740–741 {& <http://www.persee.fr/showPage.do?zoom=0&urn=ridc_0035-3337_1992_num_44_3_4566&pageId=ridc_0035-3337_1992_num_44_3_T1_0740_0000>}; Paolo Cappellini in *Quaderni Fiorentini* XXI (1992), pp. 595–599; Norman S. Marsh in *International and Comparative Law Quarterly* 42 (July 1993) 3, pp. 747–748; Pierre Legrand 'Strange Power of Words: Codification Situated' *Tulane European & Civil Law Forum* 9 (1994), pp. 1–33; Paolo di Lucia in *Sociologia del Diritto* 21 (1994) 1, pp. 201–203.

[2] Cf., e.g., Pierre Legrand 'De la profonde incivilité du Code Civil de Québec', pp. 1–13 and Sylvie Parent 'Le Code civil de Québec: incivilité ou opportunité', pp. 15–25, both in *Revue interdisciplinaire d'Études juridiques* (1996), No. 36. The fact that the doctrine, masterly deepened with exemplary accuracy, of the Civil Code was completed in practically the last moment of its effect–*Quebec Civil Law* An Introduction to Quebec Private Law, ed. John E. C. Brierley & Roderick A. Macdonald (Toronto: Edmond Montgomery Publications Ltd. 1993) lviii + 728 pp.–, just to be replaced by an utterly new concept of codal implementation, indicates the defencelessness of mere theorising at all times.

[3] Cf., e.g., Marta Gracia Blanco 'Codification et droit de la postmodernité: La création du nouveau Code pénal espagnol de 1995' *Droit et Société* (1998), No. 40, pp. 509–534.

[4] Cf., e.g., *Renaissance der Idee der Kodifikation* Das neue niederländische Bürgerliche Gesetzbuch 1992, hrsg. Franz Bydlinski, Theo Mayer-Maly & Johannes W. Pichler (Wien, Köln & Weimar:

1. With Ethos Changed

First, in the guise of a general observation, a rather striking statement can be made. Notably, as the end of the second millennium was approaching, codification itself started increasingly to lose in purity and in the consistency of its classical ideals that once used to constitute a strict and coherent system. And this holds good in more than one aspect. On the one hand, the supremacy of statutory law, with its function of exhaustively embodying the law, gradually is showing signs of waning.[5] On the other hand (and as a result of the above), the requirement developed half a century ago as a logical perfection of the European ideal of codification, namely that a determination of the law to be codified be maintained through re-drafting law-codes periodically, by keeping pace with changing historical, economic and social conditions given at any time, has itself weakened. (As is known, it is socialist codification that, having set itself the objective of the embodiment of the law as a code, realised this requirement in the most principled way, purely and consequently, and also served as a pattern that later became–through the pressure of the need for modernisation–a model enthusiastically followed by the Afro–Asiatic developing countries.)

For practical considerations, this leap into the opposite extreme can be perceived as a pendulum-effect. From now on, it is not re-codification any longer but the utter negation of codification itself (i.e., the abandonment of codification in order to reach a state of "de-codification"[6]) that comes to the forefront more and more forcefully as a new landmark. More precisely, the emphasis is increasingly shifting from the code itself to the actual filling of one-time code-like functions. In other words, the systemic form of making the law objective and suitable to provide a seamless response to any question at will within its field of regulation seems to be eventually substituted by the actuality of whatever reply was only channelled by the code, maybe by providing nothing but systemic or taxonomic loci to which, conceptually or institutionally, the freely contextualisable judicial opinion

Böhlau 1992), 157 pp. [Schriften zur Rechtspolitik 5]; Rodolfo Sacco 'Codificare: mode suprato di legifare?' *Rivista di diritto civile* XXIX (1983) 1, pp. 117 et seq., specially at p. 120; as well as Konrad Zweigert & Hans-Jürgen Puttfarken 'Allgemeines und besonderes zur Kodifikation' in *Festschrift für Imre Zajtay* hrsg. Ronald H. Graveson (Tübingen: Mohr 1982), pp. 569–580.

[5] According to Friedrich Kübler 'Kodifikation und Demokratie' *Juristenzeitung* 24 (1969) 20, pp. 645–651, especially at p. 651, the crisis of the law in general is "nothing but normal in a democratic industrial society [where] the fragmentary and periodical character of the statute is a part of the ordinary state of affairs". A similar view can be found in, e.g., Josef Esser 'Gesetzesrationalität im Kodifikationszeitalter und heute' in *100 Jahre oberste deutsche Justizbehörde* Vom Reichjustizamt zum Bundesministerium der Justiz, hrsg. Hans-Jochen Vogel & Josef Esser (Tübingen: Mohr 1977), pp. 13–40 [Recht und Staat in Geschichte und Gegenwart 470].

[6] Natalino Irti *L'età della decodificazione* 3rd ed. (Milano: Giuffrè 1989) 195 pp.

may refer.[7] According to the new mainstream opinion–regarded as exclusively justified by the ideologies of postmodernity–, the alleged "authoritarianism of codification" of the past will have to yield its place (both as an ideal and as the technique of regulatory practice) to a kind of "democratic openness",[8] in pursuance of development typologies mostly rooted in American experience but increasingly generalised so as to include European practices as well.[9]

As a logical consequence of this, present-day legislators tend to leave behind all former endeavours attempting systemic purity and consistency (as if these were nothing but instances of a kind of doctrinarian atavism), only to make way for the pragmatism of borrowing from nearly anywhere, and thereby accepting both the partialness and fragmentation of results.[10] In addition to all these, a new kind of localism, transitionalism and pragmatism, making headway under the aegis of globalism, is rapidly gaining ground, and explains the attempt at absolutising currently ongoing endeavours with the wish to re-write the past also (a practice far from unfamiliar in the France of earlier days). Notably, a paradigmatic shift is at stake as a tendency becoming more and more general, in terms of which the codification once completed by NAPOLEON, along with its magnificent and lasting type-framing features, seems nowadays to be

[7] According to the expression of Sacco 'Codificare' [note 4], p. 125, it is no longer the code-form that is superior but the idea of its (suit)ability to offer a solution, for, „Il codice non è [...] superato. È superata l'idea che un codice possa nascere privo di lacune, e che la sua sola lettera possa offrire une buone soluzione per tutti i possibili casi del futuro."

[8] According to Kübler 'Kodification und Demokratie' [note 5], p. 651, there is a "change of the authoritarian codification state towards a system aiming at democratic openness where legislation has become a political instrument of a permanently required adjustment" in progress. According to Valérie Lasserre-Kiesow–'La codification en Allemande au XVIIIe siècle: Réflexions sur la codification d'hier et d'aujourd'hui' *Archives de Philosophie du Droit* 42 (1998), pp. 215–231, quotation on pp. 223 and 231–, "the future is no longer to be found in the past. [...] [C]odification based on paradigms of statism as well as on perfection of form and contents certainly does not have any future any longer."

[9] See, as a first formulation, by the author, 'Átalakulóban a jog?' [Law in transformation?] *Állam- és Jogtudomány* XXIII (1980) 4, pp. 670–680 and 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives' in *Legal Development and Comparative Law* ed. Zoltán Péteri & Vanda Lamm (Budapest: Akadémiai Kiadó 1981), pp. 45–76, particularly para. 5, as inspired by Richard A. Wasserstrom *The Judicial Decision* Toward a Theory of Legal Justification (Stanford: Stanford University Press 1961) 197 pp. and especially pp. 122 et seq.; Per Olof Bolding 'Reliance on Authorities or Open Debate? Two Models of Legal Argumentation' *Scandinavian Studies in Law* 13 (Stockholm: Almqvist & Wiksell 1969), pp. 59–71 and especially pp. 65 et seq.; Roberto Mangabeira Unger *Law in Modern Society* Toward a Criticism of Social Theory (New York & London: The Free Press 1976) ix + 309 pp. and especially ch. II; and, especially, Philippe Nonet & Philip Selznick *Law and Society in Transition* Toward Responsive Law (New York: Harper & Row 1978) vi + 122 pp.

[10] According to Jean-Louis Bergel 'Les méthodes de codification dans les pays de droit mixte' in *La formation du droit national dans les pays de droit mixte* (Aix-Marseille: Presses Universitaires d'Aix-Marseilles 1989), pp. 21–34, "from now on, there is nothing but mixed laws" (p. 34), because "the mixed character grows widespread by becoming the general rule" (p. 35).

swept out of collective memory and taken notice of, if at all, rather as a historically incidental exception in the birthplace of classical codification, only to relativise the very term 'codification' (along with the idea and the historical achievement represented by its one-time realisation), by reducing its meaning to the practice of rationalising one aspect of the mass-scale and all-inclusive management implied by today's public administration, that is, to the continuous consolidation of its legal normative stuff (from statutes to governmental decrees, including administrative regulations).[11]

This short-sighted and extreme simplification (forecasting "the end of history" with all the a-historical conceptual misrepresentation inherent in FRANCIS FUKUYAMA's contemporary Utopianism)–in addition to its rather controversial nature, as such a 'codification', taken as a genuine piece of consolidation, has to first "transcript", then "transgress" the positivated legal stuff it has processed, tearing this stuff out from its original texture by placing it into another context, and thereby finally "transdict" it[12]–is not only sheer "conceptual abuse"[13] but is obviously indicative of decline, too.[14] All this slowly starts to characterise our age to an extent that some observers believe they

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[11] As a vice-president of the National Committee for Codification, Guy Braibant–'Codification' in *Encyclopaedia Universalis* 6 (Paris: Encyclopaedia Universalis 1995), pp. 39–42–has visualised today's practice, drowned in everyday hygiene and weak through lacking any concept, as the great universal achievement of mankind. Because, although "codification has been an ancient dream of mankind" (p. 39), yet its manifestations "hardly have more value than the texts adopted or issued by them". Namely, "codification itself is nothing else than the operation or policy of the fabrication of codes, through re-arranging former norms or creating new norms." (p. 39) Accordingly, the term 'codification' itself has a twofold meaning. True, there was once also "a great work of codification", the *Code civil,* yet, today "systematic codes" are also available to us. For–he goes on–"the renaissance [of codification] took place after the [Second World] War" (p. 40).

