STUDIES ON DEVELOPING COUNTRIES

No. 88

CSABA VARGA

MODERNIZATION OF LAW AND ITS CODIFICATIONAL TRENDS IN THE AFRO-ASIATIC LEGAL DEVELOPMENT

1976

INSTITUTE FOR WORLD ECONOMICS
OF THE HUNGARIAN ACADEMY OF SCIENCES

BUDAPEST

I. Introduction: The composite nature of Afro-Asiatic legal development

As regards their political and social structure, economic development and cultural traditions the Afro-Asiatic systems embrace the most heterogeneous state formations. The range of these formations extends from the clinging to primitive conditions of a tribal community, through capitalist and often imperialistic tendencies, even to the global or partial acceptance of the revolutionizing programme of socialism. The Afro-Asiatic system embraces states which are so to say only in the beginning of becoming acquainted with the elementary achievements of civilization, whereas at the other end of the gamut there are states which appear in world economy as industrial powers. Their cultural heritage and tendencies are about as motley-coloured: here the range extends from the undivided domination of tribal beliefs, through the all-embracing community shaping power of historical religions, to arrangements institutionalizing laicized, bourgeois traditions.

In this wealthy store-house of the conditions and potentialities of past and present the qualification as Afro-Asiatic is not merely a geographical one, in particular when projected on the fundamental dilemma of the social development of the countries in question. At a single point namely the states dubbed as Afro-Asiatic form a community throughout. And this is the point where as the preliminary question of their social problems all of them are struggling with a single problem, with the confrontation by the more and more pressing exigency of the modernization of a delayed development. Their delay in development was partly, or almost wholly, due to their colonial status. With their liberation, with the first tentative steps made on the path to independent building of a state, their potentialities have of necessity multipled - and the attainment of independence nevertheless has manifested itself as something of a dual effect. They could though free themselves of the external influence unfavourable for them, still the continuation of a national policy of their own (moreover as the precondition of this policy, the forging to a nation) presupposed the emergence of the traditions of their own, their past aspirations, i.e. their becoming a guiding force and the motor of development. These traditions and aspirations were, however, mostly archaic; in the present state of development (in particular when the non-socialist path was chosen) they were in their trends absolutely of a hindering nature: in their totality they suited the African tribal communities or the Asiatic feudal formations.

It is for this reason that in the legal systems of the Afro-Asiatic countries we have to reckon with a duality or with an even more composite multiple stratification from the very outset. In each case we may on the one

part find the traditional law manifesting itself as the law of their own of the particular historical (tribal, religious or class) communities, a law which by itself or in association with other similar legal systems somehow embodies the national (or more accurately, the prenational) traditions. And on the other part we shall find the law forced on them by the states exercising colonial power or almost colonial influence, a law taken over or inherited from these states, which even after appropriate neutralization, limitation, reform, or replacement by another somehow embodies or forms the foundations of modernization, the intermediary link to the western systems and solutions, the moorings of becoming traditional of the institutions and processes accepted as modern, the framework for their appropriation as domestic, the medium of their precipitation. This dual rootedness of the Afro-Asiatic legal systems, the dual source of their development - at the same time representing its extreme poles and marginal values - not only reminds of the antinomic character of any process of modernization advancing through the creation and resolution of continually remanifesting contradictions, but at the same time splits in two the phenomenon, the potentialities and functioning of the Afro-Asiatic codification. Namely as regards the often archaically harsh and rigid, petrified traditional legal systems owing their survival to their traditional character, codification is often the only possible means for the practical manipulation of these laws, for their breaking away off their original carriers, their statement and positivation in a statutory form, and even for their slightest modification. Whereas for the adapted western legal systems codification is in the majority of instances not a question of such an elementary nature, but purely the function of considerations of expediency or of the adherence to instrumental legal traditions.

Within this relative community the problem of codification will of course present a number of unique variants in the states in Africa and Asia. Therefore if their typification of at least relative validity has been made a point, we can set out only from fundamentals of their historical development which, even if not exclusively specific for the particular types, are nevertheless in their tendencies, their effects shaping the physiognomy of the type in question, in its totality of a determining character.

Accordingly it appears to be justified that before all a distinction should be made between the systems ruled by Muhammadan law, where a process of modernization set in already in the course of the 19th century, and where traditional law was formed by religious teachings and their logical consequences accepted as revealed, - and the systems where modernization has been formulated as a task of the present century, in most of the cases intertwined with the gain of political-economic independence and the efforts to forge these geographical-political units to nations, and where as traditional law a yet even more archaic, deeply particularized body of tribal customary law appeared often not even surpassing the threshold of becoming or transforming to, a law. It should be noted that in the expansion of Islam embracing whole continents it was by no means exceptional that within a concrete political-geographical unit Moslem religious tradition encounters traditions of tribal customary law. Even if occasionally this encounter has meant not only a superficial contact, but a mutually fertilizing coalescence, it has not, however, influenced the problem of codification and its solution in any decisive manner. On the other hand we deem it necessary to segregate, as a category embracing exceptions rather than autonomous types, from these two a third variant, regarding the countries of which modernization (or, to be more exact: Europeanization) during the end of the 19th century or the present century, bringing about an unheard-of rise, did not take place on the ground of the decisive role of Moslem or tribal

traditions. Thus in these countries codification has not emerged as a divided problem, partly bequeathed by their own past, partly polarized to that adopted from foreign lands, but has been accepted or rejected, as the case may be, as aligned to the western examples determining the whole of legal development of these countries in question. I.e. apart from the types of Muslim and tribal customary law problems of codification were apt to emerge which in the last resort could be settled on the pattern of the corresponding European (Continental or Common-law) systems.

2. Modernization by codification in the systems of Muhammadan law

Islamic law is a religious law, it relies on Allah's revelation for eternity. This revelation has been given a form in the revelations of the founder of Islam, Mohammed, in the canonized text of the Koran. Scarcely a tenth of the anyhow not too bulky compilation called Koran is absorbed by profane (although accepted as hallowed) instructions for everyday life. Therefore the Koran is merely the basis, the final point of reference, of the holy teachings on law. For shaping these teachings into a system of legal norms already at an early date attention was given to tradition grown out of the deeds of the Prophet. Later on some principles formulated by jurisdoctors of outstanding authority in the Moslem community for the interpretation and application of the tradition, unanimously approved by the community, were taken into consideration, and so also still later certain solutions owing their birth to analogical application, in like way participating of the holiness of the Law.[1] This development and at the same time stiffening and closing of the sources of Islamic law advanced the canonization of the teachings on law as something unchangeable. It failed, however, to bring about their codification.

As is known codification is one of the possible means of the systematization of the norms as sources of law, their consolidation and preservation in a form of system. Thus codification will fail when it comes to guarantee the homogeneity and uniformity of a larger system, i.e. one embracing the further resolution and specification of these norms, their interpretation and application. I.e. interpretation necessarily appearing with the need for practical application and further development becoming inevitable will drive every system of assertions or norms (systems equally of religious, philosophical or legal concern) towards divergence and splitting into doctrines. Obviously neither law of Islam could avoid this dual process of development and at the same time disintegration emerging with the necessity of a natural law. Hence Muhammadan law could have by-passed sectarianism in no way, still it is characteristic of its spirit and forming that about the year 750, scarcely a few decades before the separation of the schools ("rites") of law interpretation now in the process of gaining their independence, the idea emerged of codifying the officially accepted interpretations of sacred texts. The proposal was, however, rejected by the khalifa upon the remonstrance of the founder of the Malikite rite.[2] Thus the texts commanding sacral veneration have become petrified in their historically traditionalized chaotic superposition and turned into untouchable sources which neither the politically sovereign state power nor (on the plea of some sort of a theocratic charism) any other agency could lay hands on.

Islamic law has in this form, with a claim to unchangeableness descended to posterity through a millennium, whereas in the meantime in

contrast to this at least in principle immovable Shari'a law only the administrative, fiscal, criminal and similar provisions of a rising, and then decaying empire underwent changes. These possibilities of change differing by branches of law on the whole met the altering needs of an empire[3] until in the 19th century they encountered new needs coming from Europe, the harbingers of the imperative of economic development. The proclamation of the Tanzimat in 1839, which in response to decisively French influence purposed the steering of the Ottoman Empire into the course of European development, promised changes in three domains: in regions covered by Shari'a law not at all or partially only (i.e. before all in criminal, procedural and commercial law) the existing regulation was superseded by received codes having as patterns the French codes;[4] for the application of these codes (before all for that of the new body of regulations of commercial law) secular courts became established by the side of the until then exclusively existing religious tribunals in 1860; and finally Shari'a law and its complete practical and doctrinal material, the fiqh, were consolidated into a system and (except for the still intact teachings on family law and the law of inheritance) codified in the Mejelle in 1876.

What was striking in this process was before all that codification appeared as the form of the French law-exportation. This accounts for necessarily that the compilation of commercial code was at the very outset the symptom of the invasion of Western law into the sacred realm of Shari'a law, an invasion which brought about the slackening of Shari'a, a law believed to be immovable and eternal.[5] Associated with the organization of commercial courts as in principle secular courts of exceptional jurisdiction was the relegation of the by-gone exclusiveness of the ecclesiastical courts to the store of relics of the past. Moreover the ecclesiastical courts themselves were turned into requisites of the past, into tribunals of exceptional significance.[6] And finally, what was of greatest importance, this process came to be integrated into a process of disintegration and revival in the light of which the creation of Mejelle on the one part meant the failure of the dream cherished by Ali Pasha in 1868 of the transplantation of the French Code civil, but on the other brought about an irreversible, unalterable break in the development of Islamic law, viz. the secularization of Shari'a, its submission to the authority of state power, its attachment to law-creating human arbitrariness, its profanization as statutory law, all what viewed from the head-waters of Shari'a law manifested itself as disintegration[7] in fact.

In the universal obligatoriness of the taqlid which preserved Muhammadan law more or less as a unity, no change had taken place in point of principle in the absolute and exclusive recognition of the authority of interpretations and precedents by jurisdoctors of times by-gone from the 10th century onwards through close to a millennium down to the end of the 19th century.[8] In response to the social need of adaptation this law of Islam nevertheless got started and a forceful process of internal erosion set in. As has been seen processes of this kind was the incorporation in codification of areas not covered by Shari'a, of provisions which in their consequences nevertheless set limits to Shari'a in its operation. We have to mention also that a beginning was made again with the juxtaposition and confrontation of the particular rites and in principle infallible teachings of jurisdoctors. In the crevices of the possibly discovered contradictions then analogical reasonings were inserted which in this way led to the formulation of exceptions or new solutions. When this nevertheless failed the secular courts achieved the restriction of Shari'a by reshuffling the rules of jurisdiction and procedure without even blushing.[9] In countries where the bind-

ing force of traditions prevailed by a degree weaker, or which were exposed to the penetration of imperialistic economic policy defenceless and to a higher degree, these manipulating processes of law modernization were easily put aside only to apply instead more effective, more clear-cut solutions of law reception remorselessly cutting into the live flesh of Shari'a.[10]

If we accept the typology which by far not unjustifiably accepts the development of Turkish law as standard, the pattern providing criteria for identifying some levels of development in the process of modernization and laicizing codification of Islamic law,[11] then after the first phase of conquests and growing expansion of Muhammadan law at that time showing a theocratical, internal immobility (610 to 1839), followed by the second phase of incipient fermentation, of the midway detachment (1839-1917), we have to reckon the third phase in the decay of the Ottoman Empire and in the disintegration of law from the closing down of the reforms of Tanzimat (1917-1926), when profane legislation already reached the most inviolable innermost core of Shari'a, viz. the provisions governing the personal status, the family and inheritance, and tore them asunder and modified them. It appears all this had been the outcome of the tendency to detach law by codification from its past religious bonds, the inevitable consequence of the growing demand for approximation to Western civilization (and within it the commanding necessity of emancipating the women and to make free the matrimony) and not in the last order of the final feebleness and agony of the Ottoman Empire during the first World War.

As is well known, the various levels, layers and components of social relations cannot be isolated from one another completely. If this is considered in its legal consequences then it will mean that e.g. the promise of the modernization of family ties in principle carried with it the Europeanization of commercial relations. For the present purpose, however, it is of by far greater significance that any peripheral rearrangement of Islamic law, any rearrangement of new domains by Western techniques of codification, or even more any restatement of Shari'a law (in its traditions and historical expression a casuistic ensemble drawing conclusions from case to case) by the system-centred technique of codification setting out from the axioms of general abstract principles, shook not only unique, selected institutions of Muhammadan law, but its entire outlook, method, traditional manifestation and operation. In the field of Muhammadan law modernization it means that codification (both as reception of contents and as purely technical trans-structuration as realized by the Mejelle) was not only the harbinger of a new, different world of content solutions, but also of another world of approach to, and ideology of, law and the methods of its creation and application. And all this, even if in a less spectacular form, in its erosive and disruptive effects manifested itself in the last resort as a factor comparable to the earlier, moreover in certain cases penetrating even deeper and perhaps more effective. For the consequence and reaction of a so called non-organic reception, simply settling down on the old law as new content, yet not relieving of or commingling with it may easily come to the fore as a duplication of the law.[12] The disruption of a given legal order from the inside (from the side of the spirit, ideology and methods of this law), however, may even if slowly and unobserved, yet with certainty achieve its object: disruption by technical re-structuralization is irresistible and the law concerned will hardly be capable to defend itself by a successful reaction obstructing the process. Therefore the transforming role of codification having as outcome a foreign law reception will by far not remain restricted to the transmission of content solutions. In the case dealt with before it appears we had to talk of a transsubstantiating, yet first of all of

a technical reception determining the whole fate of the process of reception directly affecting the outlook and methods of law.

