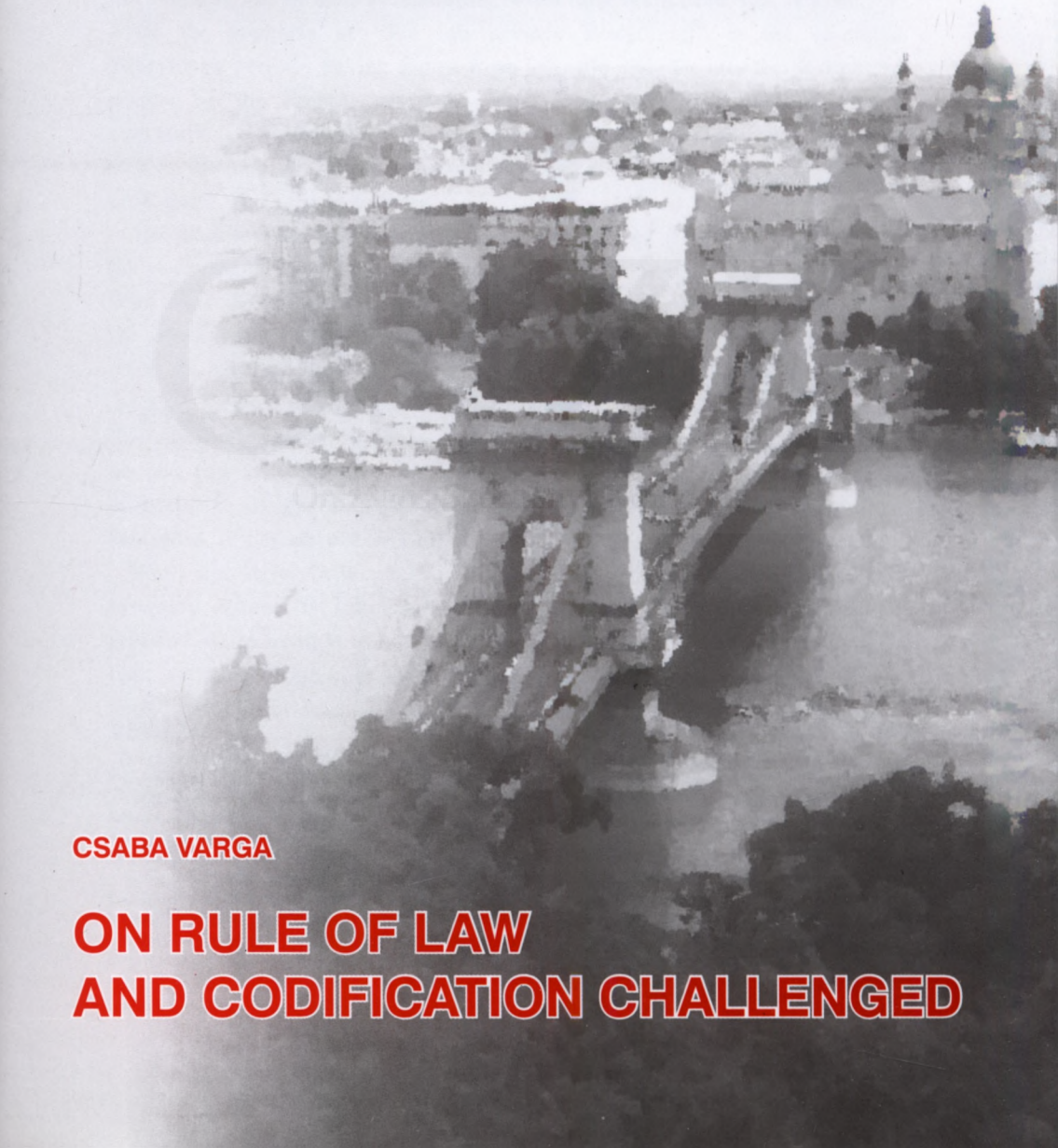
Papers from

Legal and Political Aspects of the Contemporary World



CSABA VARGA

ON RULE OF LAW AND CODIFICATION CHALLENGED

Contents

Rule of Law – At the Crossroads of Challenges[*]