[12] Terms by Gérard Timsit 'La codification: transcription ou transgression de la loi?' in his *Archipel de la norme* (Paris: Presses Universitaires de France 1997), ch. V, pp. 145–159, especially at pp. 151, 155 and also 159. Actually, TIMSIT speaks about consolidation, yet, indicative of uninhibited actualisation, he terms it codification all along [as done also by both Elisabeth Catta 'Codification et la loi fétiche' in *Interpréter le droit* Le sens, l'interprête, la machine, dir. Claude Thomasset & Danièle Bourcier (Bruxelles: Bruylant 1997), pp. 63–69 and Denys de Bèchillon 'L'imaginaire d'un code' *Droits* (1998), No. 27: La codification 3, pp. 173–184], and blames it basically for "transcendence of the limits of the law" (p. 151) and for "a mummification of the law" (p. 159), that is, for the fact that exactly this false codification, operating with original sources of the law, falsifies them unpronouncedly, because it re-positivates them in a new context and medium.

[13] This conceptual extension is expressly considered as an abuse by, e.g., Dominique Gaurieu 'La rédaction des normes juridiques, source de la métamorphose du droit? Quelques repères historiques pour une réflexion contemporaine' *Revue générale de droit* [Ottawa] 31 (2001) 1, pp. 1–85.

[14] Having apparently passed the great moments of codification once and for all (accompanied by the gradual erosion of the belief in rational plannability and in any *Gesamtplan*'s logical executability, in addition to the lack of appropriate political and legal circumstances) may perhaps account for the fact that "The importance of codes will decrease, and the drafting of truly new ones–capturing and organizing new realities–will be, at least for the moment, an almost impossible task." Mirjan Damaska 'On Circumstances Favoring Codification' *Revista Jurídica de la Universidad de Puerto Rico* LII (1983) 2, pp. 355–371, quotation on p. 370.

can discover exactly opposite, counter-running tendencies among the trends in the United States of America and in the European Union, pointing out that while there re-assertion or launching of codification has been put on the agenda, here on our continent, it is de-codification.[15]

2. Undermined by Disappointment

A kind of scepticism has become general–first in the form of disillusionment, then as a general awakening, due to the vanishing of the myths of the European ideal of codification[16]–which, as extended also to the past, has gradually but surely been transferred from a loss of the confidence placed in the regulatory force of and normative foresight by the law, to a general disappointment in codification itself. Some present-day sober explanations trace this back to over-intensified yet puristic expectations (and, in this regard, doctrinarian as well), which were thus excessive throughout (and, therefore, impractical, having consequently proved unsuitable to stand the test of time), fixed back in the age of the Enlightenment, which was the birth of classical codification.[17] We can immediately draw a conclusion from this recognition, according to which codification could prove successful with lasting effects and applicable in the long run only where its drafters were the least inclined to over-enthusiasm.[18] We seem to have left behind once and for all–as the one-time children's room of our (post)modernity–the claim to be codifying the law with the intent of "establishing a new unified legal system". We are only going to draw on codification in as much as it is inevitable "to safeguard the interests of the community by restricting, as far as possible, the political aspects and influence of different lobbyists"[19]–not ex-

[15] Shael Herman 'The Fate and the Future of Codification in America' in *Essays on European Law and Israel* ed. Alfred Mordechai Rabello (Jerusalem: The Harry & Michael Sacher Institute for Legislative Research and Comparative Law [of the Hebrew University] 1996), pp. 89–129, especially p. 124.

[16] E.g., André-Jean Arnaud *Pour une pensée juridique européenne* (Paris: Presses Universitaires de France 1991) 304 pp. [Les voies du droit] speaks on p. 294 about "reassuring, alleviating myths of the simplicity, permanence and abstract character of the law".

[17] E.g., Karsten Schmidt *Die Zukunft der Kodifikationsidee* Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts (Heidelberg: Müller 1985) 79 pp. [Juristische Studiengesellschaft "Karlsruhe" 167].

[18] "The reason why in Countries with old Civil Codes the courts are still able to find their way lies in the fact that legislators did not attempt too much." Werner Lorenz 'On the »Calling« of Our Time for Civil Legislation' in *Questions of Civil Law Codification* ed. Attila Harmathy & Ágnes Németh (Budapest: Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences 1990), pp. 118–129 on p. 128.

[19] Hein Kötz 'Schuldrechtsüberarbeitung und Kodifikationsprinzip' in *Festschrift für Wolfram Müller-Freienfels* hrsg. Albrecht Dieckmann et al. (Baden-Baden: Nomos 1986), pp. 395–407 at p. 397 and, for contrasting past and future, cf. also Attila Harmathy 'Codification in a Period of

cluding the possibility either that the instrument of classical codification will one day be replaced by artificial intelligence and its new media technologies.[20]

Transition' *U[niversity of]C[alifornia] Davis Law Review* 31 (Spring 1998) 3, pp. 783–798, quotation on p. 789. It is worthwhile to notice the irony inherent in the fact that the image of the past formed by such prominent civilian authors about codification, taken once as a creative power, is nothing other than the image of future major expectations formed within the European Union. Or, this is a proof that even if history does not repeat itself, we do so ourselves. Thanks to our urge to adapt, we again and again draw on the past, and its experiences and instrumentalities.

[20] "The arduous road to new integration will probably be paved by artificial intelligence better able to detect patterns in the complexity of the modern social life." Damaska 'On Circumstances…' [note 14], ibid.

3. Systemicity as the Core Element

Well, what is codification like and where is it heading at the threshold of the new millennium? Most responses seem to confirm my earlier monographic stand,[21] which is seen by certain dreamers of our future as something hopelessly embedded in (as formed by) the ideals of the past, therefore statist, and, so as to declare what the law is, authoritarian—or, briefly stated: atavistic and, as such, to be transcended. In sharp contrast with this, there is only an elastic, wishful image formed about the character of the future European civil code, vaguely sketched with exploratory uncertainty, far from being discernible in any aspect.

According to the theoretical literature (leaving out of account, for the moment, the deconstructive reconstructions of the near future), the core of codification is still the idea of a system manifested in both its composition and structuring, doctrinal reflection and conceptual building up, including the judicial practice of referring to code-based definitions of institutions, legal constructs and dispositions as well:[22]

> "Putting an end to the rule of the fuzzy and uncertain, wrongly cut boundaries and of the only approximate classifications, by applying definite cuts and creating sharp boundaries, replacing the former by setting up clear classes."[23]

Or, codification invariably appears (1) as an exclusive body of law, (2) implementing unity in its regulatory field and (3) with logical coherence and

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[21] Cf., Varga *Codification…* [note 1], passim.

[22] See, first of all (though tacitly admitting to be unable to comprehend the entire continental approach to law beyond the separation of what is systemic and what is non-systemic), M. D. A. Freeman 'The Concept of Codification' *The Jewish Law Annual* 2 (1979), pp. 168–179, especially at p. 169. For the development in history of the concepts 'system' and 'legal system', see, from René Sève, 'Introduction', pp. 1–10, and, for their analysis by example of the *Code civil*, his 'Système et code', pp. 22–86, both in *Archives de Philosophie du Droit* 31: Le système juridique (1986).

[23] Pierre Bourdieu 'Habitus, code et codification' *Actes de la recherche en siences sociales* (1986), No. 64, pp. 4–44, quotation on p. 42, claiming that the "the system is built on […] cognition as universal, through the inseparably logical and ethical necessity of it" (p. 4).

consequentiality;[24] or, showing the features of (1) completeness, (2) freedom from contradictions and (3) regulatory economy;[25] or, furthermore, of a (1) comprehensive and (2) systematic (3) enactment by the legislature,[26] (4) promulgated as a code.[27] The theoretical attitude is conservative here: types of codification have started to diverge, including those once the paths for the mere collection and textual embodiment of laws, I once termed as the quantitative, and later on, the systemic reshaping of the law according to the logical ideal of a system, I once termed as the qualitative. Also, the notion implied by the terms 'code' and 'codification' has become reduced to mean just the latter, that is, the qualitative type, carrying–as a *sine qua non*–the criterion of systemicity regarding the law processed throughout.

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[24] Michel Humbert 'Les XII Tables, une codification?' *Droits* (1998), No. 27: La codification 3, pp. 87–112, applies the collective incidence of all these characteristics to qualify the *lex duodecim tabularum* as a code (pp. 110–111). According to Arnaud *Pour une pensée...* [note 16], p. 135, codification is a "coherent and systematic regulation" achieved through "exhaustive totalisation" which, according to R. C. van Caenegem *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press 1992) viii + 215 pp., especially at p. 12, denotes "a general, exhaustive regulation of a particular area of law", by "involving a coherent programme and a consistent logical structure".

[25] François Ost 'Le code et le dictionnaire: Acceptabilité linguistique et validité juridique' *Sociologie et sociétés* XVIII (avril 1986) 1, pp. 59–75.

[26] Reinhard Zimmermann 'Codification: History and Present Signification of an Idea' *European Review of Private Law* 8 (1995) 1, pp. 95–120, especially pp. 96–97. R. C. van Caenegem *Judges, Legislators & Professors* Chapters in European Legal History [Goodhart Lectures 1984–1985] (Cambridge: Cambridge University Press 1987) x + 205 pp., on p. 42 defines the code as a comprehensive and systematic exposition replacing all previous laws in a new text promulgated as a law. Barbara Dölemayer 'Zivilrechtliche Kodifikationen in Europa im 19. Jahrhundert' in *Evolution of the Judicial Law in XIX*th *Century* ed. Grzegorz Górski {= *Law in History* [Lublin] 1 (2000)}, pp. 117–130, on p. 118 identifies it simply as the "materially comprehensive, systematic, abstract and rational regulation of an entire area of law summarised in a code (*codex*)" [„materiell umfassenden, systematischen, abstrakten und rationalen Regelung eines ganzen Rechtsgebiets in einem Gesetzbuch (codex)"].

[27] Of course, there are softer definitions as well. According to Tullio Ascarelli 'L'idea di codice nel diritto privato e la funzione dell'interpretazione' [1955] in his *Saggi giuridici* (Milano: Giuffrè 1949), pp. 48–49, for instance, "The code is characterised by a claim to construct a »new«, »complete«, and »definitive« legal order that includes amongst its formulations solutions for all possible cases", and, as stated by Pio Caroni *Lecciones catalanas sobre la historia de la codificación* [Lezioni catalane sulla storia della codificazione] (Madrid: Marcial Pons 1996) 177 pp. [Publicaciones del Seminario de Historia del Derecho de Barcelona 1], especially at pp. 22–23, the code is a "written presentation aiming at plenitude, with a unificatory function".