Now in Turkey transition characteristic of the third phase took place by the introduction of a reform code of family law in 1917. It remains a fact though that after two years it was abrogated. Notwithstanding the return to the principles of Shari'a, however, the effects of the code were strong enough to shake the belief in the eternal invariability of Shari'a by tying marriage to a contract in writing and recognizing the wife's right to initiate a divorce suit. The code was also strong enough to bring about a duplication of law among the desert tribes clinging to orthodox religious principle and customary law,[13] further to spread the ideas of reform sparing nearly nothing in a large part of the Moslem world, in the "succession states" of Turkey.[14]

Apart from the Yemen and Saudi Arabia, both guarding autocratic inertness, there is virtually no country in the Islamic world which would not have entered the path of reforms designated as the third phase and advanced on it to the end. It was by an irony of history, however, that apart from Turkey and the Turkish community of Cyprus there is no state of Moslem traditions which within the framework of bourgeois development would have eliminated completely the legal objectifications of the creed of their ancestors, or laicized their legal order to the extreme components. Namely the territories of Muhammadan law on being detached from the Ottoman Empire and on gaining independence or becoming French or British mandates, received a strong impetus to secularization: by resorting to the law-transplanting techniques of codification for their contents and form transformed their commercial, civil and criminal laws, substantive as well as procedural - yet did not sever the ties attaching them to the community of Islamic law. Although the duplication of laws came to an end, i.e. one which was characteristic of the struggle of the old and new in the second phase. The exclusiveness of the old, and then its condominium has been relieved by the exclusiveness of the new. The law, its administration and finally the legal education have eventually been unified, and become thoroughly étatized.[15]

The rear-guard action of legal traditions has not, however, come to an end by this. Moreover, the process of preservation by terminating has found its expression of yet greater nicety only now.[16] E.g. as far as the creation of civil codes is concerned, codes may have been compiled mostly under the influence of the French Code civil,[17] efforts may have been made to achieve what has stood for a synthesis of Europeanization and the orthodox Muhammadan tendencies,[18] Islamic law and spirit, which have with more or less consistency, yet successfully been eliminated from the textual expression of code, have nevertheless found their way back by the postulation of Shari'a as the subsidiary source of law as an unchanging gemeines Recht of the Moslem world, notably in the provision which, when the Code was silent, has prescribed customary law, or in want of such, the teachings of Shari'a principles, or of natural law and/or equity as obligatory law.[19]

The subsidiary recourse to the traditions of a common past of Islamic law did not take place at a time when this past was still alive, strong, laying the path to the birth of nations. On the contrary: this recourse to the traditions took place when that past had already been closed down, become a socially neutralized legacy, when confronted with the diasporic scattering following upon the birth of nations, in a state of final divergence that common past was all that was left over, what served as a link, what reminded something as a certain community. Although the function of traditions could

prevail with a much greater modesty than the European gemeines Recht, the building of Western techniques and contents of codification upon Islamic subsidiariness, the filling of its crevices with Islamic legal ideology nevertheless meant the victory of traditions. It is a sign of the relativity of any compromise that in Egypt the preservation of Muhammadan law as crevice-filling framework was valued as recoiling from definitive laicization, whereas in less westernized countries the same could manifest itself still as a step forward.[20]

In addition there was yet another factor which notwithstanding the almost complete appropriation of European techniques of codification or the consequent continuation of the practice of law-reception blocked the majority of the states of Islam at a certain level and in the last resort marshalled them into a maze of internal contradictions. Briefly this was that family law and the law of inheritence had undergone a process of reformation, without, however, changing its colour: the law of personal status put on a modern guise of codification, and yet it persisted in its intrinsic loyal attachment to the ancestors' Moslem traditions.[21]

Hence it appears that codification had several faces, or showed at least several in the advancement of the Muhammadan law development. It seems from the effects of the Mejelle and the restatement of family and personal relations by codification that codification had a decisive role in segregating this traditionally religious law from the faith and its objectifications and in secularizing its ensemble of norms. At the same time its role did by far not come to an end by providing means for étatisation or by assisting at the objectification of law in a profane legal form. As has been seen, in the complete reformation of commercial and civil relations, in the full re-shaping of the punitive system, codification appeared as the form of a complete or partial law-importation. The circumstance, however, that codification appeared as the medium of reception of given contents and/or forms, further that it manifested itself in all cases as an autonomous factor of legal development, mostly in discontinuity with its environments (arriving as a stranger and often staying on), and not as an organic moment of the unbreakable process of an organic development, also refers to peculiar deformities. What is referred to here is that the new codified restatements of Shari'a law, the one superimposed on the other, did not purpose in fact a law-embodying codification: they were merely means, modest forms of renewed (and partial: timid or idea-less, yet always fragmentary) reform, further that the reception-approach to codification frequently brought about the atrophy of the internal forces of legal development;[22] and the sometimes exaggerated turning of attention to foreign solutions (as possible patterns for reception), the exaggerated concentration of legal development on the possibilities of reception, its becoming the function of alien inspirations produced mixtures deposing on domestic law as inorganic, in their components grating against one another or thrust out as foreign bodies.[23] I.e. the fact that in the fever of Europeanization the codification by reception was considered a panacea, an omnipotent and by itself sufficient means for modernization of law, moreover that even a moderate adaptation of the received law to local circumstances had in most of the cases been ignored, was in its ultimate effects the cause why in the breakthrough of reforms brutally upsetting traditional law the appropriation of the western patterns, their incorporation or adaptation were in reality retarded.

This is the situation where the less would have easily been the more. In any case it remains a fact that the domestic development and adaptation of the received codes, their creative practice tending towards a relative independence did not become sufficiently familiar in territories possess-

ing the past community of Islam, at least both development and practice remained below their own potentialities. Furthermore it remains a fact that the reception-approach to codification concentrated on foreign codes as ensembles of norms torn out from their socio-legal context and conceived in an abstract form, instead of handling these as moments having merely a relative independence, of composite socio-legal processes of motion. Therefore this approach ignored not only the special-unique components of codes wholly unsuitable for transplantation, but, what is a sign of shortsightedness already, it also ignored their whole legal environment, contextual relations (their native doctrines, judicial practice, development by supplementary laws). And finally the failures resulting from mechanical receptions of law, the sensitivity aroused by their drastic effects created a situation where the will of the revival of Muhammadan traditions, their enforcement as domestic contents in modern forms had come to be secularized: today it is a purely social force, notably nationalism living in particular among Arab peoples and making efforts for reviving national traditions that has become the standard-bearer of Muhammadan legal traditions.[24]

A genuinely radical, complete transformation of the legal system has been carried through by Turkey perhaps most consistently. This was a reform completed "by the stroke of the pen", a radical change-over bringing about a relentless turn, a total break in legal development. In fact in the course of three years, eight wholly foreign codes had been introduced which so to say in its totality replaced traditional, then still effective law.[25] Even if particular, specifically unique or chance-like factors had a word to say,[26] as regards both the role-playing of European codification and the ways of a possible break with Muhammadan legal traditions, what was of greatest interest was the adoption of the Swiss Zivilgesetzbuch The reception of the Swiss Code gave expression to the antiquatedness of the French Code civil in particular in its regulation of family relations as well as to the internal complexity of the German Bürgerliches Gesetzbuch losing itself in minute details, compensated only slightly by contents heralding future development. The practice of reception of the Turkish Republic had as its purpose the brutal subversion of earlier law; it performed this task in fact consistently, without compromises; it has transformed the legal system in its totality in a wholly comprehensive manner. By this it has reached the fourth phase of Muhammadan law development beginning in 1926. As a matter of course for this by the side of modern contents also a sufficiently simple way of expression on the optimum level of generality was needed, notably a form which in the practical concretization of the given contents ensured a relative freedom of action and the widest possible space for adaptation.

As a matter of fact in Turkey the act of reception had as its purpose the adoption of codes only as entities standing by themselves and isolated from their socio-legal context, as textual objectifications transmitting technical solutions satisfactory by themselves. Reception had before it the identity of the enacted starting point of a positive legal dogmatics and not of the achievement of a practical end. And for an ideology in the light of which at the very outset "the statutes are but simply the frameworks of laws. For real law develops within the limits of these frameworks, in application and practice shaped to suit the exigencies of the country,[27] - now from the spectrum of such an ideology the principled generality of the received code, its provisions on the filling of gaps, the increased role and independence of the judge were needed that in the wake of the same text Turkish legal practice should for its contents become autonomous, a practice tending towards independence and more and more adapting itself to the, from the Swiss model different, specific national conditions.[28]

Hence codification as a means of the law reception concentrating on the mere text does not qualify itself as valuable or worthless. Turkish codification by reception of foreign codes with a ruthlessness and radicalism has brought about the direct replacement of a traditional religious legal system of roots struck into feudalism by the law of a developed, monopol-capitalist, secular political and social formation. By the institutionalized opening of the valves of loosening and refining, with an efficacy gathering strength even such a replacement could become, if not free of problems, still possible. This is expressed by the circumstance that the coexistence of a foreign code-text with domestic legal development has still perspectives, reserves not exhausted by continual mutual regeneration even today. The code has with its presence and coexistence of half a century, it appears, coalesced with other traditional institutions and systems of norms of Turkish society to a remarkable organic whole. At least this is what the recognition suggests namely that reception is considered more convenient than all the (national) variants which could have been compiled by the receiving nations themselves, then and also today.[29]

3. Codification as means of the reform and replacement of the tribal customary law traditions

In the social and political systems presenting tribal customary law as their traditional original law, confrontation with the present had its beginning only a few years, or still better decades, before. This delay bears testimony not only to the backwardness of conditions inherited from colonization, but also of the size and urgent nature of the task to be accomplished. For in the principles and policies of colonial rule a peculiar contrast, in its outcome at the same time a dialectic identity, were the features of French and British colonial administration. Namely the colonizers irrespective of whether they introduced the French type of dominion forcing on the colonies their own institutions at any costs, or the British type of dominion preserving the traditional institutions of the native population (where the institutions of the metropolitan country formed the framework only), yet in the last resort decisively they differed from one another in the forms of manipulation with indigenous legal systems, in the methods of penetration only, but not in the pure fact of it.

The colonial powers, irrespective of whether with their administration they rejected the indigenous institutions, like the French, or allowed them to operate within the framework of institutions of the metropolis of their own, like the British, eventually did not eliminate or replace the traditional, original systems of law of the territories in question. What they did was a duplication of law at most.[30] By integrating their own law as a rampart or a safety valve, however, in the ultimate outcome they nevertheless left the native laws to their fate. The colonial powers did not bother much about the development of indigenous laws; they concentrated their efforts on the operation of their own law and institutions to a degree just sufficient in the circumstances. Namely contrary to the principle of non-intervention so seriously wanted to observe in the British India of the 19th century,[31] and then later in the 20th century mainly in territories with Muhammadan traditions in fact enforced,[32] in British dependencies, in the everyday practice of colonial administration as its proper outcome the supreme rule of Common Law became established, which then in order to weaken the native customary laws as far as this could be done, at least in their formal enforce-

ment led to their gradual forcing back and subordination to the principles of English law.[33] Consequently local customs, viewed from the perspective of centuries, did scarcely develop. Owing to the continual reproduction of the conditions of a subsistence primitive economy of tribal communities the customs in question eventually descended to posterity without being allowed to crystallize at least in their legal character. These customs not only did not become detached from the organic unity of the everyday practice of society preserving them, but did not even become differentiated from other norms regulating the tribal community life. It was for this reason that a specialist in African law could declare: "Instead of stating that in a society called primitive nothing is law, we might as well state that everything qualifies as law in these societies."[34] Now the ensamble of such ritual, moral and legal customs was what constituted for the African countries now independent, in their pre-nation state of particularizedness, the legal traditions of their own, their intrinsic properties.

On gaining independence these territories now in possession of a statehood of their own mostly took over the sources of law imposed on them in the colonial age. In this manner colonial legislation regenerated often as autonomous, sovereign law-making. As a function of such a process the earlier metropolitan law was mostly allowed to live on, and later provisions were made for admitting as an auxiliary source the earlier customary law. The circumstance that sovereign legislation made rapid strides,[35] that not only the legislation of the colonial age survived, but also as auxiliary source the domestic law of the former colonizing power,[36] could not affect the triumphant revival of customary law, its making headway in diverse forms yet in an increasing manner, or its attaining an almost predominant formative role. Namely customary law was by no means the remnant of ancient systems, as it might have appeared in the outlook of the colonial administration. Customary law was something to which the population adhered as to its most innate own,[37] as to something that stuck fast indissolubly and adequately to the given economic-social conditions,[38] as to something which therefore disposed not only of a past, but also of a present and even a future.

This is before all borne out by the circumstance that the attainment of political freedom led to an unheard of rising tide of tribal and national self-consciousness. The growth of political potentialities was accompanied by the genesis of a peculiar community - an inter-African ideology. The consciousness of Africaneity took shape, something that political leaders like Senghor, Nkrumah and others also awakened, suggested and proclaimed, and made the by tribes different traditions of customary law one of the expressions, embodiments and guards of the forms of behaviour of this Africaneity, the mirror of the common mentality of the African ethnic groups.