VARGA Csaba [*]

(Law: Values & Techniques) Human history is not only the field of new recognitions but the scene of adapting experiences gained from failed revolutionary novatory zeals to liveable practice and, thereby, also the stage of the sobering test of their acceptability, when their realisation, too, is assumed. After the euphoria of "We can achieve everything!" in the so-called honeymoon period—having grown from infantile disorder into the destructive plague by the French Revolution—was over, the jurisprudent PORTALIS addressed the French National Assembly to present the *Code civil* as a first step on the path of consolidation of a balanced social progress under stabilised conditions, by words as follows:

"In these modern times we were too much fond of changes and reforms. If the centuries of ignorance are the scenes of abuses as regards institutions and laws, then the centuries of philosophy and Enlightenment are perhaps much too often nothing else than scenes of exaggerations. [...] Change is needed, when the most perilous of changes would be if we did not make the change. Because we must not fall prey to blind prejudice. All that is old was once new. The essential thing is, therefore, to put the stamp of stability and permanence on our new institutions, which ensures them the right to grow old. It is profitable to safeguard all that we do not have to destroy; the laws must spare habitudes, if they are not harmful."[1]

Well, our days' fashionable call-words and endeavours, channelling our everyday actions by commanding us to get along, are yet to be tested in practice. At present, it is not even clear if their vague terms are at all more than just random (or, consciously constructed) products of enlightened minds, issued from occasional constraints (or political calculations), which may have

[*] In its first version, presented in Hungarian as the closing address at the workshop on "Nation and the Rule of Law", organised by Sándor Lezsák, MP, and Professor Tibor Király, of the Hungarian Academy of Sciences, in the Kossuth Klub in Budapest in 2001, and published in English in *Iustum, Aequum, Salutare* [Budapest] I (2005) 1–2, pp. 73–88 and, in an enlarged version, presented in English at both the "Saint Thomas Education Project" [Step] Conference at Palermo in 2005 and the International Symposium on "State, Social Transformation and Legal Reform" in Nagoya in 2006.

[*] Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences [H–1250 Budapest, P.O. Box 25]; Professor, Pázmány Péter Catholic University, Director of its Institute for Legal Philosophy [H–1428 Budapest 8, P.O. Box 6] <varga@jak.ppke.hu> <http://varga.jak.ppke.hu>

[1] Jean-Étienne-Marie Portalis 'Discours préliminaire' in F. A. Fenet *Recueil complet des travaux préparatoires du Code civil* I (Paris: Videcoq 1836), pp. 11 and 481.

once been generated either by humility towards values or by professional intellectualism reduced to a mere parrotry of slogans.

All this notwithstanding, our subject can hardly be addressed otherwise than in a tone of respect and pathos. 'Rule of law'? A momentous notion implying dramatic human experience, a concept of great traditions and significance regarding its theoretical foundations and historical dilemmas, implying both ambiguities[2] and heavily laboured responses fought through and out: a notion which refers to a similarly noble series of further concepts such as 'human rights', 'constitutionality', 'parliamentarianism', 'democracy', and so on. And yet—or, exactly for this very reason—we have to continue the train of thoughts commenced above. For all these call-words present themselves as if they spoke from the past. However, we cannot know for sure whether or not they always and everywhere convey indeed nothing but the message of the past, embodying an elementary search of humans for ways out from one-time tensions, with adherence to values and institutional paths of responding to challenges of the time, all crystallised through and at the cost of the hard experience of past generations. For although the words themselves may be rather old terms, what they imply are genuinely new strivings, and all we may realise about them is that presently and with all our efforts, we do pursue them but have no theoretical proof as to for what purpose exactly, and we do not even have a dim idea about the world that would emerge as exactly a result of them, as there is no one having experienced that so far.