4. Challenge by the European Union

Well, it is exactly this differentiation that seems to be disappearing as an outdated past achievement from the postmodernist visions of the political voluntarism of the European Union, not yet equipped with any encouraging practical experience in an all-comprehensive codificatory regulation.

The first guinea pig for experimentation in this immense ongoing endeavour is the effort at elaborating, one way or another, the codification of private law of the European Union. For the time being, we know less about the underlying motives and perspectives of common European legislation (including the clarification of the theoretical foundations and necessity of a systematic codification), which is reminiscent of the classical period of drafting constitutions and law-codes as well, than about the nature of "democratism" characterised by constant hesitation and an easy readiness to launch the bureaucratic machinery of common legislation in motion. No doubt, the dilemmas regarding the legal expression of the foundation of national states in the 18th to 19th centuries will gain new aspects in the current rush to found a truly inter-national state. Therefore, I still find invariably remarkable the lessons drawn two centuries ago, according to which "codes and constitutions have performed analogous institutional roles" in the legal performance of the political and civil foundations of a society, supporting and complementing one another in the historically parallel rush to provide basic chartae and law-books.[28]

Well, returning to the issues pertaining to the common European codification, all we could ascertain about its outlines so far is that

- it does not aim at abstract conceptual clarity, consistency or exclusive pursuance of any ideal or actual model;[29] it will presumably represent the entire European and even all-Atlantic heritage in the tradition of values and techniques as a practical whole in a (perhaps even mosaic-like) new quality. At the same time,
- it does not aim at perfection, nor at any exclusive completeness.[30] As the result of a new definition of the law, it will have to accept openly –in the context of constantly changing interests and depending on the institutional moves at any given time–a purely temporary and

[28] Cf. Antonio Gambaro 'Codes and Constitutions in Civil Law' in *Italian Studies in Law* 2, ed. Alessandro Pizzorusso (Dordrecht, Boston & London: Nijhoff 1994), pp. 79–104, quotation on p. 79.

[29] Jürgen Basedow 'Codification of Private Law in the European Union: The Making of a Hybrid' *European Review of Private Law* 9 (2001) 1, pp. 35–49.

[30] According to Lasserre-Kiesow 'La codification…' [note 8], what once, in the period of classical codification, embodied "the totalisation of knowledge" (p. 221), is nothing else on the final analysis than "a patriotic and habitual juridical exaggeration […] which only hinders the ideal of a legal Europe" (p. 223). In a similar sense, see also Wolfgang Wiegand 'Back to the Future?' *Rechtshistorisches Journal* (1993), Nr. 12, pp. 277–284 on p. 283.

m e d i a t o r y role. Therefore, having drawn the lesson from the failures of codification up to now,

- it can be nothing more than just " c r e e p i n g ".[31] As soon as this figurative expression has reached consensus among the students of law taking part in the debate (also revealing the poet, dreamer, innovator and/or social revolutionary hidden in each of us even if mostly suppressed by our scholarly discipline), the doctrinal (and maybe dry, yet systematic) reasoning of treatises in jurisprudence has become substituted (in a way unheard of in juridical literature of earlier times) by a rhapsodic subjectivism with lists of desires and the boundlessness (almost reminiscent of the ecstasy of the so-called 'honeymoon-period' characteristic of early modern and modern revolutions), even unrestraint and randomness, of a credo of "Anything is possible, because by virtue of the power of such a giant club, we are in a position to target anything at will!".

Accordingly, some keep day-dreaming, hoping that a kind of the desired end-result will after all emerge one way or another, in one form or another, upon the pattern and with the automatism of the '*Volksgeist*' once active in CARL VON SAVIGNY's thought, due to the emerging clarification of principles through their continuous testing in practice and their unflagging re-consideration and adjustments, combining the effect of scholarship and doctrine with the socialising force of living practice and the educational efforts available through general and vocational training.[32] According to other opinions, the desired unity of the European Union can, at most, emerge as the result of endeavours in which the accumulation of principles (to be further shaped, reasserted and represented throughout by a truly inter-national European legal profession, capable of rising above national fragmentation) will be conceived in the womb of common European professional education and business practice, with a unifying legal scholarship and doctrine in the background. Therefore, it is practicality that the new European creed calls for and not pure scientism or self-complacent authorial egoism; for the latter can merely lead to selfishness, yielding only unnecessary complexity and contradiction, i.e., abstract and doctrinaire conceptuality that, as dried-out and lifeless fruits, cannot genuinely respond to the present, truly practical challenge. Or, new PORTALISes are needed, since only the hu-

[31] The term 'to creep' denoting 'to develop slowly and steadily […] in the hope of advancement' was first used by Klaus Peter Berger *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International 1999) xxviii + 376 pp.

[32] Klaus Peter Berger 'The Principles of European Contract Law and the Concept of »Creeping Codification« of Law' *European Review of Private Law* 9 (2001) 1, pp. 21–34.

mility of traditions can provide bases for a codification achieved at the level of foundational principles.[33] Among the authorial convictions, it seems to be a bit too daring to dream further about–reminiscent, first of all, of the patterns offered by the American Restatement of the Law and uniform legislation–experimental preparation of such projects as the Principles of European Contract Law or of European Civil Procedure, so as to be able to decide, given the newly acquired practical experience, how to go on (if one will have decided to go further at all);[34] or, partly preconceiving the response, to leave the consummation of the codifying process to legal practice from the outset, whose result appearing some time in future can, of course, be applied to refine further either the normative material itself or any of its official commentaries.[35] No matter how the European legal profession may decide, we have to be aware of the fact that even if any codification is eventually completed, "[i]t could then take decades before today's level of predictability and rationality of decisions would be reached again."[36] At the same time and in an evident interrelation with this,

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[33] Ole Lando 'Some Features of the Law of Contract in the Third Millennium' *Scandinavian Studies in Law* 40 (Stockholm: Almqvist & Wiksell 2000), pp. 343–402, especially pp. 361–363.

[34] Ewond Hondius 'Towards a European Civil Code' in *Towards a European Civil Code* ed. Arthur Hartkamp, 2nd ed. (Nijmegen: Ars Aequi Libri & The Hague, Boston: Kluwer 1998) xiii + 652 pp., pp. 3–19.

[35] As formulated by Christof U. Schmid 'Legitimacy Conditions for a European Civil Code' *Maastricht Journal of European and Comparative Law* 8 (2001) 3, pp. 277–298, on p. 296, there will be an "integrative Restatement with a common European commentary section", onto which–more and more acceptedly anyway in West-European practice [cf., e.g., Reinhard Schulze 'Vergleichende Gesetzesauslegung und Rechtsangleichung' *Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht* (1997), pp. 183–197 and G. Monateri & A. Somma '»Alien in Rome«: L'uso del diritto comparato come interpretazione analogica ex art. 12 preleggi' *Il Foro Italiano* V (1998), p. 47]–a so-called comparative interpretation is going to be built. Although this seems to contradict the established practice according to which, from the very beginning, a "CARTESian style" has been dominant in the exclusive European judicial forum properly designed so far, i.e., the European Court of Justice, which is allegedly "inspired by the French tradition, in which judgments are more set up as binding conclusions of a quasi-scientific nature than justified argumentatively" [cf., e.g., J. H. H. Weiler 'The Function and Future of European Law' in *Function and Future of European Law* ed. Veijo Heiskanen & Kati Kulovesi (Helsinki: Helsinki University Press 1999), pp. 9–22 [Forum iuris], pp. 17. et seq. and Stefan Leible 'Die Rolle der Rechtsprechung des EuGH bei der europäischen Privatrechtsentwicklung' in *Auf dem Wege zu einem Europäischen Zivilgesetzbuch* hrsg. Dieter Martiny & N. Witzleb (Berlin: Springer 1999), pp. 55. et seq. and pp. 73. et seq. [Schriftenreihe der Juristische Fakultät der Europa-Universität Viadrina Frankfurt]. This is a practice that will, if not accompanied by a total shift in character, be downright inoperable in a kind of regulation carried out mostly on the level of mere principles.

[36] Schmid 'Legitimacy Conditions...' [note 36], p. 287.

• the question of the future duality and/or eventual convergence of the British Common Law and the continental Civil Law is still raised as a vital issue.[37] This old-new question (earlier only a favourite delicacy for legal comparatists to generate intellectual pleasure) has now become, from a vague presentiment of the presumable consequences of a political resolution, the *sine qua non* of such a resolution and its feasible future realisation. For the common European administration of justice as practised in Luxembourg, Strasbourg, etc., for a few decades now has only required commonality of results, while the issue how these have been actually reached remained irrelevant, as well as which ways and what procedures were resorted to and which sources were referred to in the process. However, a common European codification, now contemplated, already penetrates straight into the heart of the law. It presupposes the unification of all the intellectuality and underlying approaches, conceptual thinking, and subordination to logical and systemic forms–that is, sensitivity, skills and styles–that, in their turn and throughout the sequence of centuries, not only offered our continent a scope of law-positivations diverging in nature from those on the British Isles but, so to say, embodied a route and direction diametrically opposite to the hopes placed in this converging European future, both in the historical experience and their scholarly reconstruction, in the conceptual and methodological frameworks of political and constitutional thinking, in the stake and nature of philosophising–or, in sum, in making the choice between the pragmatic reliance on human and social experience or the mere pursuit of the barren logic of preconceived conceptual schemes, and, thereby, also between the empirical (inductive) and the principled and methodical (deductive) ways of construction–from the one-time accomplishment of the entire revolution in natural scientific thought.[38]

[37] The Clifford Chance Millennium Lectures *The Coming together of the Common Law and the Civil Law* ed. Basil S. Markesinis (Oxford & Portland, Oregon: Hart 2000) vii + 255 pp. and, in it, especially Basil S. Markesinis 'Our Debt to Europe: Past, Present, and Future', pp. 37–66; Vivian Crosswald Curran 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union' *The Columbia Journal of European Law* 7 (2001) 1, pp. 63–126. One of the authors–R. H. Helmholtz 'Continental Law and Common Law: Historical Strangers or Companions?' *Duke Law Journal* 1990/6, pp. 1207–1228–remarks in conclusion (p. 1228) that "Common lawyers always wished to avoid some aspects of Continental law, but they also habitually regarded it as a companion and resource to be called upon in need, not as a stranger."