It may appear fairly well as a contradiction, and also antagonistical, that for the African countries now enriched in potentialities and entering the path of state-building, this customary law has become something given partly as the most anachronistic, and exactly owing to their primitivity a salvaged piece of their past, and partly as the promise of fulfilment of coming to themselves of the African peoples and their traditions, as the depositary of an African future preserved from the golden age long past. This contradiction, exactly because it is a real one, can hardly be resolved by the rejection or elimination of the one or the other of its conflicting parts. Namely both sides are by themselves and taken seriatim true. All that may be questioned is whether they refute one another directly, i.e. whether they are mutually exclusive, of an antinomic nature. Following from what has been set forth it cannot be doubted that in its present state this

body of customary law is a growth of the past tribal organization. At the same time neither is it doubtful that this law accepts community with African traditions not only on the level of tribal organization. Apart from this it appears for certain (as evidence calling for no pronounced confirmation on the part of specialists in African law) that the days of the survival of local customs in this form are counted in Africa. And since the only form of their existence is the preserving and objectifying practice of the corresponding community, their dilemma is by far graver than that of the spinning wheels of the Hungarian peasants dumped in the garret, or of the cupboards thrown onto the yard. By the side of the actually predictable trend of development within years or decades these customary laws will have to disappear from the life of community without their lesson's being studied by legal ethnography and anthropology, or without being used for legislation eager to become national.[39] For in the triple task standing before the enormous work of African legal development, viz. modernization, unification and Africanization, obviously modernization is the most important and it is which in the one or the other form, without the possibility of being parried, operates against the continuation of customary law as customary law, i.e. towards its liquidation.[40]

As is known, however, the relative clearsightedness as regards the perspectives is no recompense for the unsettledness of the agenda of the present. A study of the programmes of legislation is though often apt to create the impression as if the new states were primarily striving for becoming freed of the fetters of customary law.[41] In reality, however, it appears the question is not to pour the baby with the bath, i.e. to liquidate the traditions, but it is of the problem of their utilization, the selection of its expedient framework and forms. Namely, as has been said, there is agreement in so far as customary law cannot as such constitute the law of the future. To decide, however, what the present will have to do, depends on the role acted by the actual system of customary law in the social and ideological moulding of the given community, on the faith in viability of the traditions of customary law, on the form of the community development to a nation, on the quality of its tendencies of rationalization.

In this way a variety of alternatives begin to unfold themselves as regards the present of customary law. These are alternatives which have not moved in the hypostatized dichotomy of complete supersession or complete survival, but have given by far more shaded answers to the question. And it is exactly in this complexity concerning the present of customary law and its ideological reflection that the problem of codification turns up. One of the alternatives, viz. the judicial development of customary laws is essentially the denial of the path of codification. The historically grown other path, viz. the consolidation of customary law by its putting down in written form is on the other hand the affirmation of codification, in its form reminding of registration by coutumiers of European feudal customary laws as a preliminary form of codification. The third path, viz. the replacement of the whole body of customary law by way of new law-codes is finally the complete exploitation of the stock of means of codification, of its instrumental potentialities. It is a solution the next of kin of which may perhaps be discovered somewhere about the different variants of the Muhammadan law codification.

As regards the development of local customs by the everyday practice of local judiciary, this - exactly because its causes and consequences equally consist in the rejection of codification - amounts to a tactics putting off the problem rather than solving it. For it stands to reason that though customary law lends itself readily to shaping equally by judicial

way and legislatory one, partial moulding of its contents, however, cannot accomplish the task of its transformation to written law. Adaptation of customary law in such a way may close somewhat the abyss separating its contents from the demands of modernization, still it cannot change the basic character of customary law which is the principal source of its anachronism. This form of adaptation will mean a compromise specially corroborated by the fact that in the countries where the desire has emerged for such a slow development through this practice, in most of the cases neither the unification nor the centralization of the organization of judiciary has yet taken place. And yet what appears to be probable, the development of tribal customary law, in among themselves particularized traditional tribal courts isolated from courts of written law cannot seriously carry with it the promise of either modernization or unification.[42] Much has been disclosed of this procrastinating tactics, exchanging the actual risk of action for the security of hope relying upon itself, by the behaviour of Uganda, whose trend has been defined by a government proposal hoping for the automatic merger of customary law into written law.[43] Notably the belief that disappearance of customary law predictable for the near future will be the more or less spontaneous consequence of unification of the courts of law, has relieved those responsible for legislation of all to be done. And characteristically those have been relieved not only of the work of codification, but, on the pattern of the practice of the age of colonization also of the inconvenience to authorize again the supreme court to apply local customary laws. This is the point where policy qualifying as subjective has been thwarted by the logic of social development. Social exigencies have deceived, and corrected, these hopes and ultimately Supreme court has also been forced to apply customary law, a policy advancing its development by practice.[44]

Developing and shaping customary law by judicial practice might as well be a program of legal policy knowingly undertaken and willed, planned and applied,[45] regarding its value, however, beyond a conjectural analogy with development of European law in Antiquity, the Middle Ages and modern times it cannot serve as the basis for drawing conclusions of any kind. Even in want of completed experiences acceptable as representative it appears to be certain that development of customary law by judiciary provides no decisively new quality, and what it may offer as new in contents, may be exploited only as raw material for codification.

Consequently judicial development of customary law will appear as a state of transition only, as an intermediary phase, which in the one way or the other paves the path to the codification of customary law. This is borne out by the fact that development of customary law by the judge was a usually accepted means of development of customary law in the practice of indigenous courts of the colonial era, still it never led to a substantial result worth discussion. The case was altogether different with the codification of customary law, which as the natural (yet not inevitable and, owing to the undervaluation of customary law in the colonial era, not even too frequent) consequence of judicial development of customary law produced works of outstanding importance already in the preceding period.[46] Thus putting down in a summarizing written form of local customs, their consolidation in the form of codes appears to be a progress of a more decided character than judicial development, a progress namely promising direct results and therefore from the point of view of social development more desirable. Naturally we have to remember that not even the codification of customary law must be regarded as a by itself satisfactory result or process abstracted from the historical task of the modernization of law in Africa.

Under the actual conditions of legal development in Africa and Asia (embracing also the moulding effect of the judicial application of customary law extending over many decades and even centuries) the codification of customary law is the opening act of a historical process rather than its termination. Its fundamental significance manifests itself in that it shakes the system of ancient customs in their firmest, most proper foundations, viz. in their most intimate and organic union with the everyday life of tribal community. It removes them from their foundations and objectifies to an external image. Codification brings about between the form changed in quality and the scarcely modified contents a discrepancy, an inner conflict which will of necessity drag the contents before the crossroads. For the written, fixed, externalized form will break down these contents to elements of a form, its bare partial moments, which will sever the contents from their life-giving roots, stiffens them and in their given historical state - so to say fixed as a snapshot - at once distorts them to their own death-mask. By this the development of customary law as such will on the whole come to its end, yet the new form as allowed by its potentialities will provide facilities for manipulation with new, more advanced means, i.e. for adaptation and reformation by means of techniques of legislation and judicial law-application received and radiated from Europe.

Thus in neither time nor space the codification of tribal customary law stands far from the peculiar functions of codification which in the "succession states" of the body of beliefs of Islam have called to life the Mejelle and similar products of legislation, legislation namely which by the right of sovereign authority have secularized religious law relying on revelation to positived statutes. In all these two dialectically intertwined processes have proved to be of a decisive character, namely on the one part the removal of traditional law from its original, life-giving and preserving medium and context, and on the other, the inoculation and trans-structuralization of this archaic law with European legal techniques. Notwithstanding its community hic et nunc of the modernization of Muhammadan law the codification of customary law in the countries of Africa and Asia is tied, measured by historical standards, by a deeper relationship to the putting in authoritative written form of the customary laws of the feudal age in Europe. Namely as a historical task the consolidation into national legal systems of the great European mosaic of laws born of the customary law of Teutonic tribes and the isles of customary laws of European feudal particularism (parallel to the kings' centralizing efforts brought with it) was the same as the integration of customary laws of the African tribes into national legal systems. It was the function of consolidating and unifying in written form the law as girded with narrower or wider reformatory tendencies.[47]

Within this obvious fact of genetic-historical relationship,[48] however, considerable discrepancies appear. What appeared first, in feudal Europe the case was one of the conversions of unwritten form of a with itself more or less identical law into its written form, i.e. of a change-over between the equally possible and in different historical periods equally adequate forms of given contents. In the case of tribal customary laws, however, the issue is one going beyond a merely formal change-over, viz. a conversion of law from the one of its potentialities and conceptions to another one in its roots wholly differing from the earlier. Notably the social phenomenon, which in the tribal customs appeared as legal, was not a system of formalized variants of behaviour serving as standardized pattern in the shaping of behaviour, or as the criterion of the resolution of conflicts, i.e. a form providing a law in agreement with the civilized European traditions, portioning out and embodying this law. It was a different, historically

preceding phenomenon, dialectically denying the European one (which was of a litigious outlook, purposing the cutting off of the dispute at the conflict-resolution), a phenomenon of a conciliatory outlook and appeasing approach, at the settlement of conflict emphatically striving for a real and concret resolution, having as its end definitive acquiescence, and therefore not striving for a formal or formalized embodiment or exclusiveness of the law, contributing to the shaping of behaviour or the settlement of conflicts only as starting point, as a more or less weighty apropos rather than as the inexorable expression of some sort of an externalized-objectified Word.[49] Secondly, in Europe the consolidalism of customary law passed off within the same social-economic formation, as the concomitant of its transition period from feudal particularism to the prevalence of the centralizing efforts of royal power, whereas in Africa the scene and wider social context of this process was provided by the precipitation of tribal (often nomadic) conditions of life in a formation of monopol capitalist effects inherited from neo-colonialism and adapted in a primitive form. I.e. feudal Europe, it appears, transposed customary law only re-orchestrating, but not re-writing it, and as written law substantially reproducing it on its own social and historical level. On the other hand in Africa the codification of customary law as additional task also presupposed the confrontation of the law of tribal communities with the exigencies of present day capitalism. Finally, thirdly, the codification of European customary law was with the liquidation of particularism aimed at the interests of certain layers of society only, whereas the codification of customary law in Africa has subversive effects on the population organized on tribal foundations, implying also the tearing out of the communities of large families from their society-shaping group cohesion.

The putting of customary law in an authoritative written form manifested itself even in feudal Europe as the inevitable stage of an inevitable transition. This was the case not only because it rendered the practice of the customs, in their spontaneity so far little controlled and controllable, pliable for the purpose of a central, conscious, planned organization of society, but substantially also because it served as an ideological-technological preparatory stage for the reception of the stock of means of a classical codification. Now the peculiar social physiognomy of the customary law codification in Africa and Asia reminds of the further strengthening and growing emphasis of these potential advantages and exigencies. Namely this transformation, which is passing off in the society and law of tribal customs, presupposes a leap, a flash-over between poles and types of development by far more apart: the transition from the informal, conflict-resolving pre-feudal law of the large family and tribal communities to the formal, conflict-determining capitalist law. And the multiple socio-legal leap, which this transition presupposes, does call even more emphatically for the insertion of intermediate stages which purpose not only the integration of this body of customs into the work of a central state-building, its moulding and kneading into a pliable part of it, but ideologically and technologically serve the preparation for the reception of modern legislative means of the codification of law.

In reality, however, this formula is by far not so simple and the countries concerned do not even conceive it as an operation free of problems (yet necessary). Namely the possibility of codifying customary law even today, in the phase of coming to fruition, still forms an open question. For a number of factors may still operate towards its limitation, moreover to its frustration. To mention by way of example only a few of such factors, both possibility and expediency of codification may be queried by the enormous tribal, territorial and linguistic particularizedness of customary laws

within a given political unit,[50] by the considerable differences of development which may hardly be bridged over even within one and the same country,[51] further by the legacy of earlier political dismemberment and dividedness, which beyond the ethnical differentiation and that of development, as the outcome of divergent effects of colonization have produced divergent and even conflicting traditions in one and the same country.[52] There is yet another problem, namely in both federal and unified countries codification of local law cannot be successful unless it is done locally. Often, however, customary law is a federal affair and the federal constitution will hardly agree to local codification.[53]

Consequently when codification of customary law is aimed at grasping isolated tribal customary laws in their particularity, often it will have to overcome a resistance being a set-off to the hopes codification holds out. In the presence of ethnographical, anthropological, sociological and (recently) legal researches for collecting customary laws as a private work the official codifications become more and more directed to the seizure of units larger than the tribal. I.e. tribal customs are in their closed individuality mostly reflected by the compilations of an exploratory nature which even when applied by the courts will in principle remain private work void of any official significance.[54] On the other hand codifications of customary law which carry an official guise, at the same time present a tendency to a regional or national unification of customary law. Therefore, apart from local works of an experimental value, the codification of customary law has been successful, and as regards a political unit, complete, leading to a reassuringly stable and closed result, only at places where standing on tribal foundations the codifiers have at the same time transcended the tribal limits, so that the customary law codification has stood also for unification. This on the other hand presupposes such a leap of quality, which in want of adequate antecedents has been successful only in smaller political communities or in for reasons of guarantee closely delimited fields of law (e.g. in criminal law).[55]

It is by no means an easy task to draw the limits. Under any circumstances it remains a fact that unifying codification of customary law is very close to, and can hardly be told from, the path, which we may designate as codificational replacement of the law what was before. As a matter of fact unification inevitably presupposes that in the code provisions be incorporated which do not appear separately in anyone of the unified laws.[56] This is by itself not yet a trend towards reform, still it signifies a transition to it anyhow. Again the element of preserving by terminating turns up, which at a higher degree is of necessity the feature of codificational replacement. What distinguishes the codification of customary law quite clearly from any codificational replacement of customary law is that codification of customary law will irrespective of whether it closely adheres to a given tribal system or unifies such, treat the traditions of tribal customs as exclusive, sovereign sources of law, as distinct from any other possible sources: it will not act as an intermediary between the body of tribal customs and any other (statutory or judicial) sources of law. The function earlier described as implying the undermining of the stability based on customary practice of a law ossified in its tribal state, i.e. its rendering pliable and its saturation with Western legal techniques, is performed in any case by the codification of customary law. Unification does not affect the realization of all these: it is merely a surplus function attaching to them.