On the European continent and for centuries, the culture of *Rechtsstaatlichkeit* has stood for the statutory regulation of given fields with given enforceable guarantees by the prevailing law and order, i.e., under the protection of state power, while in the Anglo–American world the ideal culture of the 'rule of law' has meant just the opposite to any rule by men, the ultimate guarantee of which is justiciability of any issue, that is, the availability of conflicts to subject them to the decision by judicial fora. Or, while in continental Europe we put our trust on the force of enacted rules, on the very fact of the issuance of rules, the English-speaking civilisation relies upon the sheer independence of the judiciary and the trust on the strength of undefined principles,[3] as its historical experience may have built a chain of confidence

[2] See, for the suitability of the very notion 'rule of law' for almost nothing except for mapping out routes to search for own solutions, and also for the impossibility of giving any adequate and exhaustive definition of it, the recent debate in the US as overviewed by Richard H. Fallon, Jr. '»The Rule of Law« as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (January 1997) 1, pp. 1–56.

[3] Cf., from the author, 'Varieties of Law and the Rule of Law' *Archiv für Rechts- und*

reposed on processes themselves, if operated by good will socialised within a network duly fed back.[4] Now, the question may arise: what has become of all this by today, amongst our circumstances called post-modern? Well, the tentative answer may hold that, on the final analysis, nothing but the cult of endless disputability has pervaded the scene when statutory law and order does not matter any longer—apart from providing opportunity for practicing lawyers arguing according to the demands and at the money of their clients, and also for the growing number of those professional defenders of human rights, whose exclusive ambition is steadily shifting from making the rules observed to questioning the rules themselves, no matter how clear they are textually otherwise. For, as we may learn from the contextual dependence of premises in legal logic, any rule can be circumvented from both below and above. And it is by far not logic itself (taken as the mathematics of thinking, elevated sometimes into mythical heights in the absolutism of rationality) that is positioned either to challenge or counteract this—as logic in itself is faceless and mute, and can only be asserted through roles designed for it by those having a recourse to it—, but only an external power, seemingly melting away in our hands: the strength and culture of a commitment to the respect for rules.[5] If this is missing or becomes a secondary consideration in the routinised handling of ordinary cases—only showing that a decision made upon the strict followance of a given rule was not in interference with any implied interest for the sake of which the rule would have been worth questioning—, the lawyer of our age may come up practically in any procedural stage at any time either to find a gap in law, allegedly blocking the proper adjudication of the case, or to recourse to constitutional review for the re-assessment of the rule's questioned constitutionality, in both cases only in order to justify the client's accidental claim to reach a specific solution as necessarily concluding from the law itself. That is, the end-result of such lawyering is the practical mockery of law in either case: the avoidance of the applicability of an otherwise applicable rule.

This abstractly dry formulation may seem hard to grasp for everyday

---

Sozialphilosophie 82 (1996) 1, pp. 61–72.

[4] Within a revealing context, cf., as classic, Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* [1885, 8th ed. reprint] (London: Macmillan 1923) cv + 577 pp. & *Lectures on the Relation between Law and Public Opinion* in England during the Nineteenth Century [1905, 2nd ed.] (London: Macmillan 1926) xciv + 506 pp.

[5] See, from the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] and *A jog mint folyamat* [Law as process] (Budapest: Osiris 1999) 433 pp. [Osiris könyvtár: Jog].

thought, due to the harsh but concealed reality behind it. However, the point at stake is that law can at most sanction values which are, if at all, only approximated after they have been translated into the instrumental language of statutory texts. At the same time, even the most accurately drafted rules are inevitably exposed to the objection—no matter how strikingly artificial (and practically interest-driven)—that, given a gap in the law, they do not apply to the case. After all, neither the rule, nor its allegedly implied logic can help us decide whether we should opt for applying the rule, after having construed a similarity between the rule and the case, or just to the contrary, disapplying it because their dissimilarity is construed.

Let us now return to the two basic legal cultures familiar to us. In the Anglo–American Common Law, the method of distinguishing among precedents, known for long periods, might have caused a judicial revolution or practical renovation of law on a daily basis and frequency, but it has not in fact, just because both the conservatism of the judiciary and the hierarchical structure of appeal were equally capable of controlling jurisprudence, keeping it in a tight check. In the Civil Law, built on the application of statutory texts as a logical ideal, in point of principle the legal instruments designed to fill gaps in law could also have resulted in a fluctuating judicial practice (with as startlingly[6] discretionary solutions as, e.g., in Switzerland, where, in the last resort, the judge may openly and directly take over the role of a legislator[7]) yet actually they have not either, because the same professional pathos—here appearing under the aegis of the exclusivity of an ideally logical application, resulting in deductive conclusion—has eventually prevented the techniques (reserved for limiting situations of exceptional cases) from spreading and becoming destructive.