[38] For the differing mentality, cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] and 'Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline' *Acta Juridica Hungarica* 48 (2007) 2, pp. 95–113 {& <http://www.akademiai.com/content/gk485p7w8q5652x3/fulltext.pdf>}.

Or, to put it briefly, quite simply and also simplified professionally: those of us who, ready for action, await orders in order to carry them out, or those who, attending to each other benevolently, hope the diligent acts of detail work (invisible in the humane everyday responsible practice) will produce the long desired result one day, can, at the most, be specialists in comparative law in their entrenchment into legal texts, but by no means historically and anthropologically sensitive thinkers who have, at the same time, to bear in mind the essentials of comparative legal cultures as well.[39] For the latter are those who already know–or at least presume at the level of hypothesis substantiating their approach and explorations–that law is not simply a mechanism built up of interchangeable parts, according to a product-type and operated as a machine, but an aspect of living human culture, separated relatively and only for professional purposes from the other factors and bearers of the order in making at a community level, only to be able with foreseeable security (as having stepped out from the everyday circulation of interests) to direct, influence and control the practice of conflict-resolution according to ready-made patterns, as the case may be, thereby also rendering it impersonal in the spirit of the ethos of the order itself, that is, an external Order that is, like the veil of *Justitia*, necessarily depersonalised.

(As a matter of fact, we can not by far be sure whether or not, if at all, and in which sense, the Anglo–American legal mentality may mean indeed 'rule' by 'law'. For instance, the early failure of the reformist effort by the British Law Commission (aimed at considering codification as late as in 1964) was indicative of an utter confusion as to the generalisability of the law when broken into and embodied by a series of concepts, as well as its arrangement and ordination according to abstract logical forms, with the implied possibility of also subordinating (subsuming) facts to rules.[40] For in their codificatory thought, the Britons used

[39] For their conceptual–and disciplinary–separation and the requirements of the new approach, see, by the author, 'Comparative Legal Cultures: Attempts at Conceptualization' *Acta Juridica Hungarica* 38 (1997) 1–2, pp. 53–63 and 'Comparative Legal Cultures?' [note 39], passim, pondering upon the topic covered by *Comparative Legal Cultures* ed. & introd. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] and *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I].

[40] The effort of Jeremy Bentham–"The unity of a law will depend upon the unity of the species of the act which is the object of it" [in his *Of Laws in General* ed. H. L. A. Hart (London: Athlone Press 1970), p. 166]–was reasserted to ordain the proper obligation or empowerment to each and

to maintain that if law were to be traced back to a (re)posited series of rules at all, what would be most meaningful of all this settlement for the judges could only be the rather informal reasoning based upon the *travaux préparatoires*, indeed worthy of the human intellect. And this is exactly what the 19th-century British-Indian codifier wanted to express when he remembered as follows: "we added as many illustrations as we thought necessary for the purpose of explaining it", and, therefore, it would be most beneficial to include these rules' grounds along with the rules themselves into such codes.[41] Well, they were actually, then and now, trying to beat a path lagging centuries behind GOTTFRIED WILHELM LEIBNIZ' age and recognitions. Actually, the very idea of codification arises from the theoretical understanding that code-based law cannot indeed be anything other than a sheer sequence of abstract and general rules, while the underlying understanding of the common law is still related to the idea of something that can exclusively be grasped empirically, placed somewhere between the casual decision and the grounds for decision, equally drawn from tradition.)

5. The Issue of Convergence

Even just a glance through the literature pouring on this topic[42] is enough to see that there are already painstaking case studies about the intensifying "Europeanisation" of

every behavioural situation as a 'law/right' befitting it; JOLOWICZ' whole venture–*The Division and Classification of the Law* ed. J. A. Jolowicz (London: Butterworths 1970) vi + 905 pp.–set itself the aim of replacing this BENTHAMite dependence on acts by a dependence on social facts; while Julius Stone pointed out–in his *Legal System and Lawyers' Reasonings* (London: Stevens 1964), p. 269–that even the most elementary natural facts (like, e.g., the rotting scrap of a snail found in the beverage, as referred to in *Donoghue v. Stevenson* [1932] A.C. 562), may mean "dead snails, o r any snails, o r any noxious physical foreign body, o r any noxious foreign element, physical or not, o r any noxious element"; as other authors–W. L. Twining, K. O'Donovan & A. Paliwala 'Ernie and the Centipede: Some Theoretical Aspects of Classification for the Purposes of Law Reform' in *The Division...*, pp. 10–29–have also ventured to prove that "a black female poodle puppy can be classified by colour, sex, species or age". Freeman [note 22], pp. 172–173.

[41] *Black v. Clawson* [1975] A.C. 591; Lord THOMAS BABINGTON MACAULAY's letter to Lord AUCKLAND, quoted by John H. Farrar *Law Reform and the Law Commission* (London: Sweet and Maxwell 1974) xv + 151 pp. [Modern Legal Studies] at pp. 58–59; F. Vaughan Hawkins in *Juridical Society Papers* 3 (1865), pp. 110 et seq., especially at p. 112; as well as Farrar, p. 159. Quotation by Freeman 'The Concept of Codification' [note 22], pp. 176–177.

[42] For the background, see, e.g., J. G. Sauveplanne *Codified and Judge Made Law* The Role of Courts and Legislators in Civil and Common Law Systems (Amsterdam & New York: North-Holland 1982) 28 pp. [Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde; Nieuwe reeks 45:4].

British jurisprudence[43] and all the "myths of codification"–according to which, to mention just one formulation,

> "I. A codification can provide an accessible and complete formulation of the law and can enable the development of the law in a planned manner. II. Codal regimes are rigid and not adaptable. III. The common law's emphasis on case law techniques makes it admirably adaptable to new circumstances."[44]

–which, of course, as dreams and Utopian expectations, can be justified neither in the domain of Civil Law, nor that of Common Law. It may seem paradoxical, yet it is a truth worth considering that even, for instance, French law is more flexible, more suitable for practical adaptation and fertilising application from many aspects, than case-law directly made by judges. After all, the continental law-applying process steps out from general principles calling, by their nature, for interpretation, and it may initiate debate on the meaning and applicability of rules independently from the question of the very existence and systemically co-ordinated arrangement of the same rules–as opposed to English judge-made law, reduced to an amalgam(ate) of casual decisions, which, like "an amorphous mass […] [in which] there is no organizing principle",[45] directly carries on–because of the undifferentiated unity of the rules and their casual application–the legal character and self-identity of the whole, up to its last component as well.[46] Well, expectations linking positive or negative Utopianism

[43] E.g., Reinhard Zimmermann 'Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen *civil law and common law*' *Zeitschrift für Europäisches Recht* I (1993) 1, pp. 4–51; Jonathan E. Levitsky 'The Europeanization of the British Legal Style' *The American Journal of Comparative Law* 42 (1994) 2, pp. 347–380.

[44] Basil A. Markesinis 'The Destructive and Constructive Role of the Comparative Lawyer' [originally in *Rabels Zeitschrift* (1993), pp. 438–448] in his *Foreign Law and Comparative Methodology* A Subject and a Thesis (Oxford: Hart 1997), pp. 36–46, quotation on pp. 37–38.

[45] Alan Watson 'The Importance of »Nutshells«' *The American Journal of Comparative Law* 42 (1994) 1, pp. 1–23, quotation on pp. 11 and 12.

[46] See André Tunc 'Codification: The French Experience' in *Problems of Codification* ed. S[amuel] J[acob] Stoljar (Canberra: The Australian National University 1977), pp. 63 et seq. on pp. 73–74, as well as René David *French Law* Its Structure, Sources, and Methodology, trans. Michael Kindred (Baton Rouge: Luisiana State University Press 1972) xviii + 222 pp., especially at pp. 80 and 83.

It is to be noted that this is the line by which the question of the general part of civil codes becomes directly a regulatory problem of codification–as it defines, in principle, the upper layer of normative axiomatism (without which the "lawyer at sea in the law like a pilot without a compass" would helplessly roam [cf. Joseph Unger *System des österreichischen allgemeinen Privatrechts* I, 5th ed. (Leipzig: Breitkopf und Härtel 1892), p. 641, as well as Konrad Zweigert & Hein Kötz *Introduction to Comparative Law* I: The Framework, 2nd rev. ed. trans. Tony Weir (Oxford: Clarendon Press 1987), p. 167]–, as well as the gap-filling technique of the Swiss *Zivilgesetzbuch*, commissioning the judge to become eventually an accidental substitute to the legislator (§ 1), the specific feature of which lays not only in the fact that it can be traced back via Immanuel Kant even to Aristotle (*Nicomachean Ethics,* 1137b) but it also reasserts the continental regulatory principle (the judicial empowerment notwithstanding), by eventually declaring that

to codification mostly appear mixed with manifestations of either the euphoric belief in a Common Europe[47] or, to the contrary, an extremist rejection of it.[48] Any analysis of the signs, steps and events of actual rapprochement (or, at least, of effective interaction and mutual influence) is a relatively rare phenomenon. For instance, in Germany, the jurisprudence of the *Bürgerliches Gesetzbuch* has arrived from the onetime exegesis reached as a "juristic game of chess" to a "case-law revolution",[49] while in English legal thought, an "increased self-assertion of a kind of doctrinarism" is emerging (as a feature indicating that "these peculiarities and jagged edges, on both sides of the

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"in order to be legal a decision must be based on a rule which can be formulated as a general one" [Franz Wieacker *A History of Private Law in Europe* With Particular Reference to Germany {Privatrechtsgeschichte der Neuzeit, 1952, 2nd ed. rev. 1967} trans. Tony Weir (Oxford: Clarendon Press 1995) xvi + 509 pp. at p. 391].

[47] Basil Markesinis *The Gradual Convergence* Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century (Oxford: Clarendon Press 1994) xliv + 275 pp.; James Gordley '*Common Law and Civil Law:* Eine überholte Unterscheidung' *Zeitschrift für Europäische Privatrecht* I (1993), pp. 498–518.