Abstractedly viewed transition through the codification of customary law, irrespective of the form in which it is carried through, is not only a necessary stage, but even a desirable one. Most often only European au-

thors bring forward anxieties against the codification of customary law by arguing not quite unjustifiedly that such a codification at a given level of development artificially puts a stop to natural development: it not only frustrates the further development of customs, but by a stiffening delimitation even falsifies their development so far.[57] This incidentally justified grief, however, appears in the objective need of modernization to be rather sensitivity or aestheticizing flirting characteristic of an ethnographical salvage of past. Beyond the undoubtedly humane values imbedded in tribal traditions, forced to struggling with their own awakening nationalism and Africaneity the African states themselves have taken a stand to make preparations for a reasonable, yet painful decision in the alternative of salvage of traditions versus modernization. The alternative, and rendering it apparent only, the need for development were given, and even when allowance was made for a certain compromise the states concerned had to decide in a determined manner. This explains why in the accelerating pressure of social and economic development the African states though have almost unanimously undertaken the codification of customary law, still present a wavering attitude. Still not because they find the solution to be too much, on the contrary, they find it too little, and parallel to this they are in search for a method to go beyond the whole of customary law. I.e. to the political leadership it is not the need for transition that most appears to be doubtful, but in want of dispensable years or decades to be wasted it rather doubts whether there is time for gradual transition.

The need for a choice between the risks of a slackening of speed in the interest of gradual transition or a dash forward compelling to the repudiation of traditional mentality implied in the alternatives seriatim burdensome, often with the weight of a psychic moment of inertia, suggests the solution-promising final result as desirable and to be chosen, viz. the anticipation of the replacement of the whole of customary law by codification. In such a psychological state the fluctuating image that in our days "the African governments almost throughout demand the compilation of codes and not of books of customary law ... In like way we may ponder whether the making of law-books before becoming a reality will not become antiquated for the benefit of codification"[58] will become predominant.

The choice of the path to replacement by codification, i.e. the choice of the third way, will have allurements also for the young states in Africa and Asia which have not yet covered the earlier ways or stages, before all because a rapid transition, ignorant of midway standstill offers the hope for a definitive solution. Replacement by codification by occupying the place of the whole of earlier unwritten and written laws, by salvaging their experiences believed to be usable and by alloying them with ideas of reform, stands for the unification of an earlier ethnically and regionally, and for its sources equally particularized law, for turning it into a code-law as the decisive (or exclusive) foundation of any subsequent development of law. According to its intrinsic claims and potentialities replacement by codification, too, brings into being a "harmonic synthesis" of the attachment to tradition and the satisfaction of the exigencies of modernization.[59] The statement will therefore have to be admitted as true that tribal or national character does not exclusively cleave to customs: placed in the light of new tasks customs may be reflected also by legislation.[60]

This third way, by making the code-form the fundamental or even exclusive form of the system of sources of law, constitutes a uniform path, still as regards its practical realization (before all the quality of the synthesis: i.e. the rate of preservation of the old and enforcement of the new) it opens a scope for a variety of solutions. E.g. it may occur that the states

concerned will concentrate their efforts directed to replacement by codification on a definite branch of law.[61] The demand for replacement may also lead to a set of codes[62] - or to the idea of a single, all-embracing code[63] - mostly of compiling-systematizing functions, extending to the legal order as a whole and, as for their contents detaching themselves slightly only from the ancient sources and producing a novel quality mainly in their form. Finally it is even possible that in the efforts directed to replacement of earlier law by codification beyond the claim to synthesis also tendencies directed to reforms come into prominence, to produce also in African law a peculiar amalgam-type of code approximating the reception of law. At the replacement by codification a peculiar surplus-problem may confront a country under Common Law colonial influences which beyond its own traditions and survivals has to overcome vested precedent-law traditions in order to acquire code-law techniques of making and applying the law. The final choice of the path of codification will mostly be little influenced by this, still it may at least retard, if not postpone, codification by inserting transitory forms.[64]

Obviously the greatest and also most decisive strides made towards the modernization of law is represented by this type, approximating reception of foreign law. At the same time, however, it is this form where the danger of a breaking away from the present and so from the memory of the past temporarily still tying to itself the present with many threads is perhaps greatest. As has been seen, for the Zivilgesetzbuch transplanted into Turkey half a century was not sufficient to turn it into a quasi-innate force, the ferment of social and economic development. Similarly as regards the reception of foreign laws by African countries it is doubtful whether these laws will have power enough, by becoming the incentives and standardizers of the unfolding of modernization, effectively to influence the social and economic conditions in question, while they will themselves also become assimilated to these conditions. Regarding the future it is by all means justified to put this question, still it may hardly influence the choice of the present, what again is one of the paradoxes of development from out of backwardness. For actuated by the need for taking a step forward to make such a choice may simply be compelled, either because extreme tribal particularizedness has made reliance on tribal laws hopeless from the very outset,[65] or because in the state of enormous backwardness of legal life (in the first place of tribal laws), the development of tribal law has appeared as a meaningless, illusory undertaking, whereas on the other hand, the pursuit of other traditions has proved to be politically inconvenient.

For the understanding of this drastic form of replacement of ancient law by codification we have to be aware of that in these countries development of social conditions started from an incomparably lower level than in Turkey in the times of the First World War. These countries, like Ethiopia, belonged about ten years ago to the most backward countries of the world, consequently the mechanical reception of a western code would have presupposed the leaping over of an unbridgeable abyss. Hence since between the present and the future looming up on the horizon the distance was greater than could be mastered, the code to supplant the African tribal traditions has been approximated and primitivized to local conditions. On drawing up their scheme of codification some African states have combined the desire for adopting western patterns with far-reaching concessions to the peculiarities of their primitive present and to this end an artificial code has been prepared. Like a test-tube baby a code neither too strictly original nor too closely a transplanted one has been compiled. What has been created as a mediator between the adaptation to primitive conditions and

the promise of development was in fact a "comparative" code, a specifically new variant of a code relying on given individual combination of innumerous provisions of unnumerous codes.[67] This artificial phenomenon (which has been dreamt by its European makers as something built upon the African tribal traditions, adapted adequately to the social and economic conditions of the model state) is suffered in the present development nevertheless as a foreign body wedged into the receiving medium, which in turn tends to thrust it out by setting in motion its mechanism of defence.[68] Like half a century ago in Turkey, the question is whether these creations by themselves honourable, yet artificial, projected to practice do not prove to be mere "fancy laws",[69] idealistic growths pointing to beyond any possible limits of influencing society?

When now we strike the balance on discussing the question of tribal customary law modernization as a problem of codification the statement may be made that code-form equally constitutes the culmination - the medium of organization, the instrument - of the various methods of modernizing customary law. Between judicial development and replacement by codification there are, as regards their legal quality, social importance and radicalism, many possibilities which not only indicate the different stages of modernization, but at the same time in succession reveal the potentialities immanent in the means of codification. In the putting in authoritative form of customary law, i.e. in its official, normatively stiffening codification (when the peculiarities following from its character as a written law are at present ignored) the element of systematization predominates. In this case codification will become a means to mould the amorphous, pliable material of traditional customary law to a definite form, and by exploring its intrinsic relations and cohesions to arrange it as the ordered series of elements attached to one another. Replacement by codification serves for the performance of more composite functions. Whereas at the codification of customary law systematization will become the principal contents of the conversion of customary law into written law by means of codification, at the replacement by codification systematization is a subordinate, secondary moment only. At the codification of customary law novelty manifests itself in its shaping to a written law as in a new form; the element of systematization does not lend new contents in this process. On the other hand in the replacement by codification the new form will be coupled with new contents: here the novelty is a complete break in development of law, in a starting of a new law as for its contents too discontinuous with earlier development.

It is for this reason that replacement by codification carries with it an emphatically direct social significance, for as regards its substance it is an element of a socially influenced and controlled process of development, which points far beyond the law, this lending merely the form to the process. With the means of codification law can here in reality act the role of ancilla only. As regards this role there is a number of appearances. These do not, however, confess to the complete truth absolutely and therefore they may become the sources of erroneous judgements. Namely codification is in its form established in Europe[70] the crowning of an organic development, its discontinuous form-giving culminating in synthetization which has not of necessity denied the proceeding continuous development in its totality, although it has inserted a caesura as its end. Now this classical model of European codification has been made use of in countries of Africa and Asia resorting to replacement by codification without these countries having appropriated the organic rootedness that has given life to these codes as the most proper products, in their own mother-countries, of the domestic social and legal development. The code may even when it serves

as the means of reception or importation of foreign law, as is the case here, carry the semblance of or hope for this organic rootedness. On the other hand, the code will, if it draws away from the actual social-economic needs, from the potentialities and trends of development, rise to the position of a dominus which will in the unequal struggle with reality sooner or later, yet certainly, be wiped out or brought to failure.

The possible approximation of organic rootedness, the realization of a dialectic interplaying between the role of ancilla and that of dominus will become the duty of replacement by codification also in the modernization of Afro-Asiatic tribal customary laws. Replacement by codification will have to become an image which advances the future worth struggling, but will never become a tabula utopiarum.

4. Problems of codification in some modernized legal systems in Africa and Asia

As has been made clear in the foregoing discussion code-making has in the majority of the countries concerned a key-role in their fight for overcoming the consequences of underdevelopment and for speeding up their social and economic rise. Codification could hardly be considered some sort of a panacea for remedying backwardness in development, it is nevertheless beyond doubt that codification provides a tool for the store of instruments of modernization which must not be ignored. The use of this tool as a matter of course presents a multi-coloured picture: in fact as has already been made clear, the Afro-Asiatic systems are far from being homogeneous. There are several among the states which have already left behind the basic task of modernization and yet raise problems of codification. These are the systems which in the introduction to the present work have been collected in the category of exceptions. Their most general feature is the appropriation of western patterns of development with more or less success and by assimilating these to their conditions by varying ratios. Furthermore if modernization has not Europeanized them, it has nevertheless drawn them away from their original, traditional institutional-ideological background, and consequently their legal development has ceased to be the mere function of the replacement of an archaic religious-tribal law.

This group of countries in Africa and Asia (exactly because it comprises the countries departing from the former ones by the one or the other property), primarily does not differ from other groups by possessing some sort of a definite property; the difference consists rather in the want of such a property.

As regards the subject-matter of the present study, the group in question differs from others before all in that the Muhammadan religious-legal tradition and/or tribal customary laws are not confronted here by the coercion of a modernization by replacement of earlier laws: their profanization, étatization, the establishment of a system of their unified statutory written law have already been completed. And exactly because their modernization has presupposed the choice of western alternatives and the opening of the gates to their influence already at the very outset, their problems of codification present a closer community with the problems of the types serving as models rather than with the problems of those analysed before.

This characteristic manifests itself, first, in that the group in question, at least as far as its codificational problems are concerned, completely embraces and assimilates the external effects suffered during colonization

or the reception of foreign laws. Secondly, this assimilated foreign influence often becomes absolute with such a naturalness that the legislation of the state in question, which after a time has gained both its political and economic independence, will later in the full possession of its legislatory potentialities assimilate this influence so as to render it even more national, instead of setting up an alternative to it in the sign of a national development of law.

By way of example we may mention that there is a state where continental codificational traditions of the colonizer settled on the indigenous traditions of codification. Later not even British-American influence was able to effect any changes on the conditions as they existed, all it could do was go on with shaping them. Eventually national legal development, too, did hardly make any progress in codification as compared to the earlier colonizing influence and effects. Substantially it adapted only the earlier sources, and when in the course of it stress was laid on some sort of a change, this consisted merely in the synthetization of conflicting effects of the colonial period.[71] There is a state where the system has been preserved which for centuries was the common law of Western Europe,[72] i.e. the continually adapted Dutch variant of the Roman-Germanic law broken up before any systematization by codification. This pre-codificational tradition opposing codification has, alloyed with Common-law effects, been raised to a determining factor to an extent that, even in the presence of national legislation and notwithstanding the pressure of the disorder in sources of law, the idea of codification has been killed in its germ.[73] And there is yet another state where the colonizing power in order to ensure the export of its law has by codifying, primitivizing and adapting it to colonial conditions institutionalized this law. Decades have elapsed, or almost a century since this was done, and although the attainment of independent statehood and constitution have carried with them the promise of a peculiarly national and, at the same time, democratic and progressive legal development, substantially the law as it became established has not changed. Its framework, and to a great extent its form and contents are equally defined by a series of codes compiled of the law imported during the colonial era.[74]

This feature seems to suggest that the problems of codification of the modernized Afro-Asiatic systems are closely attached to ones of their modernizing Continental or Common-law systems. We may add that there are plenty of examples which make it clear that legal development become independent often does not go beyond the corresponding influencing system as regards either contents or form. Still as will be seen this statement does not, however, hold its own as an apodictic thesis. It is merely a half-truth whose validity is limited by two factors.