After all, what is given in law is nothing but a set of techniques. True, certain limitation in the practical application of techniques can be achieved by other techniques. However, effective limitation can only be secured—instead of techniques themselves (that is, by rules institutionalising techniques through their linguistic formulation in the normative ordering)—by the entire culture operating and also substantiating law: primarily by the culture of the legal profession and secondarily by general social culture. (It is to be noted that the

[6] Cf. the revolted echo to the news of its draft even with Benjamin N. Cardozo *The Nature of the Judicial Process* [1921] (New Haven: Yale University Press 1961), Lecture III, beyond the ones of RUDOLF STAMMLER, EUGEN EHRLICH or HERMANN KANTOROWICZ from Germany.

[7] *Schweizerisches Zivilgesetzbuch* (1907), § 1.

latter may counterbalance the former while the former may supersede the latter, for societal life is composed of the endless alternation of tensions and loosenings of such a kind. However, a variety and also a mutuality of segments, layers and sets of norms interacting in social integration have arisen in all societies just to provide for social identity, defining the framework of social reproduction, a complex network of regulations with mechanisms of check & balance, in a medium of tensions balanced amongst various challenges to preservation and change.)

"God is dead"[8]—although doubt and negation in final issues had become trivial long before NIETZSCHE, I wonder whether we have ever thoroughly reflected upon what a society knowing neither transcendency nor supra-human authority any longer would be like. Could it mean more than ORTEGA's rebellion of the masses[9] or the raving mob once cherished with enlightened intentions by *Viridiana*?[10] In a society, where the dignity of the person is replaced by the mere self-assertion of the individual, where the concern for a nation's destiny is substituted by the undoubted right to the free choice of domicile and marriage by occasional partnerships, where citizens are reduced to consumers and conscience gets cared for by sheer mass media control—well, in such a society, could there remain any bond other than merely procedural frameworks and rules of game arising from optional agreement, similar to contracts between individual parties but projected as universal (as hypostatised in the very idea of an underlying social contract)? Religion and morals are no longer in a position to support. Consequently, there are no duties any longer known, only rights. And the law itself (if at all formulated in rules' structure) is less material than processual now, serving as a mere rule of the actual game not guiding any longer on the substance of what to do or what to refrain from, as exclusively the guaranteed procedural frameworks of how to proceed on are mapped out by it. Law is mostly reduced to the issue of how and with what legal claim we can act successfully when addressing either the state we have opted for or another self-asserting individual (e.g., when demanding material support by reference to some human rights after the only ascertainment of the

[8] Friedrich Nietzsche *Thus spake Zarathustra* [Also sprach Zarathustra, 1883] trans. Thomas Common [1891] in <http://eserver.org/philosophy/nietzsche-zarathustra.txt>, Prologue, para. 2.

[9] José Ortega y Gasset *La Rebelión de las masas* (Madrid: Revista de occidente 1930) 315 pp. [*Revolt of the Masses* authorized trans. (London: Allen & Unwin & New York: Norton 1932) 204 pp. & trans. Anthony Kerigan, ed. Kenneth Moore (Notre Dame: University of Notre Dame Press 1985) xxxi + 192 pp.]

[10] Luis Buñuel *Viridiana* (1961).

bare fact that we as humans exist is made).

Since its conception as a discipline committed to social criticism, legal sociology has proven countless times how unfounded and illusive the lawyers' normativism embodied by their traditional professional mentality is, presuming law having strength by itself. It is only legal sociology to teach that the force of law is nothing but symbolic, in so far as it can at the most attach the additional seal of a particular social authority on tendencies already asserting themselves in society.[11] Indeed, in our post-modern era it seems as if common sense were replaced by simple-mindedness. Ideologically, we have endowed law with a mythical might and authority, while in fact we have emptied it.[12] By tearing it away from moral and social traditions, we have detached it from its millennia-old exclusively organic medium, thereby depriving it of its only genuine foundations; what is more, we do not even respect it any longer, as a matter of fact. We only use it as a field of operations in our unscrupulous battle repeatedly re-launched with no end, transubstantiating brute force (or substitutive pressure) into so-called inventive legal reasoning.