[48] Cf., e.g., from Pierre Legrand, 'Legal Tradition in Western Europe: The Limits of Commonality' in *Transfrontier Mobility of Law* ed. Robert Jagtenberg & Esin Örücü & Annie de Roo (The Hague, London & Boston: Kluwer 1995), pp. 63–84 and 'How to Compare Now' *Legal Studies* 16 (1996) 2, pp. 232–242; similarly Satu Paasilehto 'Legal Cultural Obstacles to the Harmonisation of European Private Law' in *Function and Future of European Law* [note 36], p. 99 and Mauro Bussani '»Integrative« Comparative Law Enterprises and the Inner Stratification of Legal Systems' in *European Review of Public Law* 8 (2000) 1, pp. 57 et seq., especially at p. 85.

According to several opinions–e.g., Werner Flume 'Vom Beruf unserer Zeit für Gesetzgebung' *Zeitschrift für Insolvenz- und Wirtschaftsrecht* (2000), pp. 1427–1429 and especially at p. 1429, as well as Hugh Collins 'European Private Law and the Cultural Identity of States' *European Review of Public Law* 3 (1995) 3, p. 353–365–, national legal arrangements with their code-based expression are anyway part of the cultural heritage, whereby they, being cultural monuments, can hardly be relinquished by any state without it simultaneously giving up something of its own identity as a state.

For instance, Luigi Mengoni *L'Europa dei codici o un codice per l'Europa?* (Roma: Centro di studi e ricerche di diritto comparato e straniero 1993), p. 3 [Saggi, conferenze e seminari 7] excludes unification through codification from the circle of possible alternatives: „reconoscere che l'un codice per l'Europa non è un'alternativa realistica". Pierre Legrand 'Brèves réflexions sur l'utopie unitaire en droit' *Revue de la common law* 3 (2000) 1–2, pp. 111–125 quotes from the work of Pilippe d'Iribarne *Cultures et mondialisation* Gérer par delà des frontières (Paris: Seuil 1998) 354 pp. [Couleur des idées], pp. 324–325, according to which "The reason according to the taste of the French is more noble, more devoted to the beauty of theory, more attached to the pure and gratuitous things, more based on general systems and ideas, more brilliant, more abundant in elegant demonstrations, and more sharing the characteristics of *grandeur* than the English do".

[49] Josef Partsch *Vom Beruf des römischen Rechts in der heutigen Universität* (Bonn: Cohen 1920), 50 pp. at 39, as well as John P[hilip] Dawson *The Oracles of the Law* (Ann Arbor: University of Michigan Law School 1968) xix + 520 pp. [Thomas M. Cooley Lectures] on p. 432, quoted, among others, by Reinhard Zimmermann *Roman Law, Contemporary Law, European Law* The Civilian Tradition Today (Oxford: Oxford University Press 2001) xx + 197 pp. [Clarendon Law: Lectures].

Channel, are in a process of being with away"[50]). Or, a disillusioning cold voice is needed, which would neither applaud, nor oppose, just remind us that, given the second millennium elapsed in European history, what has happened up to now is not too much and not necessarily new either. Therefore, one can state that

> "To conclude on that basis that the common law is being »Europeanised« is probably as rash as to imagine that it was ever isolated in the first place."[51]

And indeed, we cannot be so oblivious as to forget that, just a few decades ago, the very idea of applying any universal abstract formulation, such as in case of the direct and uniform judicial enforcement of transnational human rights charters, had filled the House of Lords with dread. Similarly, English lawyers have proved unable or unwilling to propose (perhaps out of pretension) a means more suitable for the internal division of their own law than factual classification (i.e., a method arranging facts according to the initials of their English names)[52]–acknowledging with complacency that human mind has never produced and could probably never produce anything more fitting than the purely alphabetical "chaos with a full index"[53] of the words identifying legal loci and contexts.

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[50] Reinhard Zimmermann 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' *The Law Quarterly Review* 112 (October 1996), pp. 576–605, especially at p. 590 and quotation on p. 589.

[51] Xavier Lewis 'The Europeanisation of the Common Law' in *Transfrontier Mobility of Law* [note 49], pp. 47–61, quotation on p. 61.

[52] The aim of *The Division and Classification of the Law* ed. J. A. Jolowicz [note 41], is admittedly nothing less than "A plea for a factual classification of the law […] a factual division of the content of the law" (p. 7). The situation has not changed since. As Bernard Rudden states in his 'Torticles' *Tulane Civil Law Forum* (1991–1992) 6–7, pp. 105–129 on p. 105, "the alphabet is virtually the only instrument of intellectual order of which the common law makes use".

[53] The expression of Sir Thomas Holland is quoted by Norman S. Marsh' review article in *International & Comparative Law Quarterly* 30 (1981) 2, p. 488.

6. Reconsidering Early Past

Now, looking back from the future soon to come to the past, what is codification of the various historical epochs like in the mirror of analyses by recent literature?

As far as the early occurrences preceding the Greek and Roman code-based forms are concerned, it can be ascertained that they were, for the most part, not normative sources of law[54] but "pious hopes and moral resolve rather than effective law"[55] or, at

[54] "Neither in the prologues nor in the epilogues nor elsewhere do the law-codes order any one to observe their provisions. Judgments in lawsuites pay no regard to the law-codes." Arnold Walther *Das altbabylonische Gerichtswesen* (Leipzig: Hinrichs 1917) xii + 274 pp. [Leipziger semitistische Studien 6:4–6], p. 227 {reprint (Leipzig: Zentralantiquariat der DDR 1968)}. Also cf., in the same sense, B. Landsberger 'Die babylonischen Termini für Gesetz und Recht' in *Studia et documenta ad iura orientis antiqui pertinentia* II, ed. Martin David (Leiden: Brill Archive 1939), pp. 219–233 at pp. 221–222 {& <http://books.google.hu/books? id=lBoVAAAAIAAJ&pg=PA219&lpg=PA219&dq=b.+landsberger+%22gesetz+und+recht%22&source=bl&ots=QAFcKE2_xB&sig=mOA7VAtJQP9cs2tt-nvnkO3jk_s&hl=hu&ei=v40_S8qCKpGImgPnzfnpDg&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAsQ6AEwAA#v=onepage&q=b.%20landsberger%20%22gesetz%20und%20recht%22&f=false>}.

[55] J. J. Finkelstein 'Ammi-Saduya's Edict and the Babylonian »Law Codes«' *Journal of Cuneiform Studies* 15 (1961), pp. 91–104, quotation on p. 102. "Their primary purpose was to lay before the public, posterity, future kings, and, above all, the gods, evidence of the king's execution of his divinely ordained mandate." (p. 103) – Accordingly–as Adolf Leo Oppenheim *Ancient Mesopotamia* Portrait of a Dead Civilization, rev. ed. (Chicago: University of Chicago Press 1977) xvi + 445 pp. states–, HAMMURAPI's code (similar to all former Accadian and Sumerian codifications) has no connection whatsoever with the legal practice of the age. Its contents can, from several main perspectives, be regarded rather as a traditional literary formulation of the King's social obligations and as the expression of the King's awareness of the differences between the existing and the desirable state of affairs. (And it is to be remembered that this edition also remarks in notes–rather thought-provokingly for the understanding of all-European development–that the fatal approach of trying to squeeze reality into a series of formal requirements was unknown in Mesopotamia and probably also in the entire ancient Near East. It was only a later and definitely peripheric development, notably, Judaism–having originated from the desire to generate, due to certain ideological motives, specific social relationships–that managed to bring about such a behavioural pattern.)

times, simply traditional literary compendia used for the official training of clerks,[56] which could, of course, also serve as reference manuals for judges faced with troublesome cases.[57]

It is surprising how early the idea of order arose, so to speak, contemporaneously with JUSTINIAN, but thousands of miles further, in the West as well.[58] And in conceptual arrangements, substantive regulation is the first to become separated from procedural and evidentiary rules in early compilations, so that it can finally be declared that

> "all questions for which there is no regulation have to be answered upon the basis of the regulation given in the law. […] The law becomes, out of something inherent in the things, a kind of order posited above the things, an autonomous power."[59]

New realisations are now available about the substitutes for codification from antiquity up to the present day. On the one hand, we not only learn how widespread it was for official compilations to enter into effect in the form of manuscripts–either due to the lack of a printing press or to some local custom–, but there were even times when they were expressly designed to be made public by way of being deposited (for example, at the Town Hall in case of the *Coutumes de la ville d'Ypres*, 1535) as accessible to anyone who asked for a copy on payment of a certain

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[56] A. Leo Oppenheim *Ancient Mesopotamia* (Chicago: University of Chicago Press 1964) ix + 433 pp. at pp. 14–21.

[57] Raymond Westbrook 'Biblical and Cuneiform Law Codes' [*Revue Biblique* 92 (1985), pp. 247–264] in *Folk Law* Essays in the Theory and Practice of *Lex Non Scripta*, ed. Alison Dundes Renteln & Alan Dundes (New York & London: Garland 1994), pp. 495–511, especially at p. 503. For the entirety of these early forms, see also Raphael Sealey *The Justice of the Greeks* (Ann Arbor: The University of Michigan Press 1994) xiii + 164 pp.

[58] Notably, it appears already as a programme in title 1 of the book II of the version of the unified (Visigothic and Roman) code of RECCESWINTH (654) as amended by ERWIG (681) that the law-book has to provide "a clear and honest meaning, expressing clear precepts for the doubtful […] in orderly arrangement […] in ordered titles". Quoted by Katherine Fischer Drew 'The Barbarian Kings as Lawgivers and Judges' in her *Law and Society in Early Medieval Europe* Studies in Legal History (London: Variorum Reprints 1988), pp. 7–29 on p. 15.