First, it is though a global characteristic of the Afro-Asiatic states having a modernized system, still not in all cases a strictly prevailing element that they closely adhere to the codificational ideology and practice of the system exercising a modernizing influence. There is e.g. a state which has advanced from the absolutism of unconditional autocracy, from a nihilism considering the law a willing tool in the hands of the absolute monarch to an European political and legal formation accepting law as the expression of some sort of a social equilibrium. The law which by a confrontation with the person or institutions of the law-giving divine Tenno has never been objectified or applied has been modernized, when even the concept and ideology of subjective rights have been naturalized. With the aid of a series of codes presenting French and German influence the legal system of this country has been re-shaped root and branch, moreover the impetus of codification (though since become exposed to considerable American influence)

has been preserved unchanged. At present this multi-coloured effect has, by allowing a scope to certain national traditions, been re-formulated in a synthetic form and to reinforce this trend also the fundamental branches of the legal system have been recodified.[75]

There is yet another state which has suffered the joint effects of Islamic law, of French law as adopted by the Turkish Empire and of Common-law only to mould these effects with the admixture of the archaic cementing medium of national and religious traditions in a country which by having gained its independence approaches the political and legal establishment of a western, Anglo-American system. In the course of this process jurists are making efforts to knead the chaotic effects of the past (which was acquainted with codification only in its fragmentary, controversial manifestations, in an ambiguous form) with the means of code-making into the synthetic elements of something new. Owing to the close attachment to the past, however, this has not, at least for the time being, been achieved: practical attempts directed to this end have, it appears, been successfully frustrated by archaic traditions petrified centuries before (by traditions namely which are undoubtedly the ferments of radiation of the consciousness of community of the past, yet the barriers to modern national evolution, to progress as understood today.)[76]

Hence the countries in Africa and Asia which have replaced their earlier laws already in the colonial era, at opening the gates to the West, or as the concomitant of their formation as an independent state, by a new law (or have at least modernized it), have overwhelmingly taken over the codificational ideology and practice of the influencing (replacing or modernizing) system. Dependent on the form and dynamism of internal development modernizing codification might as well have been in advance of its time (or at least one providing a satisfactory framework for the development required by its internal forces) so as to create the impression as if the development of codification of the states freed from their colonial lot had come to a standstill at the level attained and both the adapted variants of the former colonizers' more developed systems and the ideology and practice calling for a code-form or rejecting it, had been preserved. On the other hand when assimilation has not been complete, when modernization by reception of western laws has not prevented national traditions from re-asserting themselves, together with any distorting or individualizing effects of their influence, then the problem of codification has taken (and may take too) on new colours and will then in its attachment to the problems of the modernizing system continue its life as an independent variant.

In order to clarify our earlier examples, this may manifest itself not only in that - as in the first example - Americanization and the idea of re-codification have been inoculated in the French and German codificational traditions. It may manifest itself in a sharper form, namely that in the interpretation and practical application of these apparently classical products of codification, in their translation into reality a return is made to the ancient practice of conflict-resolutions. There is a growing number of symptoms that confronted by given community interests (or by private interests deserving protection) this codified ensemble of rules has not been recognized as the exclusive embodiment of law. Thus positived statutory law will become a manifestation deserving respect, yet remaining a mere historical one, viz. a weighty, yet not the only, and not even the last, argument. Instead statutes will become only "one of the possible foundations of the judgement", an orienting indicator, whose "presumption of rationality", too, may - if considered necessary - be defeated by the judge.[77] And it exercises also an individualizing effect that in the field where - as in the sec-

ond example - a mosaic-like cavalcade of codificational effects has been displayed, the manifestation of a nationalism gathering strength through a revival of religious and legal traditions may not only annihilate the endeavours of codification, but (reinforced by recently prevailing American effects) blur the reality and paralize the enforcement of codes already in being.[78]

On the other hand, the fact that some states in Asia and Africa may carry through the work of unifying replacement only imperfectly will also operate towards the relative autonomy of its codificational problems. Here we have not in mind the feature analysed before, namely that practical application of codes is adapted, and also deformed, by the medium of transplantation of the code borrowed from abroad to the domestic, national traditions. What we have in mind is that the act of law modernization, the unifying-replacing codification mostly brings about the national unity of law only formally, as for the contents it does not produce the like. And this not because its translation into reality has been influenced by recourse to methods nourished from different traditions. This is the case because the indissolubility of the bonds of the past, the tenacity of the survival of traditions in certain branches of law or within certain groups of society have simply frustrated the replacement of earlier law by any unifying-modernizing codification. All what has happened was what generally happens at breaking away from the real potentialities of reality, viz. that the new does not supersede the old, but settles on it, - a circumstance leading to the plurality of law, to a duplication of contents.

This may pass off in a tolerated form,[79] in certain branches of law in an expressly legitimate way,[80] or squeezed between the framework of legal codes, only secondarily,[81] - the substance is in all three cases the same. And this is that our code can lay no claim to generality: it reflects particularity, which is opposed by another particularity guarding past heritage.

It would be an interesting experiment to see in these examples the typical consequences, fate and after-life of Afro-Asiatic law modernization, the vistas of the replacement of Islamic religious or of tribal customary laws by codification. In reality, however, nothing would be as unfounded as this. Namely we have seen that these examples are mostly a congeries of exceptions which do not organize into types. At the same time even their atypical character carries something common, general, which is not without a lesson even projected to the problems of modernizing religious-tribal law.

And this common trait consists in that any society may assimilate and appropriate the means of codification to the point where its problems of codification are identical with problems of codification in the country exercising the codificational effect. It is, however, by far not necessary that such a technical, structural or formal identity should lead to a complete identity of contents. In the process of appropriation of the effects of reception substantially two alternatives are given. Reception may weaken the forces of internal legal development, moreover even waste them to a great extent. At the same time the contents taken over by means of the reception-al codification may be assimilated to the country's own image: to its national legacy, traditions and developmental peculiarities. As may be seen from what has been set forth earlier, this assimilation may manifest itself in the way, how the wording of the code is conceived as a source of law, how it is applied in judicial conflict-resolution (i.e. in its use as obligatory basis of deductive decision-making or, on the contrary, merely as a possible source of juridical argumentation). It may equally appear in the limitedness of the unity of law to be brought about by it: in the limited degree of its territorial-

personal effect and/or of its grasping in extension and depth the whole of the law (i.e. in that whether it embraces the totality of society regionally or ethnically, or excludes certain regions of law from the unifying codification; and where it recognizes codification as a means of unification and replacement, does it guarantee any institutional place and individualizing influence for local customs).

The mechanism of reception studied as a process for and by itself may easily create the impression of its imperfection or deformation. We should not, however, ignore that both fundamental types of modern codification (the classical Continental type and its in accomplishment and realization midway Common-law variant) have been born under specific historical conditions for the satisfaction of social needs specifically given for them, i.e. not as abstract ideas but as phenomena having concrete historical determinedness. Accordingly neither is reception a simple adoption of something thought ideal by iself: it purposes the solution of a concretely given specific problem by making use of the experiences of others. Therefore its value has to be appraised decisively by the experiences of the receiving country. It is on this ground that we do believe the "deformation" suffered in the course of reception does not stand for an absolute loss of value, moreover on the contrary: it may even be the creator of national values.

Afro-Asiatic law modernization may according to its intrinsic potentialities be the carrier of a dual tendency. First, it may contribute to the international unification of legal concepts and institutions, something that is beyond doubt the sign and desirable consequence of 20th century (mainly economic) development. Secondly, it may contribute to the creative exploitation of national legacies, to the survival of traditions worthy of being transmitted to posterity, something that in this age, in particular in systems which could not yet cover the whole path to becoming nations, is one of the powerful incentives and promises of social development.

5. Summary

Among the historical legal systems the ones developed in countries of Africa and Asia are those which have salvaged almost untouched their archaic character. These systems relied on religious revelation or on traditions of tribal customs. Exactly owing to their archaic rootedness they remained withdrawn into themselves, of a preserving nature rather than one encouraging to development. Their survival was not some sort of atavism, a petrifaction worthy of amagement: they simply reflected the general conditions of life embracing continents, which in their entirety corresponded to social and economic formations of tribal communities, of pre-feudal, or feudal types other than the European.

It was their economic, political and social backwardness, weakness and defencelessness which accounted for their becoming the targets of European, and then American colonizing policy at a rather early date. In the majority of cases this was not void of success: according to its contents and depth penetration extended from simple influencing, the drawing of countries within the sphere of interest to downright colonization, to settling of the colonizing powers as if in their home countries. Penetration was overwhelmingly of an economic nature, following economic ends. This, however, without exception brought with it political, social and legal consequences. As regards the legal consequences, it was mainly in private law (substan-

tial and procedural) relations affected by commerce that the reception of fundamental legal institutions of the colonizing countries, the assimilation of their native law to the European or American patterns - in varying depths and extension - had become the precondition of their economic exploitation and influencing by the colonizing powers.

In the development of law these Afro-Asiatic systems are those of which the statement most generally may be made that they are void of any traditions of codification of their own. And yet they are the systems whose development in the 19th and 20th centuries passed off almost uniformly in a codificational way, or at least by holding out codifications as a long-range target. The generality of the reality (or prospect) of codification presents a striking contrast to the generality of the absence of their own traditions in codification. Now this apparent contradiction may be resolved in two directions, its resolution reminding of a dual lesson. First, any exportation of law, imposition of a foreign law, can take place in the most appropriate form only by way of codification. Secondly, for a radical regeneration of law, for a modernization of law by replacing the old, it is in like way codification that is the most appropriate medium.

The states in Africa and Asia which during the 19th and 20th centuries (in response to a such and such influence) embarked on modernizing their law, in all cases coupled their progress on the path dictated by traditions with the adoption of foreign models. These models mostly were the laws of the country exercising the strongest economic and political influence. Owing to the logic of imperialistic policy, law-modernizing countries in reality had no other alternative. Political-economic pressure was mostly unambiguous to an extent that it precluded even the mere raising the issue. It should be noted that this lack of alternatives was at the same time not only of exclusively political origin and nature. The countries in question notwithstanding their common religious or tribal determinednesses were heterogeneous and at the same time undeveloped to an extent that they could not learn much from their own past, or even from that of their companions. The impulse which could have started and directed them on the path of development, had to come from the outside. In the highly important process of Afro-Asiatic law modernization the imperialistic pressure and the stage of development attained in the contents and techniques of legal settlement became the factor pegging out jointly the path of their development. This explains why in the effects and trends of their foreign law reception often there have been no far-reaching changes even when these countries have become independent. The earlier (colonizing) influence has together with the means of legal development, the techniques of administering justice, the working methods of learned cadres in legal profession, the order and spirit of training jurists become traditional, and what earlier was ratione imperii dictated has imperia rationis found followers.

What concerns us here in the first place is the relation of this process to codification. Irrespective of the terminal point whence we survey this process, i.e. whether from the end of the country replacing its law by modernization or from that of the country exercising its modernizing influence, it is codification that has become the mediater, organizing mean and key problem. In like way the code-form was the most appropriate means for the imposition or reception of a foreign law, or for the institutionalization of an artificially established law. What betrays its instrumental value lies in the fact that its use as the form of law-imposition has become general on the part of both the Continental and the Common-law countries. I.e. recourse to the code-form for imposition, reception, or simply radical regeneration of law, has become a commanding necessity to an extent that

it could not be frustrated even by the aversion to codification firmly established in Common-law traditions; at most intermediary stages had to be inserted.

Thus codification has been resorted to not simply as to a means of consolidation, unification or modification of law, like in the course of legal development of the states in the European continent extending over two millennia. Although codification of law in Africa and Asia may not pride itself of representative works only remotely reminding of the French Code civil, the trend of their development towards codification is nevertheless more accentuated and often socially weightier than that of the feverish codification so characteristic of the age of European bourgeois transformation. Afro-Asiatic modernization of law by codification often wants a complete change-over at a single stroke: it aims at the often complete replacement of legal ideology, of the system of sources of law, of the techniques of law-making and administering justice, of the traditional ensemble of rules and regulating principles in conjunction with a dynamic social and economic development embracing several stages.

This explains why codification has so to say become a symbol of progress and modernization in Africa and Asia. The transformation of law and its codificational ways are closely associated here with social and economic progress to an extent that often they are looked at as a panacea. As has been seen codification may prove as an adequate form both for the reception of existing laws and the artificial construction of new ones. When we now emphasize the instrumental adequacy of the code-form, we have to emphasize, too, that it is merely a form, the means of given contents. It is necessary therefore that it should exclusively be the adequate form of proper contents: an intermediary which as a proper reflection of the underlying conditions and trends of development should stand for the complete unfolding of the intrinsic forces and reserves of development and not for their withering away.

NOTES

1. For more details see BOUSQUET, Georges-Henri, Le droit musulman, Paris, Colin, 1963, 22 et seq.

2. VELIDEDEOGLU, Hifzi Veldet, Le mouvement de codification dans les pays musulmans - ses rapports avec les mouvements juridiques occidentaux (Rapport général présenté au Ve Congrès de l'Académie internationale de Droit comparé à Bruxelles), Annales de la Faculté de Droit d'Istambul, VIII (1959), 9-11, 26.

3. It should be noted that unlike Shari'a this profane body of rules from the very beginning recognized as human product was permeated, at least in the form of compilations, by the idea of codification at an early date. At the height of the power of the Ottoman Empire at the initiative of Mohammed II e.g. the Kanunname was compiled (after 1453) - i.e. a systematic compilation of administrative rules enacted after the foundation of the Empire. This code was followed by others created by other sultans extending also to fields such as criminal law, etc. Finally under the designation Defter Kanunu compilations were published of the subsidiary laws of certain provinces, towns and other communities. VELIDEDEOGLU, 27-28.