Rule of law? When I am discussing here the role of society and societal culture in support of law, I do not mean only to allude to the facelessness of legal techniques taken in themselves. They are neutral in themselves indeed, as they can be used to serve different, moreover, conflicting values as well. Just as law is not simply a pyramidal aggregate of abstract rules, posited in a given hierarchy, but the living total of meanings and messages getting concretised in one way or another at any time, following generations' efforts at both refining them so as to build them into a systematic dogmatics and transforming them into liveable practice by filtering them through conventionalisations contextualising formal regulation in the materiality of practice, it is neither backed simply by a hierarchical structure of values but by a sensitively changing compound of a huge variety of aspects and considerations of values. For it is always a responsible decision with a personal stand taken in pondering values and balancing amongst them that the formalism of the mere observance of rules in law disguises. After all, when we, giving official

---

[11] See, from the author, 'Towards a Sociological Concept of Law' *International Journal of the Sociology of Law* 9 (1981) 2, pp. 157–176.

[12] Cf., from the author, 'Joguralom? Jogmánia? Ésszerűség és anarchia határmezsgyéjén Amerikában' [Rule of law? Mania of law? On the merge of rationality and anarchy in America] *Valóság* XLV (2002) 9, pp. 1–10 & <http://www.valosagonline.hu/index.php?oldal=cikk&cazon=326&lap=0> {on Paul F. Campos *Jurismania* The Madness of American Law (New York & Oxford: Oxford University Press 1998) xi + 198 pp.}.

reasons for our decision, subsume facts under a rule through logical inference or reject a claim in want of subsumability,[13] actually we do balance between values. Apart from few truly exceptional cases, usually we do not negate (or exclude from supporting) some specific value just in order to implement some other value(s) instead. Just to the contrary. Being skilled in the judicial 'art' (made up of empathy, intuition and ingenuity, among others), we strive to find solutions which may ensure the optimum realisation of values (by allowing to serve important values without the disproportionate detriment to other values), solutions which can be duly justified, as resulting from (with no similarly arguable alternative in) the given normative and processual contexture. By the way, this is exactly the reason why we are used to proudly recall the term '*ars*' used by ancient Romans when referring to law,[14] denoting in Latin proper 'art' and 'craftsmanship' alike.

*

(Human-centeredness and Practical Orientation) When I am speaking about historical experience, truth and justice fought out through the lives of generations, I mean testing by everyday practice. Nevertheless, it has to be remarked that accepting the test of everyday practice as a criterion is theoretically far more honest and demanding than today's a-historical neo-primitive absolutism, growing into the present mainstream of Atlantic thought. For even MARXism, among others, by emphasising the moment of *praxis*, the principle of historicity and the role of *hic et nunc* particularity in the overall complex of historical (self-)determination, has made a standard out of actual practice itself, taken as an accumulation of human experience and self-reflection. As opposed to it, the current time-spirit replaces responsible human actions with the forging of hectic programmes, offering hardly anything more than feeble life-substitutes, ready to present even immature whims and varieties of otherness (sometimes bordering on deviance) in an a-historical universality. Well, it is known from reconstructions from the history of ideas that the very notions of rule of law, human rights, constitutionalism, parliamentarianism, as well as democracy—all these are also products of endeavours, recognitions, successes and failures accumulated through thousands of years, to which meditative pagan Antiquity, the Christian Middle Ages, as well as modern and contemporary times (striving for anthropo-

[13] For a reconstruction, cf., from the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.
[14] "*ius est ars boni et aequi*" Celsus in D 1.1.1. pr. Ulp I Inst (Pal. 278).

centrism) may have equally contributed. And the fact notwithstanding that they may seem relatively completed and solidified as abstracted in a series of theoretical statements from the Enlightenment up to the present age, they are in a constant process of refinement and further shaping. It is exactly the Christian tradition that had laid the foundations for all these, with the transcendence of divine law and the human commitment to values, by substantiating the inviolable and unquestionable dignity of the human person. More importantly, it is also the Christian tradition that marked out the dependence of human institutions (as mute instruments in themselves) upon a given destination designed for value-implementation.[15] This is the reason why Christianity has set internal barriers for these institutions to prevent them from growing self-centredly predominant, that is, from growing into a self-definingly independent power with the eventual chance of turning against man himself, by the eventual risk of destroying the rest of his dignity.