[59] [„alle nichtgeregelten Fragen sich aus der im Gesetz gegebenen Regelung beantworten lassen müssen. […] Das Recht (Gesetz) wird aus einer den Dingen innewohnenden eine über die Dinge gesetzte Ordnung, eine autonome Macht"] Wilhelm Ebel *Geschichte der Gesetzgebung in Deutschland* (Göttingen: Verlag Otto Schwartz 1958) 107 pp. [Göttinger rechtswissenschaftliche Studien 24], on p. 75. According to his examples, such is the promulgation of a *Gerichtsordnung und Landrecht,* auch Polizei-, Holz-, Hütten-, Bergordnung und Reformation (1592) on the estate of Wildenburg a. d. Sieg or of a *Rechtsordnung* consisting of 16 titles (1663) as based upon the reformation of the *Bericht über Erbfälle und über etliche Mißbräuch* on the estate of Kurköln (1538) (p. 73); and, as a conceptual systematisation, the issuance of a *Gerichts- und Landordnung* (verf. Joh. Fichard, 1571) in the county Solms and, as parts of it, a *Von den Landrechten* (with 32 titles) and a *Von Gerichen und gerichlichem Prozeß* (with 40 titles) (p. 74).

amount[60]–just as the Icelandic law-speaker [*lögsögumaður*] centuries earlier (back in the age of the *Konungsbók* [*Codex regius*], 930–1262) could be approached to reassert occasionally for those who looked for justice, what the law was.[61] On the other hand, not only holy books (like, e.g., the *Bible* for the first founders of the state of Massachusetts) can provide rudimentary guidance as the law's summation but, at times and for want of anything better, maybe even practical guidebooks, written originally for didactic purposes for students.[62]

Well, especially in case of the great oeuvres marking the emergence of the classical type of codification (like, e.g., the *Allgemeines Landrecht*[63] and the *Code civil*), despite the former's authoritarian and the latter's revolutionary origin,[64] their

[60] E.g., the *Statutes of the Grand Duchy of Lithuania* (1529), as well as the *Sud'ebniks of the Grand Duchy of Moscow* (1497 & 1550). Cf. Wacław Uruszczak 'Les codes de droit en Europe à l'époque de la renaissance' in *La codification européenne du Moyen-Age au siècle des Lumières* éd. Stanisław Salmonowicz (Warszawa: Polskie Towarzystwo Historyczne 1997), pp. 69–102, especially at p. 101.

[61] Sigurður Líndal 'Law and Legislation in the Icelandic Commonwealth' *Scandinavian Studies in Law* 37 (Stockholm: Jurisförlaget 1993), pp. 55–92.

[62] The *Hexabiblos* (1345), compiled by the Thessalonian learned specialist CONSTANTINE HARMENOPOULOS and usually referred to as the "miserable epitome of epitomes of the epitomes", was applied throughout the late Middle Ages as a substitute source of the law in Greece and the entire Balkans. What is more, it was even confirmed by an order of February 23, 1835 of the Kingdom of Greece that, for lack of any custom or judicial practice to the contrary, it had to be applied as a general source of the law until a civil code was finally drafted (which was actually done as late as on February 23, 1946). Or, in South-Africa, the Thirty-three Articles that constitutionally established Transvaal stipulated in section 31 that '*hollandsche wet*' had to be taken as the basis of the law. The new Constitution (*Grondwet*, September 19, 1859) defined, in Annex [*bijlage*] 1, firstly Johannes van der Linden's *Rechtsgeleerd practicaal en koopmans Handboek* (Cape Town: Juta 1806), secondly Simon van Leeuwen's *Het Roomsch-hollandsche recht* (Amsterdam 1676) and thirdly Hugo Grotius *Inleidinge tot de hollandsche Rechtsgeleerdheid* (1631) as serving as its framework. That is, it ordained practical handbooks published in wide circulation during the 17th century as the basic reference to law in the second half of the 19th century despite the fact that the new civil code of the Netherlands (*Burgerlijk wetboek*, 1838) had by then left the old law behind for decades, as a mere preliminary. Watson 'The Importance of »Nutshells«' [note 46], pp. 20 and 19.

[63] According to Peter Stein *Roman Law in European History* (Cambridge: Cambridge University Press 1999) x + 137 pp., p. 112, the main drafter of the *Allgemeines Landrecht* was CARL GOTTLIEB SUAREZ who shared the views of CHRISTIAN WOLFF, in terms of which it is the ruler's duty to guide his subjects to lead a perfectly reasonable life. Therefore, the Prussian Code had to have an educational purpose and, as addressed to the public, it had to be comprehensive, clear and definite as well.

[64] According to the witty remark of Domenico Corradini *Garantismo e statualismo* Le codificazioni civilistiche dell'Ottocento (Milano: Giuffrè 1971) xiv + 143 pp. [Pubblicazioni della Facoltà di Giurisprudenza della Università di Pisa 39] at pp. 12 et seq., the classical codes were originally drafted with the purpose of safeguarding either absolutism or basic freedoms. At the same time, Jean-Louis Halpérin *L'impossible Code civil* (Paris: Presses Universitaires de France 1992) 309 pp. [Histoires] points out that all the natural law, colouring the French Civil code, only served to conceal the novelty of its wording (p. 289), while "the text finally adopted after struggles of nearly one and a half decade was the longest among all the proposals yet at the same time the least revolutionary." (p. 287)

one-time embeddedness in tradition[65] is increasingly re-discovered and emphasised now–especially in light of today's intellectual and institutional challenges that, as driven by a common "European interest" or under the simple pressure of time and out of helplessness, look back rather on SAVIGNY instead of THIBAUT.[66] This is all the more remarkable because it appeared as the practical correction of the cardinal idea of the Enlightenment–namely, the ideals of rationality, logicality and universality[67] that once resulted in the emergence of the new, quality type of codification (and which ideals were once believed to have absolute validity)–at a time when all these revolutionary illusions, wishful thinking and magic expectations had to be put to the test of life by being implemented in practice.

7. Reconsidering Late Modernity

Thus, it is no mere chance that PORTALIS' personal contribution to the drafting of the *Code civil* is now–in contrast to the disdainful tone once used when remembering him[68]–in the limelight and seen as a revelation (revoking the image of a bitter and disillusioned treatise with a non-mainstream picture of his age, once considered worthy of oblivion). Secondly, it is little wonder that it is through the interpretation of the *Code NAPOLÉON* as a sociological phenomenon that we now start collecting the following facts about J. E. M. PORTALIS (1746–1807) as features determining his personality: He fled to Northern Germany during the Revolution, where he got into contact with Pietists; his attraction to the oeuvres of BLAISE PASCAL and MONTESQUIEU

[65] James Gordley 'Myths of the French Civil Code' *The American Journal of Comparative Law* 42 (1994) 3, pp. 459–505.

[66] Anton Friedrich Justus Thibaut *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland* (Heidelberg: Mohr und Zimmer 1814) 67 pp. and Friedrich Carl von Savigny *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr und Zimmer 1814) 162 pp., both reprinted in *Thibaut und Savigny* Ihre programmatische Schriften, hrsg. Hans Hattenhauer (München: Vahlen 1973) 298 pp., pp. 61 et seq. as well as pp. 95 et seq. As to the movement and their debates, cf. Hans Wrobel *Die Kontroverse Thibaut–Savigny im Jahre 1814 und ihre Deutung in der Gegenwart* (Bremen 1975) v + 307 pp. [Diss].

[67] "A well conducted government must have a system as coherent as a system of philosophy, so that finance, police, and the army are coordinated to the same end, namely the consolidation of the state and the increase of its power. Such a system can only emanate from a single brain, that of the sovereign." S. Andrews *Eighteenth-century Europe* The 1680's to 1815 (London: Longman 1965) xiii + 402 pp. at p. 119. And, as S. E. Finer *The History of Government* From the Earliest Times, I–III (Oxford: Oxford University Press 1997), p. 1456 continues this line of thought, showing the parallel between the great epochs of governmental bureaucracy and codification (p. 1458), all this preconditions "belief in uniformities in Nature, the logicality of Reason, and correspondingly, the need to rationalize, systematize, and codify the laws under which subjects were to live."

[68] E.g., Marcel Planiol *Traité élémentaire de droit civil* conforme au programme official, I (Paris: Librairie Générale de Droit et de Jurisprudence & Pichon 1900), § 80: „n'a point dépassé la médiocrité".

deepened. It was also during that period that he started to castigate the one-time misery of his homeland in an essay only published posthumously. For in Germany, as he wrote, he had seen the materialisation of a good form of what he called *esprit philosophique:* small universities, closed intellectual circles without any major social or political interpenetration, where ideas were not driven by the chance of materialisation, thus being unable to become directly dangerous either. The French Revolution had, on the other hand, originated from the *salons* of Paris, as launched by the "Sophists". The whole atmosphere of the Enlightenment in France with direct interpenetration of ideas and mobilisation of the political elite itself, focussing on the idea of a mentally anticipated conceptual system while urging its systemic implementation, was suitable to tempt both irresponsibility and extreme consistency, and, once inflicted on the Nation as a living practice, it might also elicit the eventual (ill)fortune of a whole country. Well, such a cry in PORTALIS' complaints[69] may remind the reader of present-day criticisms of the wantonly useless, bare intellectualism marking our modernity.[70] Accordingly,

[69] "How much we could have benefited, if the idea of system had not thrown pernicious errors into the most useful truths, and if the wise lessons of experience had not been suffocated by exaggerated and absurd theories!" "It was the men of genius, of character and of vision, and not the Sophists who founded societies, built cities, and taught things to peoples. Sophists always appear at times when morals are corrupted. They are born therefrom and they are hardly suitable to raise, with their miserable influence, those degraded spirits and hearts. As soon as they formulate an idea, they believe they have brought about a kind of institution. But, as the ideas formulated do not, by themselves, capture people, they neither take roots where they were sown. They just keep multiplying the laws, whereby they exactly achieve the debasement of legislation. And meanwhile everything gets lost: the false philosophical mind is like a deaf shell enclosing everything." J. E. M. Portalis *De l'usage et de l'abus de l'esprit philosophique durant le XVIII*[e] *siècle* [Paris 1820] 3e éd. (Paris: Moutardier 1834), pp. 300–301 and 402–403, with a selected reprint in Jean-Étienne-Marie Portalis *Écrits et discours juridique et politique* (Aix-Marseille: Presses Universitaires d'Aix-Marseille 1988), pp. 227 and 398–399.