4. In this process among others a criminal code (1840, 1858), a commercial code (1850) with procedural appendix (1860), a code of maritime commerce (1864) and codes of criminal and civil procedures (1880) were enacted.

5. As is known the prohibition of the collection of interests at all times rigorously enforced in Islam (although somewhat relaxed in cadi practice) was formally set aside by the commercial code. The French Code civil (although its penetration was prevented by the Mejelle, this codification of Shari'a in every respect faithful to tradition) found a way for some of its principles through the codification of civil procedure on the French pattern. TEDESCHI, G., The Movement for Codification in the Moslem Countries - Its Relationship with Western Legal Systems (Report to the Vth International Congress of Comparative Law), Jerusalem, no year, mimeogr., I, note 8.

6. ANDERSON, J. N. D., Codification in the Muslim World: Some Reflections, Rabels Zeitschrift für ausländisches und internationales Privatrecht, XXX (1966) 2, 245-246.

7. The loosening of religious roots was laid stress on also by the then scandalizing fact that Mejelle was not born by following the Hanafite rite at that time having an absolute authority, but with a claim to synthetization, as the mediator between several orthodox, and even heterodox Islamic schools. Cf. VELIDEDEOUGLU, 36-37 and ANDERSON, 245.

8. See MILLIOT, L., Coutume et jurisprudence musulmans ('Orf et 'Amal), in: Rapports généraux au V^e Congrès International de Droit comparé, Bruxelles, Bruylant, 1960, 180-181.

9. BOUSQUET, 186 et seq.

10. This was the situation among others in British India with the enactment of the Penal Code (1860), the Evidence and Contract Acts (1872), and the Transfer of Property Act (1882). This appears in an even more undisguised form in Egypt, which hardly after gaining its independence (1874) under French influence compiled its civil codes separately for mixed tribunals handling cases common with Europeans (1875) and for the native courts of Moslem subjects (1883).

11. See VELIDEDEOGLU, 23-25.

12. Cf. EÖRSI, Gyula, A burzsoá magánjogi rendszerek kialakulása: Jogcsoportok a burzsoá magánjogban (The genesis of bourgeois systems of private law: Groups of law in bourgeois private law), Gazdaság- és Jogtudomány (Proceedings of Class IX of the Hungarian Academy of Sciences), III (1969), 307 et seq.

13. Cf. VELIDEDEOGLU, 40.

14. The Turkish code of family law has among others been adopted by the Lebanon, Syria, Palestine and Jordan; it is still in force in the Lebanon and in Israel.

15. The unification of the religious and secular courts and of the law schools in state hands took place in Turkey earliest, as one of the events of their national rising in 1924. This was followed by unification only in these days in Egypt (1955) and in Tunesia (1956).

16. Such as the Egyptian civil code which has been taken over almost unchanged, by taking into account a possible unification of legislation, in Syria and in Lybia.

17. For this the civil code of Iraq (1953) may serve as an example. This code, however, alloys the influence of the Mejelle with legislation during the British mandate.

18. EÖRSI, 312, compares this to the Roman-canon gemeines Recht of feudal Europe before the birth of national states.

19. In addition to Egypt (§. 2) and Iraq (§. 2) a similar provision has been taken up by the civil codes of Lybia and Kuwait, and even of Syria. The latter code, in a simplified form and without any intermediary, defines Muhammadan law as the sole subsidiary source of law.

20. Cf. TEDESCHI, 8-9.

21. The law of the personal status has been codified by Jordan (1951), Syria (1953), Tunesia (1956), Morocco (1958) and Iraq (1959), then slowly Aden, Algeria and the Lebanon have followed suit. It is perhaps characteristic that in the confrontation of tradition-salvaging and modernization often affecting harder the former only Tunesia has reached the

prohibition of polygamy as its most audacious reform. ANDERSON, 247. This tendency has incidentally been reinforced also by the circumstance that as an act of Muhammadan codification of this century in the form of the Indian Dissolution of Muslim Marriages Act (1939) and the Pakistani Muslim Family Laws Ordinance (1961) in former British-Indian territories also the codifying-reformatory settlement of family relations has made its appearance. ANDERSON, J. N. D., The Future of Islamic Law in British Commonwealth Territories in Africa, in: African Law: New Law for New Nations, ed. by Hans W. Baade, Dobbs, Ferry, Oceana, 1963. 86.

22. The first product of codification in Egypt of vital importance for its autonomous legal development, viz. the code compiled for the mixed tribunals (1875) was the work of an Alexandrian lawyer after preparation of a few months only. TEDESCHI, 12. In the phase of a self-deceiving political development, compensating the depression of the present by the passive contemplation of the past, in the period following upon the suppression of its rising of 1919, aggravated by an economic crisis (perhaps as a legal formulation of the ideology of the memory of the past glory of pharaohs) also some teachings of the German historical school of law were imported. Simultaneously in the interpretation of Egyptian and other received acts similarly inadequately prepared, at least for half a century, the exegetic method bringing about a certain rigidity became established. AL-ASSIUTY, Sarwat Anis, Les tendences actuelles de la philosophie du droit en Egypte, Revue de Droit contemporain, XVI (1969) 2, 33.

23. E.g. the Lebanon became a French mandate in 1918. Since then the country has adopted codes of obligations and contract law compiled from Egyptian and other sources (1932), a code of civil procedure inspired by Austrian law (1933), then the Turkish reform code of family law, a code of maritime commerce (1947) at Moroccan initiative, its criminal code was influenced mainly by Italian law, and finally, its code on land registration borrowed from Australia. On the other hand Iraqi law has developed under British mandate from 1925 onwards. Its criminal code, substantive and procedural (1918) further its company law act (1919) reflect strong British influence. These codes had to operate in functional community with a civil code (1953) reinforcing the principles of the Mejelle, with a commercial code (1943) and code of civil procedure (1956) both borrowed from Turkey, and with a self-inspired personal status act (1959) faithful to the Shari'a traditions.

24, Cf. e.g. TEDESCHI, 12 and 6.

25. Of the most representative imports of law we mention that of the Swiss codes of civil and contract law (1926) and of law enforcement (1929); of the code of civil procedure of the Canton of Neuchatel (1927); of the Italian code of criminal law (1926) and the German code of criminal procedure. Introduction to Turkish Law, ed. by Tugrul Ansay - Don Wallace, Ankara, Turkish Society of Comparative Law, etc., 1966, 10-11.

26. As a cause and consequence of the general political line of Turkey we may regard as such the effects of the Lausanne Treaty (1923). The priority given to the Swiss model may be explained, at least as subsidiary factor, by the fact too that both Kemal Atatürk and other

leaders of the Republic received their education and cultural outlook in Switzerland. Cf. SAUSER-HALL, Georges, La réception des droits européens en Turquie, Extrait du Recueil de Travaux publié par la Faculté de l'Université de Genève, 1938, 23. Quoted by TEDESCHI, II.

27. VELIDEDEOUGLU, 49.

28. For the by far more extensive and intensive recourse to §§. 1 and 4 of the adopted Zivilgesetzbuch, the shock caused by its adaptation, its initial success, and growing enforcement in practice see ELBIR, Halid Kemal, La réforme d'un Code civil adopté de l'étranger: Sur quelques problèmes posés par le mouvement de réforme du Code civil en Turquie, Revue internationale de Droit comparé, VIII (1956) 1, 55 et seq.

29. Cf. ELBIR, 63–64. For the accomplishment of assimilation of the Code, the raise of its deformations at adaptation to norms and its promulgation as a new national code in 1951 a committee of civil law codification was convened. This committee, however, did not get any further than the adoption of a wavering attitude, and for the time being it could not even advance further. See e.g. VELIDEDEOUGLU, 23.

30. ALLOTT, Anthony N., The Future of African Law, in: African Law: Adaptation and Development, ed. by Hilda Kuper - Leo Kuper, Berkeley - Los Angeles, University of California Press, 1965, 221.

31. See VARGA, Csaba, Kodifikáció az angolszász rendszerekben (Codification in the Common-law systems), Állam- és Jogtudomány (Quarterly Review of the Institute for Legal and Administration Sciences of the Hungarian Academy of Sciences), XVI (1973) 4, 519 et seq.

32. Cf. TEDESCHI, 3–4.

33. The first (and directly applied) lawyer of English law introduced in the colonies under British rule was law in force in England at a date severally defined for each colony (for Sierra Leone law effective in England till 1862, the Gold Coast till 1874, Tanganyika till 1920). Its local adaptation by way of legislation and judicial application was of course possible. DAVID, René, Les grands systèmes de droit contemporains (Droit comparé), Paris, Dalloz, 1964, 558. As a second (and indirectly applied) lawyer the principles of "natural justice, equity and good conscience" became attached, which were then institutionalized as limitations to the application of customary law and/or its replacements, and as independent components of the system of sources of law. E.g. in the Gold Coast two years after the introduction of English law as common law, equity and statutes of general application in force in England, in the relations between natives the authorities agreed to recourse to local customs as the law primarily to be applied in a way, however, that these customs were immediately subordinated to a third source of law. Notably it was stipulated that should the custom infringe the sphere of natural justice, equity and good conscience not defined with any precision, or should gaps be discovered in the custom, then the case had to be determined on the former principles (Supreme Court Ordinance of Gold Coast, 1876, s. 19). By this provision (by which the application of customary law was equally pegged out in Gambia, Northern Nigeria, Northern Rhodesia, Sierra Leone and the Sudan) through some sort of a back-door again English law was brought back, as may be surmised. Two things were though obvious. First, the auxiliary and restrictive source of law so marked out according to its original intention referred to the human values of antiquity conceived as

eternal human and supranatural, and, secondly, at the birth of it "The formula was a device to escape from English law, not to call it in." Still in the knowledge of its civilizatory call and superiority British colonial administration could feel it as something natural to forget the Greco-Roman contents of these categories and the original purposefulness adjusted to them and value its own domestic law as the embodiment of "natural justice". By this it did not only condemn customary law to the role of an impotent appendix to its own law, but even achieved (by enforcing a similar stipulation among others in Bengal, India, Pakistan and Burma) to unify the framework, gap-filling and policy-making contents of the customary law application on an imperial level. DERRETT, Duncan M., Justice, Equity and Good Conscience, in: Changing Law in Developing Countries, ed. by J. N. D. Anderson, London, Allen and Unwin, 1963, 114-153, in particular 151.

34. GONIDEC, P.-F., Les droits africains: Évolution et sources, I, Paris, Librairie générale de Droit et de Jurisprudence, 1968, 8.

35. To mention a single example only, in the Malagasy Republic of path towards building up an autonomous legal system was marked by about three hundred legislative ordonnances between 1960 and 1962. GONIDEC, 117.

36. The system of sources of law of the Gold Coast has changed only in so far as autonomous legislation has been placed on top of it. In conformity with Article 40 of its Constitution (1960) Common-law is not only a subsidiary source of law, but in the hierarchical order even precedes customary law. HARVEY, William Burnett, The Evolution of Ghana Law since Independence, in: African Law: New Law for New Nations, ed. by Hans W. Baade, Dobbs Ferry, Oceana, 1963, 60. This provision will hardly guarantee a position for customary law more favourable than that enjoyed by the Pacific Islands of by incomparably lesser importance. Here the system of sources of law - under the US Trusteeship - after the laws of the United States and the Trusteeship Territory recognizes the validity of local customs, not as subsidiary, yet subordinate source of law. It is of interest to note that to these as general auxiliary source all so far published volumes of the American Restatement of the Law have been attached (Trust Territory Code, Title I, Sec. 103). 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, 40-41.

37. Cf. e.g. GONIDEC, 266.

38. With reference to land tenure as the foundation of African husbandry see MOLNÁR, István, Földjogi kérdések a kelet-afrikai szövetkezeti mozgalomban (Problems of land tenure in the East-African cooperative movement), Jogtudományi Közlöny (Journal of Legal Sciences, Budapest), XXVIII (1973) 11, 610 et seq.; EÖRSI, 317, proclaims this as a principle.

39. POIRIER, Jean, Situation actuelle et programme de travail de l'ethnologe juridique, Revue internationale des Sciences Sociales, XXII (1970) 3, 509 et seq., in particular 522 et seq., urges the almost hopelessly enormous undertaking of exploration, his voice sounding almost as a call for help.

40. In connexion with evolving this triplicity Allott mentions that African

customary law could in its proper quality hardly survive a period of transition. Any further rigid preservation of its customary nature would eventually of necessity destroy its legal nature, on the other hand its being turned into a written law would do away with its organic rootedness in the practice of custom as custom. ALLOTT, 239. I.e. having survived as tribal, African custom would before long lose its nutritive soil, being on the other hand modernized in contents, it would render superfluous and condemn to an extra-role its customary appearance. EORSI, 319.

41. General hostility to customary law is shown by ZIVS, S. L., in: Pravo v nezavisimyh stranah Afriki: stanovlenie i razvitie (Law in the underdeveloped countries of Africa: Its birth and development) ed. by R. A. Aljanovskij, Moscow, Nauka, 1969, 46 et seq., further as regards Ethiopia and Uganda, also EORSI, 317.

42. The traditional courts applying customary law have been preserved temporarily e.g. in Eastern Cameroon, Niger, Gabon, Dahomey, and with the claim to definitiveness in Togo, Chad and Upper Volta. GONIDEC, 272.

43. "The codification of customary 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, Dar es Salaam, 1964, 96. See COTRAN, Eugene, 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, 82.