[70] For present-day stands about intellectualism, see *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] ed. Csaba Varga (Budapest: [AkaPrint] 1998) 122 pp. [Windsor Klub könyvei II], especially with Jeane J. Kirckpatrick 'Introduction' to her *Dictatorship and Double Standards* Rationalism and Reason in Politics (New York: Simon and Schuster 1982), pp. 1–18 and–as a stand taken by the author–'A racionális jogszemlélet eredendő ambivalenciája: Emberi teljességünk széttörése a fejlődés áraként?' [The inherent ambivalence of a rational legal approach: development at the price of the fragmentation of our human integrity?] in *A jogtudomány és a büntetőjog dogmatikája, filozófiája* Tanulmánykönyv Békés Imre születésének 70. évfordulójára [Philosophy of law and penal law: Festschrift for Professor Imre Békés] ed. Béla Busch & Ervin Belovics & Dóra Tóth (Budapest: [Osiris] 2000), pp. 270–277 [A Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának könyvei] as well as 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man, elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi's *The Fifth Man*] ed. Katalin Mezey (Budapest: Széphalom 2000), pp. 61–93. In a philosophical and socio-theoretical context, cf. also *Hayek és a brit felvilágosodás* A konstruktivista gondolkodás kritikája [Hayek and the British Enlightenment: criticism of the constructivist thought] ed. Ferenc Horkay Hörcher

> "Portalis may have arrived at the philosophical conviction of empiricism transformed into philosophy. This knows no system, only adaptation, that is, the adaptability of thought to the different requirements of the moment."[71]

To recognise again the moment of tradition embodied (among others) by the French revolutionary breakthrough in codification, as well as of experience indispensable beyond reason and logic in the judicial profession, or to re-consider the debates revolving around codification, having called to life the historical school of law in Germany from the second half of the 18th century on–well, all this alone certainly cannot be attributed to an immanent interest in the history of ideas today. After all, we have to find fixed points that help us identify the paths of the future. More precisely, it is exactly the path to be followed in the near future that makes us think we may ascertain that its uniqueness and the unprecedentedness of its venture are nothing but the extension, in European dimensions and with an all-European complexity, of the difficult and risky decision that had already been faced once at a national level in Germany of the 19th century, and of the intellectual dilemma that perhaps the one-time movement of the German historical school of law can now be taken as the best example.[72]

Anyway, the recognition according to which the age of the series of pieces of national codification was limited in a social and political sense as well, because it embodied and emphasised a further stage of universal development, is reflected in the historical reconstruction of the birth of the Austrian *Allgemeines Bürgerliches Gesetzbuch*. For, according to its recent monographer,

> "the codification of civil law was an attempt to reconcile the modern notion of the state as the supreme public authority holding a monopoly of government with the idea of the rule of law as an objective and, indeed, absolute category of social cohesion, and as such not subject to the supreme will of public authority [...]. On the Continent of Europe, codified civil law provided the legal basis for the social and political pattern of the nineteenth and early twentieth centuries: the state of absolute sovereignty which yet remained a Rechtsstaat".[73]

At the time and under the given circumstances, this reconstructive requirement of the code-based function had completely fulfilled what I had, in my own monograph referred to above, described as the main (socio-legal) function of the national unification of law, on the one hand, and the apparently merely legal-technical function of

(Budapest: Pázmány Péter Katolikus Egyetem 2002) xviii + 112 pp. [Jogfilozófiák].

[71] Jean Carbonnier 'Le Code Napoléon en tant que phénomène sociologique' *Revue de la Recherche juridique* Droit prospectif 1981/3, pp. 327–336 on p. 335.

[72] Cf., especially, Zimmermann *Roman Law...* [note 50], pp. 14–17.

[73] Henry E. Strakosch *State Absolutism and the Rule of Law* The Struggle for the Codification of Civil Law in Austria, 1753–1811 (Sydney: Sydney University Press 1967) vii + 267 pp., quotation in the Epilogue, p. 219.

the centralised state domination over the law, on the other, in terms of which the state may, in turn, control the entire theoretical and practical stuff of the law and, thereby, decisively shape its everyday implementation as well.[74]

8. Transubstantiation of the Code-based Function

How far has the fulfilment of such major vocations and expectations progressed, as assessed by critical retrospection from a present view?

> "Obviously, some of the high hopes and expectations entertained at the time of the Enlightenment have not been fulfilled: neither have the codifications made the learned lawyer redundant, nor have they led to a lasting consolidation (or, to put it negatively: ossification) of private law. Still, however, they have significantly contributed towards the national fragmentation of the European legal tradition."[75]

Well, the realisation above may serve as a typical illustration of how certain evaluations can turn into their own opposites, depending on historical evolution and practical developments, for–in light of the present-day international process of unification of European proportions–what was once (only one or two centuries ago) a landmark of national legal unification is now (and not without any foundation) re-formulated as national fragmentation. Just as paradoxical is the following statement by the same historian of European law, well versed in English legal studies, according to which

> "What German arms had achieved on the battlefields of France–political unity–had now also been peacefully accomplished in the area of private law: »One People. One Empire. One Law.«"[76]

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[74] See Varga *Codification…* [note 1], passim.

[75] Zimmermann *Roman Law…* [note 50], p. 1.

[76] *Ibid.*, p. 53, quoting Ernst Zittelmann 'Zur Begründung des neuen Gesetzbuches' *Deutsche Juristenzeitung* (1900), p. 2. Moreover, Bernhard Windscheid 'Das römische Recht in Deutschland' in his *Gesammelte Reden und Abhandlungen* hrsg. Paul Oertmann (Leipzig: Duncker & Humblot 1904), pp. 25–49 at p. 48 desired the same: to provide "a German law for the German People" by building up "a cathedral of national splendour"–a wish common to Europe as an objective of all the national states from the age of Napoleon. Cf., e.g., Josef von Görres in *Rheinisches Merkur* (April 7, 1815): *"Ein Reich, ein Recht!"*–a quote by Jean Gaudemet in his 'La codification, ses formes et ses fins' *Revue juridique et politique* Indépendance et coopération 40 (Janvier–Juin 1986) 3–4, pp. 239–260, especially p. 257. It may seem ironic, yet can perhaps be explained by the historical conditions of contemporary criticism that the first draft of the German *Bürgerliches Gesetzbuch* (1888) –as characterised by Zimmermann, *ibid.*–"was condemned as being too abstract and pedantic, it was denounced as a pandectist textbook cast in statutory form and thus as being too unGerman; it was attacked as being out of touch with the realities of life and as lacking even a drop of socialist oil." Cf. also Varga *Codification…* [note 1], p. 135, note 84.

Indeed, the requirement of both overall popular knowledge of the law and regulatory completeness no longer features amongst classical dreams and hopes regarding codification–at least, not in the sense of the law's easy accessibility, cognisability and manageability.[77] Therefore, the dream originating from the age of the Enlightenment, postulating that society and law have to be established in one consciously planned and realised act around which real life would revolve as planets in the solar system, turned out to be quite unrealistic.[78]

The fantasy of both total systemicity[79] and seamlessness,[80] effecting comprehensive and exhaustive regulation on principle, has proved to be a similarly vain hope, and even more so the attempt to enforce this through prohibiting judicial interpretation.[81] Well, all these new developments are definitely meant to re-

[77] "Today, one has given up all hope that the average citizen can be expected to comprehend the law. [...] A code may or may not be desirable: that it fails to promote general knowledge of the law cannot be regarded as a decisive argument within this debate." Zimmermann 'Codification...' [note 26], p. 108.

[78] The HEGELian parallel–"Never since the sun has stood in the firmament and the planets revolved around it had it been perceived that man's existence centres in his head, i.e. in thought, inspired by which he builds up the world of reality." Gottfried Wilhelm Friedrich Hegel *The Philosophy of History* {*Vorlesungen über die Philosophie der Weltgeschichte* [1840] IV (Berlin 1970–1976), p. 926} trans. J. Sibree (New York: Dover 1956) xvi + 457 pp. at p. 447, quoted by Varga *Codification...* [note 1], p. 302–is translated by Gambaro, p. 81, into a description of the doctrine of legal sources when he recalls that in the 19th century, "the so-called special statutes [were relegated] to the level of exceptional norms which rotated around the code, just as the planets of the solar system move around the sun". It is this same sense in which the root of the present decline of codification is seen by Irti *L'età della decodificazione* [note 6], p. 27: "The *Codice civile* cannot be recognised as having [...] the value of general law, the seat of principles that are set forth and »specified« by external laws [...]. [For it] functions henceforth as a »residual law«, as a discipline for cases not regulated by particular provisions."

[79] "If you read the proceedings, you may be amused at finding that the briskest of all the debates took place over the two little words »and hares« in a section relating to damage done by wild animals. Powerful language is used; and, for a moment, the whole of this mighty project seems to be endangered by the conflicting interests of sport and agriculture. That is the touch of humour required as a relief for so much civic virtue."–wrote Frederic William Maitland 'The Making of the German Civil Code' [A Presidential Address delivered to the Social and Political Education League and published in *Independent Review* (August 1906)] in his *The Collected Papers* ed. H[erbert] A. L. Fisher, III (Cambridge: University Press 1911), p. 482 {also in <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=873&chapter=70343&layout=html&Itemid=27>}, declaring thereby that this was nevertheless the victory of the whole over each and all its individual components.

[80] Cf., e.g., Heinz Hübner *Kodifikation und Entscheidungsfreiheit des Richters* in der Geschichte des Privatrechts (Königstein: Hanstein 1980) 74 pp. [Beiträge zur neueren Privatrechtsgeschichte 8].

[81] For Frederick the Great–*Publikationspatent* (1794), art. XVIII–, judges are prohibited "to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the grounds of some allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statutes" [trans. in Zweigert & Kötz *Introduction...*

affirm the trust necessarily to be placed by the legislator in those who administer justice,[82] as a reminder of the gradual construction of the law and the inevitable division of law-making contributions, covering all stages of the entire process of the law's formation, by conceptualising them as "the two-graded process of the law's establishment" (to use the expression of KELSEN, having written his second major treatise in 1922),[83] on the one hand. On the other, they also reaffirm the function of the code, which I earlier characterised–in describing the life, prior to the Second World War, of the *Code civil* and other classical civil codes–in a way that, in the process of gradual building up jurisprudence through merely referring to the code-text in the everyday practical development of the law, the code's genuine function gets reduced to nothing but providing and indicating systemic-taxonomic locuses for the judicial solution of the case, that is, to at most relative guidance not unambiguous by far, or excluding alternatives.[84]

Thereby, methodologically we have returned to the expectation of a common European codification of private law, to the possible methodology of its realisation and to the formulation of the main function it is to fill. Accordingly,

> "a codification […] provides a system that all those who have to apply and interpret the law to see »varitat[es] inter se connexa[e]«[85] to appreciate and pay attention to the normative context within which a specific decision has to be seen, to avoid inconsistencies and to arrive at solutions that are not only fair and equitable per se but also fit in with the solutions found to other problems. […] It provides a focus which enables him to relate seemingly disparate issues to each other and harmoniously to incorporate new strands of thought." [86]

{note 47}, p. 91].