44. COTRAN, 81-82.

45. E.g. in Indonesia, where apart from written law of Roman-Dutch origin the eighteen lingual and territorial systems of traditional Adat-law were applied, modernization has been planned without any direct codification. The minister of justice proposed in 1962 that for the advancement of national law development the law should not be fixed but rather the foreign codes, so the existing civil and commercial codes (1847) putting up obstacles to the development should also be set aside in order that the alloy of tradition and modernity might in the furnace of judicial practice take on a shape - for a future codification, LEV, Daniel S., The Lady and the Banyan Tree: Civil-Law Change in Indonesia, The American Journal of Comparative Law, XIV (1965) 2, 292 et seq.

46. In the Malagasy Republic the beginnings of customary law codification go back to the pre-colonizing era, to the end of the 18th century. It reached its accomplishment in the Code des 305 articles (1881), a code not replacing local customs but partly reforming and condensing them. DAVID, 548-549. In Natal the South-African British colonial authorities tried to codify the local customary law in a compilaton of 68 articles. It is worth while noting that the first (1878) and second (1891) variant of this Code of Native Law recognized the unwritten customs as supplementary sources of law, the third variant (1932), however, reduced the use of customs to the codified text. HAHLO, H. R. - KAHN, Ellison, The Union of South Africa: The Development of its Laws and Constitution, London - Cape Town, Stevens - Juta, 1960, 323 and 330. In the form of a Native Penal Code 'eventually the local penal customs were codified (1917), then recodified (1927, 1940) in the New Hebrides,

although the Convention (1906) serving as fundamental document of the system of sources of law here merely permitted the recourse to native customs in the administration of justice without originally attributing any significance to them beyond recognizing their subsidiary character. BELSHAW, Cyril S., Island Administration in the South West Pacific, London, Royal Institute of International Affairs, 1950, 62.

47. See VARGA, Csaba, Kodifikációs megnyilvánulások a középkori jogfejlődésben (Codificational phenomena in legal development of the Middle Age), Állam- és Jogtudomány, XVIII (1975) 1, 135 et seq., in particular 148-157.

48. It should be noted that the fact of relationship among others appeared as obvious in the international colloquy where the processes of consolidation of European feudal customary law and codification of Afro-Asiatic customary law were debated on in conjunction. Beyond the mere recognition of the positive fact of their relatedness none of the participants tried to offer an explanation of its nature and limits. Cf. La rédaction des coutumes dans le passé et dans le présent (Colloque organisé les 16 et 17 mai 1960 par le Centre d'Historie et d'Ethnologie juridiques sous la direction de John Gilissen), Brussels, Editions de l'Institut de Sociologie de l'Université Libre de Bruxelles, 1962.

49. E.g. cf. ALLOTT, 233. It is characteristic of the informal nature of these conciliatory processes and, for the veritable resolution of conflict of the wide sphere allowed for the field of argumentation and for the controlled, yet not limited arguments and counter-arguments that in these systems the patterns crystallizing even in the mass of such processes will not serve as precedents but as arguments, contributions, so to say as talking points, among many others. ALLOTT, Anthony N., Essays in African Law, London, 1960. 68. At least in that sign these are not far away from the classical Greek-Roman conception where law was not yet a general-abstract system of norms, but the just, equitable, concrete solution, in whose exploration even the positived-objectified norms "served as a stepping-stone rather than premisses". VILLEY, Michel, Questions de logique juridique dans l'histoire de la philosophie du droit, in: Études de logique juridique, publiées par Chaim Perelman, Brussels, Bruylant, 1967, 15. There is every reason to assume that in this sui generis form of law we may discover the survival of the adequate conception, form and methodological framework of customary law preceding the ancient, formalizing institutionalization following upon the formation of states. This conciliatory quasi-law will in this manner form a historical phase of development of law rather than its alternative. The social roots of such a potentiality of law, its survival to the present days, the association of the ancient forms with the forms living today (in particular with the African, Chinese and Japanese legal thinking and community practice of law) has as yet not been discussed by theoretical legal literature to the proper depth. The confrontation and incompatibility of these two potentialities of law and the social tensions resulting from it has (for the indigenous population of Australia and for natives of Niugini - New Guinea) been brought closer to us by GOLDRING, John, White Laws, Black People, The Australian Quarterly, XLV (1973) 3, in particular 9 et seq. As approach to a first theoretical formulation there is DEKKERS, René, Justice bantou, Revue roumaine des sciences sociales: Série de Sciences juridiques, XII (1968) 1, 56 et seq. and DAVID, René, Deux conceptions de l'ordre social,

in: Ius privatum gentium (Festschrift für Max Rheinstein zum 70. Geburtstag am 5. Juli 1969), I, Tübingen, Mohr, 1969, 56 et seq.

50. According to a rather illustrative remark "there is less variety among the 400 or 500 million men inhabiting Europe from Spain to Russia than among the 15 million Belgian Africans." SOHIER, A., Traité élémentaire du droit coutumier du Congo belge, 2e éd. 1954, 9. See M'BAYE, Kéba, Le droit africain: ses voies et ses vertus, Revue sénégalaise du droit, 1970 (IV) 7, 11. To continue the examples, in Kenya, Uganda and Tanganyika constituting Tanzania we have to reckon with more than 200 independent systems (COTRAN, 74), 68 equally applicable systems in Senegal inhabited by scarcely two and half million (M'BAYE, 23), moreover in New Guinea and Papua, where the number of natives is scarcely more than one million, there are more than 100 systems of customary law on record (WESTON, Arthur B., The Marriage of Traditional Law with Common Law in Post-Independence Developing Countries, lecture delivered in the section of private international law of the Hungarian Lawyers' Association, on the 8th January, 1974).

51. In Ghana, Nigeria, Kenya, Tanganyika, Zambia, Gambia and in a number of other countries in Africa and Asia the tribal, territorial and linguistic differentiation culminates with a differentiation of development extending from the tenacious adherence to nomadic conditions to the endeavour to acquire capitalist Western European conditions. ALLOTT, The Future of African Law, 225.

52. E.g. in Somalia beyond the tribal traditions and the strong influence of Islamic law the confrontation with the legal after-effects of former Italian and British colonial role is yet another task to be tackled. In Cameroon the same manifests itself as the problem of reconciliation of the legal effects of French and British rule. BENTSI-ENCHILL, K., Plaidoyer pour une Commission du Droit africain, Revue sénégalaise du droit, 1969 (III) 5, 65.

53. This obstructing provision has among others been taken up in the constitutions of Cameroon (1961, section 6) and of Zaire (1964, section 49). GONIDEC, 274.

54. Some sort of an inertia momentum (which may of course be reasonably explained also by difficulties involved in the repeated need for producing evidence of the existence of local customs) drives compilations of customary law almost without exception to their being applied as codes. The written objectification may mean a snapshot-like image, yet codification stands also for stiffening objectification. To forestall this in Java, when in the 30s Adat-law was put down in writing, on each page of the compilation the following was printed in capitals: "THIS BOOK IS A DESCRIPTION, IT IS NOT A CODE!" KENNING, J., Some Remarks on Law and Courts in Africa, in: Integration of Customary and Modern Legal Systems in Africa, New York - Ile-Ife, Africana Publishing Corporation - University of Ife Press, 1971, 69-70.

55. For the former examples are Buganda, Lesotho, Swaziland, Botswana and partly Somalia (ALLOTT, 225), for the latter - in its original criminal law - Nigeria (ALLOTT, 227) and Kenya (BENTSI-ENCHILL, 65, Note 2).

56. In connexion with the Tanganyika Customary Law Project COTRAN, 85, lays special stress on this.

57. E.g. see KENNING, 69 et seq.

58. POIRIER, Jean, La rédaction des coutumes juridiques en Afrique d'expression française, in: La rédaction des coutumes dans le passé et dans le présent, 280.

59. GONIDEC, 275.

60. Pravo v nezavisimyh stranah Afriki, 56.

61. Referred to the attempts of Togo to codify civil law see e.g. AMEGA, Louis-Koffi, Prière pour un Code civil togolais, Recueil Penant, LXXVI (1966) 712, 275 et seq.

62. In Senegal from 1961 onwards more than a dozen codes have been enacted, among others civil code (1966), commercial code (1963) and code of administrative law (1966), not yet codified even in France. Pravo v nezavisimyh stranah Afriki, 56 et seq.; M'BAYE, Kéba, L'expérience sénégalais de la réforme du droit, Revue internationale de Droit comparé, XXI (1971) 1, 36 et seq. Outlining the tendency of the series of codes in Senegal CHABAS, Jean, Réflexions sur l'évolution du droit sénégalais, in: Études juridiques offertes a Léon Julliot de la Morandière, Paris, Dalloz, 1964, particularly 141 et seq., emphasizes the excess of the elements of compromise, the almost servile copying of French examples in private law known from the colonial era, in other respects the putting off of any subversion of Moslem traditions.

63. Even officially confirmed (The Kenya Gazette, 17 March, 1967, Special Issue) e.g. in Kenya such ideas were born. Pravo v nezavisimyh stranah Afriki, 51.

64. This was the note on which a debate on legal development in East Africa ended, where the acceptance of development by the judiciary as an effective means was precluded by all, but at the same time even the proposal for a compromise (EÖRSI, Gyula, Some Problems of Making the Law, East African Law Journal, III (1967) 4, 275-276) that codification should take place by sections: first the principles should be defined, then the details crystallized from the practical experiences gained with the customary law and case law adaptations, was considered too radical and therefore impracticable. Therefore a further compromise proposal was born (GHAI, Y. P. - WLUTFORD, W. C., Reform of Private Law in East Africa, Mawazo, II (1971?) 1, 50-51) that codification should be sectional, setting out from peripheral branches of law indifferent from the point of view of traditions, so as to ensure the acceptance of the new technique by way of continual experimentation and the acquisition of practical experiences in codification.

65. This justified e.g. the series of enactments on western patterns in Ivory Coast (1964). GONIDEC, 273 and 276.

66. In Ethiopia, with the assistance of two French experts, and a Swiss of comparative law, the comprehensive codification of law began in 1954. In succession criminal code (1957), civil code (1960), commercial code (1960), code of criminal procedure (1961) and of civil procedure (1965) were enacted. The reason why these codes relied on foreign sources ignoring the old law totally was that customary law in Ethiopia was mostly an undistinctive ensemble restricted to occasional equity and ad hoc settlement of conflicts. Owing to its primitiveness it was not considered mature enough to become the foundation of a national legal system. There were in the orthodox Christian nomocanon,

Fetha Negast, traditions dating to the 13th and to the 16th centuries, which could be valued as legal, nevertheless the new legal system had to be built on profane foundations. Those in charge of compiling the codes could not even develop the technically by far more polished Muhammadan traditions, not only because of their religious origin, but also for the special historical reason that Islam imported from abroad was in permanent confrontation with the national Christian orthodoxy. DAVID, René, Les sources du Code civil éthiopien, Revue internationale de Droit comparé, XIV (1962) 3, 497 et seq. and VANDERLINDEN, Jacques, Introduction au droit de l'Ethiopie moderne, Paris, Librairie générale de Droit et de Jurisprudence, 1971, 212.

67. As author of the Ethiopian civil code David writes that each article of it has been borrowed from sources which have been or were effective somewhere or have been foreseen to be enacted. To illustrate the "comparative" character of such a codification David mentions that at the regulation of the land tenure of the monocratic semi-feudal Ethiopia among others use has been made of Soviet kolhoz law and so also of the agrarian legislation of the Tsarist era. DAVID, Les sources du Code civil éthiopien, 503 and 505.

68. E.g. in Ethiopia 95 per cent of the population is illiterate, yet the language of legislation, Amharic, would not be understood by half of it. Under such conditions it is an infantile dream to expect a resounding success from the new legislation. It is quite natural that "Muhammadan law ... is still effective, although in point of principle it is void of any binding force, and the same is the situation with ... the traditional laws, which is appears continue to survive by the side of the code, for the state is void of means needed for guaranteeing general respect for the laws of the country." VANDERLINDEN, 209.

69. GONIDEC, 276.

70. Cf. VARGA, Csaba, The Function of Law and Codification, Anuario de Filosofia del Derecho, XVII (Comunicaciones al IV Congreso mundial de Filosofia juridica y Social, Madrid, 1973), 495 et seq.; VARGA, Csaba, A kodifikáció klasszikus tipusának születése Franciaországban, (The birth of the classic type of codification in France), Állam- és Jogtudomány, XVII (1974) 3, 457 et seq.

71. In the Philippines e.g. the ancient law of the Filipinos, although not wholly put down in writing, in the form of the Codex Maragtas (about 1200) and the Codex Kalantiao of criminal law contents (1433) already had certain indigenous traditions in codification. The Spanish codes introduced towards the end of the Spanish dominion of about 350 years, the Código Penal (1870), the Código Comercial (1885), the two procedural codex (1888) and the Código civil (1889) built upon these traditions sowed the seeds of European classical codification. This shattered the law in its contents, yet formally it did not amount to a change in quality. American colonial dominion during the first four decades of the present century manifested itself in the continuation of this trend with a duality of effects. First, on the level of legislation the traditions in codification came to be enriched, the products of this process were a Code of Criminal Procedure (1900), a Revised Administrative Code (1917), a Revised Penal Code (1932) and the Rules of Court bringing under regulation civil procedure (1940). Secondly, on the plane of administration of justice, however, American

dominion thwarted the process: the making of precedents binding on the courts took the edge off from codification (at least in its classical acceptation). Now the gaining of independence by the Philippines after the Second World War brought about no qualitative changes in its legal development. What may nevertheless be reckoned as a change was the search for a synthesis amidst the conflicting effects of colonial rule. The Spanish-American codes remained in operation. Merely a new Civil Code (1949) and its procedural part, the restated Rules of Court (1964) signalled a change. Actually a new Code of Crimes and a Revised Administrative Code are envisaged. I.e. legislation progresses somehow in the wake of earlier development. A demand for synthesis is indicated merely by the concession made to Common-law traditions, notably by the Civil Code provision (§. 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, Melquiades J., An Introduction to Philippine Law (1926), 7th ed. Dobbs Ferry, Oceana, 1969, passim, in particular 12 et seq., 68 et seq.