[82] The necessary failure that can be traced back throughout our known history is described by Hans-Jürgen Becker 'Kommentier- und Auslegungsverbot' in *Handwörterbuch zur Deutschen Rechtsgeschichte* hrsg. Adalbert Erler & Ekkehard Kaufmann & Wolfgang Stammler, II (Berlin: Schmidt 1978), pp. 963–974.

[83] Hans Kelsen *Der soziologische und der juristische Staatsbegriff* Kritische Untersuchung des Verhältnisses von Staat und Recht (Tübingen: J. C. B. Mohr (Paul Siebeck) 1922) IV + 253 pp.

[84] And this was already a total shift, equal to giving up the original function that had historically brought about the phenomenon known as codification, because thereby the code fell back from the code-based role of determining the law to a role of merely indicating the systemic loci of the practical (judicial) shaping and making of the law. Cf. Varga *Codification…* [note 1], especially ch. V, para. 5.

[85] Christian Wolff *Institutiones iuris naturae et gentium* in quibus ex ipsa hominis natura continno nexu omnes et iura omnia deducuntur (Halæ Magdeburgicæ: Renger 1750), § 62.

[86] Zimmermann 'Codification…' [note 26], p. 110.

9. With a Methodological Conclusion

Everything considered, what underlies the above statement is nothing other than the replacement of the idea of a system, closed into its axiomatic self, by the idea of a half-open and half-closed *autopoietic* system, which shuts itself back and also re-generates itself each time it closes itself, utilising any of its original systemic definitions in any manner only when it is closed back in practice and, therefore, changing its definitions and contextualisations any time it operates, depending on its given environment. Methodologically speaking, something similar may have been in mind after the Second World War was over, when the claim for "a natural law with changing contents" (as formulated by RUDOLF STAMMLER after the First World War) became filled with concrete contents. As concluded by a contemporary author,

"[t]he eternal truths to be found in the sphere of the logic of things [...] do not constitute a closed system as once supposed by natural law, but arrive at various aspects through the entire material of the law, connected with powerful linkages to the decisions here and now to be made."[87]

With this, one has also formulated the new creed of the judicial profession in light of the new, present-day conditions of codification. For

> "difficult problems can simply be wrongly analysed because, without conceptual discipline, it is not possible to be sure that previous cases were indeed like the one now before the court. The elementary principle of formal justice, that like cases be decided alike, is thus offended. Again, whole areas of the law can be neglected if in the absence of a map nobody can see that they are being insufficiently visited [...]. There is also another kind of damage at a higher level, in that, in the absence of a common conceptual structure, lawyers lose faith in the rationality of their endeavour [...]. It is perhaps the most important feature to be kept in mind: a code has to

[87] Hans Welzel *Naturrecht und materielle Gerechtigkeit* Prolegomena zu einer Rechtsphilosophie (Göttingen: Vandenhoeck & Ruprecht 1951) 200 pp. [Jurisprudenz in Einzeldarstellungen 4], p. 198.

be brought to life, and has to be kept in tune with the changing demands of time by active and imaginative judicial interpretation and doctrinal elaboration. This requires the legislature to exercise considerable self-restraint."[88]

10. Arriving at a Crossroads Again

The lesson to be drawn with certainty is that, notwithstanding the untroubled pursuit of domestic practice, we are getting closer to a crossroads. The perspective of a common codification of private law within the European Union not only brings back (breaking through walls of silence of several centuries) memories of accomplishments and expectations of a long and distant past (once made universally valid in continental dimensions) as actual experience, but, at the same time, also refers us back to those points and moments (regarded for centuries as buried by the bygone past) from which–upon the basis of the joint acquisition of the shared Greek–Roman heritage and its differentiating (yet in a way somehow united) re-adaptation–the paths of development characteristic of the Civil Law and the Common Law had once started to diverge.

The more the advancement of European unification progresses, the more inverse the assessment of European codification becomes, reconsidering past trends, values and regulatory techniques. Thus, it is suggested that we, on the Continent, had not so much become state-organised national units unified by a sequence of national laws but, being too conceited about our most promising collective heritage within the transitory phase of an infantile disorder, became rather fragmented in national isolation from one another. The meaning conveyed by our past and the paths actually covered have thereby become dubious again with open-ending alternatives.

The problem of codification in Europe seemed to be more or less settled forever a few decades ago. Now, in the light of the new challenges that are arising from the facts of the newest European convergence, we have to resume not only our earlier investigations but, at the same time, also repeatedly re-consider the foundations and the historical (that is, as directed from the past towards the future, in terms of perspective) presuppositions of our thinking–perhaps not for the last time in our ever-changing world.

[88] Zimmermann 'Codification...' [note 26], p. 114. See also in a similar sense Heinrich Kötz 'Taking Civil Codes Less Seriously' *Modern Law Review* 50 (1987) 1, pp. 1–15 and especially on pp. 13 et seq.

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enactment. However, the formative era's foundation of rules upon underlying general principles, in a consistently established system derived from the principles and based on the qualitative idea of codification, was soon lost in the rigid and exegetical application of the great civil codes. By the end of the 19th century legal positivism as simplified to rule positivism (or, more accurately, to statutory positivism) became challenged by the free-law movement.

In England, efforts of codification at the start advanced parallel to those in continental Europe. However, since legal unity was no longer in question and the judicial route to legal adaptation had been institutionalised at an early period, the idea of codification because of rational considerations did not take hold. Even in the United States codification proved to be successful primarily as the medium for legal transplant and for reform in the new states' institutions. The Common Law pattern of restructuring the law into a new systematic body, as opposed to the Civil Law pattern of codification, is based on the rearrangement of the legal materials. Thanks to the process of argumentation through precedents, general principles could become the source for the judges' considerations without any mediation by a code. Codification in the strict sense of the word was replaced by various substitutes, such as doctrinal codification (textbook writing as the medium for 19th-century English legal export to the colonies; restatement of the law by private bodies with professional support as the tool for the American approach to law in the 20th century), the rearrangement of statutory law (consolidation), and the uniformisation and unification of law.

Summing up, the code is a thoroughly organised body of rules covering a branch of legal regulation. From the ancient collections of law in Mesopotamia and China up to the general codes of the Nordic countries in the 17th and 18th centuries, the codes committed to one written body almost the entire system of law. From the later efforts at legal consolidation, from French absolutism until the present, codification has, instead, collected all the rules of a relatively independent area within individual branches of the law. Formerly it could be a recording of customs or a compilational collection or a proposal in a private work (for example, Stephan Werbőczy's *Tripartitum opus iuris*, 1514, which was successful in

preserving Hungarian legal unity even after the country was divided in three). Private projects continue, for instance, in the recommended model codes of the Restatements of Law, which were meant for internal legal uniformisation as well as for the codification of precedent law in the United States.

Today's codes are, in general, the products of legislative initiatives. In its modern forms, codification strives for a structure moving from the general to the specific, often introduced by a preamble stating its goals, and always having a statement of general principles as its foundation. The principles in the code are often formulated as a clause from which legal practice can generate new regulations, and can even erect new legal institutions.

As its name implies, *compilation* is a way of stating and arranging the applicable rules in chronological order as a written or printed collection, or as a mass of information stored on or in electronic data bases. This information is classified in accordance with the sources from which the legal provisions are taken, and eventually by topics. Until the formation of modern codes, most law books in the ancient, medieval, and modern era were only collections of the prevailing normative material—in some cases with textual corrections, which were meant mainly to exclude possible contradictions, to leave out the parts that had lost their validity due to desuetude, to remedy textual deteriorations caused by earlier copying, and sometimes also to "correct" it in order to satisfy current dominant interests (this is *revision*). Modern compilations mostly do not revise, but keep the original structure of the legal sources elaborated in them. Sometimes the rationale of the minister who originally presented the bill is included, and in Nordic European states the preparatory material elaborated by scholarly and judicial committees [*travaux préparatoires*] are also included or attached to it.

{In its first version, Csaba Varga 'Codification' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 120–122 [Garland Reference Library of the Humanities, 1743]}

„[C]ette grande monographie parue sous un titre trop modeste, est en réalité un traité d'histoire comparé socio-juridique de la codification, donc un ouvrage d'une actualité poussée dont les juristes occidentaux profiteraient au maximum... Varga a réussi une vraie théorie de l'évolution socio-historique de la codification, théorie authentiquement originaire dans son ensemble."

F[erenc] Majoros
in *Revue internationale de Droit comparé* 32 (1980) 4, pp. 873–876

"[A]n ambitious endeavor: to give an overview of the history of codifications within the entire framework of legal history made up by human events for over 2000 years... indeed it is amazing how much substance may be poured into so small a form."

Vera Bolgár
in *The American Journal of Comparative Law* 30 (1982) 4, pp. 698–703

„[A]u delà de l'analyse socio-économique du concept ou de l'analyse wéberienne des processus de développement de la codification, on tirera profit d'une série de remarques intéressantes et des différentes grilles de classement qui sont proposées en conclusion. On retiendra par exemple le passage de l'utopie quantitative (tout couvrir) à la vision qualitative (mieux légiférer), le rôle de la rationalisation formelle du droit, la place qui tient la codification dans le contrôle étatique centralisé sur le droit."

Denis Tallon
in *Revue internationale de Droit comparé* 44 (1992) 3, pp. 740–741

"[H]is aim is [...] to examine all phenomena having resembled codification, or having acted as substitutes to it, in an attempt to offer his reader a *theory* of codification... His insistence on *codification-as-form* ...is... to be understood in functional terms... Varga's opinion that there is much historical evidence to suggest that a code derives its real authority from the political power that institutes it is alluring. Through the inherent virtues of the particular form adopted for its self-assertion, suggesting such attractive values as clarity and logic, the political authority would then find itself *amplified*... But, it is a paradoxical feature of codification that, at the same time as it appears as an instrument serving to consolidate autocratice regimes, it purports to mark a democratization of the law through ensuring direct and equal access to legal information for all. Codification does away with the monopoly of memory... Whether a European codification can (or should) effectively be achieved is not for these pages to consider. What is clear, however, is that anyone interested in the future of codification, and therefore in its many pasts, will do well to read and ponder Varga's scholarly and insightful contribution to the legal literature in comparative legal history."

Pierre Legrand 'Strange Power of Words: Codification Situated'
Tulane European & Civil Law Forum 9 (1994), pp. 1–33

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