72. HEEVER, Van den, Partiarian Agricultural Lease in South African Law, Cape Town, 1943, 7. Quoted by HAHLO-KAHN, 37.

73. In the Republic of South Africa on the score of authorities Justinian may be quoted as integral part of the system of sources of law in the same manner as the Glossists, Grotius, Beccaria, or the decisions of the supreme court of the Netherlands today, although she had lost South Africa a long time ago. The idea of codification of the mosaic-like atomized law of Roman-Dutch origin built upon the local customs, then commingled with Common-law elements and defying all attempts at forging it to a unity, was raised as early as the beginning of the 19th century. In the second decade of the present century the idea received a new impetus, for the fear lest traditional Roman-Dutch law disintegrated into an inorganic mass of components - as the remote effect of its life in the British Commonwealth of Nations - should be absorbed by Common-law, if by way of codification it was not cast into a consolidated form. The tradition and desire of a greater freedom in the administration of justice resulting from this unsettled and atomized state of sources of law were stronger than any apprehension. Kerr Wylie (1939) and then T. W. Price (1947) took a stand already against any codification and merely suggested the digest-like or, respectively, the systematic dogmatical treatment of the law, i.e. they proposed a minimum programme which for want of appropriate experts is still waiting for its turn. BOSCH, M. J. W., Quelques remarques sur le système du droit romano-hollandais et ses rapports avec le droit romain et avec les problèmes de la codification, Revue internationale des Droits de l'Antiquité, 3e série IV (1957), in particular 247 et seq.; HAHLO-KAHN, 28 et seq., in particular 49, Note 30.

74. As regards the nature of the exportation of law by the colonizing power to India see VARGA, Kodifikáció az angol-szász rendszerekben, 618-619. It is a rather paradoxic situation that in India even today mostly the codes and quasi-codifications are effective which at their time were compiled to satisfy the needs of the Common-law export, or were simply adaptations of legal reforms of the colonizing power. Accordingly the body of Indian law is still the Penal Code (1860), renewed variant (1949) of the Code of Criminal Procedure (1861, 1872, 1882, 1898) for the enforcement of the equality of rights, a copy (Civil pro-

cedure Code, 1908) of the Code of Civil Procedure (1859, 1877) following the reforms of the English Judicature Acts, the Indian Succession Act (1865), the Indian Contracts Act (1872) and the Indian Trusts Act (1882) adapting English law in a summed-up form, further the Indian Sales of Goods Act (in England in 1893, in India in 1930), the Indian Partnership Act (in England in 1890, in India in 1932) and the Indian Companies Act, all in a servile manner copying the respective partial codifications in England. The extremely close adherence to legal developments in England is indicated by the fact that promulgation of the latter Act in India was not only immediately following its original (in England in 1908, in India in 1913), but followed the reform of the original Act (in England in 1929, in India in 1936) at the distance of a few years only. Decades later the Constitution symbolizing the start of an autonomous legal development in its Article 44 declared that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." This promise, anyway made in the Preamble, remained a dead letter. It is not so much the preservation of law of the former colonizing power which is to blame for this lagging behind in legislation. In India what was characteristic of the paradoxic contradiction between the national and the progressive tendencies was that English law had been preserved for the very same reason as was in the background of its introduction, i.e. there was no obvious alternative to it. There was and still is though a traditional national law in India (in the form of Hindu law), this law, however, constitutes a mass of moral, religious and legal rules extremely disunited by schools of interpretation. It is a law embodied by sacred books which defy both codification and modernization. This is the reason why development of national and autonomous Indian law presents such a paradoxic picture: the idea of a Hindu Code (1948) proved to be wholly utopian, the replacement of the mass of religious rules being a task impossible to tackle. So all that remained was the far-reaching exploitation of the at least common, unified, codified, profane legacy of British colonial law which lends itself easily to adaptation. GLED-HILL, Alan, The Republic of India: The Development of its Laws and Constitution (1951), Westport, Greenwood Press, 1970, passim, in particular 147, for the analysis of Hindu law see 208-209.

75. As has been seen in Japan, when the Meiji era opened the gates to western penetration, French and German political, economic and legal influences were vying for determining the physiognomy of the codes to be enacted. The codes of civil and criminal procedure (1890), the civil (1896), commercial (1899) and criminal (1907) codes eventually presented a mixture of effects, still they failed to imbue Japanese society gradually militarized with the bourgeois ideas in the background of modern legislation. In a paradoxic manner democratization was brought about by the collapse of imperial power, the Tenno system, by American military occupation which brought about changes also in the law. The enforcement of its new democratic constitution and the consequential regeneration of legal system in American colours has not, however, prevented the tradition in codification scarcely of half a century from being maintained and the realization of law regeneration in the form of re-codification. NAKUMURA, Kichisaburo, The Formation of Modern Japan as Viewed from Legal History, Tokyo, The Centre for East Asian Cultural Studies, 1962, in particular chap. II, sec. 2-4, further NODA, Yosiyuki, Introduction au droit japonais, Paris, Dalloz,

1966, in particular Title I, chap. 2, and title V. From a recent compilation it will become obvious that the lion's share of modifications, supplementations and re-codifications has been completed in the present days, during the general social, economic and legal upward trend following upon the Second World War. The ratios of modifications and supplementations before and after the War are for the criminal code 2 to 7, for the civil code 3 to 7, for the commercial code 6 to 13, for the code of civil procedure 8 to 9; - even the code of criminal procedure, although in 1948 it had been restated completely, has been amended and modified on nine occasions during a decade. EHS Law Bulletin Series: Series of Japanese Laws in English Version, Tokyo, Eibun-Horei-Sha, 1962, passim.

76. Israel has received the Mejelle together with the unwritten body of Muhammadan law, furthermore together with the products of Turkish legislation before the First World War the French codes adopted in Palestine and, finally, together with British legislation in Palestine as subsidiary law the principles effective in the United Kingdom. Here, too, British colonial rule has helped to establish a tradition of codification transmitting its law export, before all in the form of the Criminal Code Ordinance (1936) and Civil Wrongs Ordinance (1944). BAKER, Henry E., The Legal System of Israel, Jerusalem, etc. Israel Universities Press, 1968, 60-64. The pioneering initiatives of independent state-building commingled with earlier motley-coloured effects have on the level of the official policy at least of a certain official recognition produced a whirling, amorphous mass of tendencies where all mixes with all, with the remark modestly added, except for socialist ideas. GINOSSAR, S., Israel Law: Components and Trends, Israel Law Review, I (1966) 3, 394. Now in this development-urging, at the same time culturally, ethnically and as for its prevalent ideologies extremely heterogeneous political formation in order to translate the millennium old dream of building a Jewish State into reality, a mass of codificational statutes have been enacted. Their codificational - so to say for balancing Continental influence by Common-law effects - has been immediately reduced, and even rendered relative by using them merely as bases for the formation of precedents and not as direct sources of law to be applied. To this reduced value expression is given by that except for the Code of Military Justice (1948) they have not been given the designation of code (khukka), but simply that of act (khok). What remains the fundamental problem of this development by codification is that the paths of final dénouement, the replacement of this mixture law by an in its character national, in its quality new law are still undefined. Before all the struggle is going on round and about the problem whether the Jewish legacy of law, i.e. the Talmudic judicial practice of the times before the diaspora and the rabbinical judicial practice in a rigid form surviving in Jewish communities of Diaspora, often tortured, exiled and living in primitive circumstances, should be considered a drag on the present or on the contrary: a reserve of future development, a reborn promise of it. The desire of revival of this heterogeneous and owing to the Diaspora territorially, developmentally and ideologically anyway multi-coloured law obviously impairs the chances of codification. This is the case among others because the Rabbinic way of argumentation necessarily will bring about the revival of treatment of written sources of law merely as starting point for free argumentation. Naturally the wish for this contingency and also its chances are still unsettled. By the side of the revival of the mostly dead contents, however, the

revival of the historically coinciding form, viz. the Hebrew language, is an issue decided long ago. In the continually reproduced conflict of the preservation of traditions and the almost artificial language reform the revival of Hebrew language has remained a serious obstacle to the acceleration of the renewal of law by codification. AKZIN, Benjamin, Codification in a New State, in: The Code Napoleon and the Common-law World, ed. by Bernard Schwartz, New York, New York University Press, 1956, in particular 319 et seq.

77. NODA, 233 and 236. In agreement with this others, too, write that in Japan the law in books could be Europeanized at a single stroke, whereas the closing up of law in action to this process can be the outcome of multidirectional, all-social endeavours of a gradual process only, if at all. TAKAYANAGI, Kenzo, A Century of Innovation: A Development of Japanese Law, 1868-1961, in: Law in Japan: The Legal Order in a Changing Society, ed. by Arthur Taylor von Mehren, Cambridge, Harvard University Press, 1963, 39.

78. E.g. cf. SASSOON, David M., The Israel Legal System, The American Journal of Comparative Law, XIV (1968) 3, 413 et seq.

79. E.g. in Japan, perhaps exactly because the century old reception of capitalism down to the end of the Second World War served political-militarist interests rather than a genuine social and economic transformation, imported law became enlisted in social development as an external tool rather than the intrinsic incentive of it. Therefore the traditional systems of norms established as the patriarchal legacy of feudalism (before all the rules of giri giving priority to mutual peace and acquiescence, valuing the facts of mutuality as the functions of and ad hoc situation and rejecting any sort of standardization) hindered considerably the practical - non-judicial - realization of law. It is a consequence of the still traditional mentality that "on n'aime pas le droit au Japon", which manifests itself in the affirmation that "l'affectivité exclue la juridicité". I.e. law finds practical application only in the rather exceptional cases of bringing an action. NODA, in particular 66 et seq., 191 et seq., for the quotations see 175 and 196. Thus law and its institutions often have an indirect, distant role only in the everyday practice of the settlement of conflicts. Between 1953 and 1959 e.g. only 0.3 to 0.4 per cent of traffic accidents causing bodily lesion or fatal, turned up in court. Damages for the overwhelming majority of accidents were settled by way of direct conciliation, in a manner only remotely touched on by the law. KAWASHIMA, Takeyoshi, Dispute Resolution in Contemporary Japan, in: Law in Japan: The Legal Order in a Changing Society, 42 et seq., in particular 63. Beyond this in a number of fields custom still has a decisive, almost predominant influence. The law of Dajo-kan (1875) defined custom still as a source of law by the side of statutes, yet the law of Horei defined its place as an auxiliary source subordinate to public policy and morals and to statutory regulation. All this did not disturb practical legal life and in particular in peasant and fishermen communities rooted in feudalism custom still confronts the mandatory provisions of the codes with success. This has been proved in detail through examples from various contractual forms and those of ownership, from the factual marriage relying on customary law, the survival of the power of paterfamilias in the law of inheritance and others by TANIGUCHI, Tomohei, La loi et la coutume au Japan, in: Études offertes a Léon Julliot de la Morandière, Paris, Dalloz, 1964, passim, 571 et seq.

80. In both India (GLEDHILL, 204 et seq.) and Israel the law of family, matrimony and the personal status still depends on the religious affiliation of the person. Their regulation in Israel is afforded by Jewish law, Islamic law embodied by the principles of Shari'a, Catholic canon law as codified in the Corpus Iuris Canonici (1918), further the law of the Oriental Christian churches relying on the Bible, Apostolic traditions and early synodal resolutions. Moreover it should be noted that in Israel the remnants of territorial particularism have also survived: e.g. in the Negev the legal customs of the Bedouin tribes are applied. AKZIN, 300-301.

81. For their in principle subsidiary, yet practice-individualizing and -creating role as regards the Philippines and South Africa see GAMBOA, 14-15 and HAHLO-KAHN, 28 et seq.

ABOUT THE AUTHOR

Dr. Csaba VARGA graduated in the Faculty of Law of the University of Pécs in 1965. From this year onwards he is research fellow of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences (1250 Budapest, Országház utca 30, P.O.B. 25), his scope of studies being the general theory of law. His papers have been published mainly in Hungarian in the periodicals "Állam- és Jogtudomány" and "Jogtudományi Közlöny". The present study is a chapter from his forthcoming, comprehensive work dealing with the comparative and historical problems of codification from the aspects of the theory of law.

Some of his papers in foreign languages include Quelques problèmes de la définition du droit dans la théorie socialiste du droit, in: Archives de Philosophie du Droit, XII (Paris, Sirey, 1967), 189-205.; Quelques questions méthodologiques de la formation des concepts en sciences juridiques, in: Archives de Philosophie du Droit, XVIII (Paris, Sirey, 1973), 215-241.; On the Socially Determined Nature of Legal Reasoning, Logique et Analyse (Louvain), 1973, Nos. 61-62, 21-78, reprinted in: Études de logique juridique, V, Brussels, Bruylant, 1973, 21-78.; The Birth of the New, Socialist Type of Codification, Acta Juridica Academiae Scientiarum Hungaricae, XVII (1975), Nos. 1-2, 111-138. p.

Reprint (2005)