In the Western hemisphere—or, in the North (to use the term of financiers regularly convening in Switzerland at Davos)—, mankind has commenced writing a new history since post-war reconstruction. What are the characteristics of this? Self-confidence, success, devaluation of human labour (as if it were a post-modern correction of the burden of labour to be carried by humans since their Expulsion from Paradise upon the Divine punishment), haughtiness of learning, the rule of reason and abstract planning with guarantees of calculability and predictability: all in all, trends disregarding God, trying to substitute Him by the individual self and also burying Him more and more vociferously and provocatively day to day. And here is the Individual entering the scene, in company of a few billion fellows, with each and every one representing their selves as the centre and last meaning—i.e., the axiomatic zero point—of the Universe, moreover, as a key to its hermeneutics and, in their ephemeral lives, also as the immoderately unrestrained consumer using up whatever goods to be found on Earth. Now his incidental pleasure constitutes the exclusive criterion of values. His rather shapeable psychical disposition is the gauge for the existence of whatever institution. 'Rule of law',

[15] Cf., from the author, 'Buts et moyens en droit' in *Giovanni Paolo II* Le vie della giustizia: Itinerari per il terzo millennio (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75, enlarged and adapted as 'Goals and Means in Law' in *Jurisprudencija* [Vilnius: Mykolo Romerio Universitetas] (2005), No. 68(60), pp. 5–10 & <http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf>, & as presented at the Saint Thomas Education Project Conference in Budapest in 2005, <http://www.thomasinternational.org/projects/step/conferences/20050712budapest/varga1.htm> as well.

'human rights', 'constitutionalism', 'parliamentarianism', as well as 'democracy'—just like the once revolutionary thought of *res publica* itself—serve from now on as the framework of random motions (maybe sometimes pulled in idiotism pouring on us from the media) for these few billion creators of world as plenipotentiary carriers and users of the ever growing catalogue of nothing but rights, and also as the guardians sanctioning the momentary state of this world, finalising or further shaping it.

A future for Hungary? The outcome into which the sublime ideas of the rule of law, human rights, constitutionalism, parliamentarianism, as well as democracy became (de)formed since the Atlantic revival after World War Two (and especially in hands of radical leftist anarchists, marking the generation of 1968) is becoming visible just nowadays, showing in full blossom the apotheosis of irresponsibility, the cult of unworthiness with chanceless chances; for, strictly speaking, eventually no one can any longer fail, since by the very biological fact that we are born as humans, now we may start reclaiming full catalogues of rights for ourselves with no obligation to return anything. Our ideals are still floating in the air, challenged but not shaken now, when the Atlantic world starts facing the outcome. Now, when the underlying societal texture has fallen apart, the hearth of families has cooled out, and citizens thoroughly programmed have become alternatingly robots and media-controlled consumer-units, everyone fights against everyone an endless battle in the name of law—with women snarling at men, minors turning against their parents, those infatuated with the same sex incited against those attached to the other one—, loathing in common the State and the Church as public enemy, from a cloud of daze. Indeed, has there been anything left to be respected in anyone who still dares set standards and values, moreover, who longs for adhering to them? We do not know yet what tomorrow's Western world will be like if irresponsibility, environmental destruction, human sinning without punishment, glorification of licentiousness and life-substitutes offered by simulated virtual worlds will have already grown to global proportions as they are going to in our day, by half-time of our near future.

We do not know either how much and how far our everyday sense and experience, having proven unfailing so far in our human history of thousands of years, will be able to adapt themselves to this world, when its reserves will exhaust, and what final impetus will, if at all, provoke humans to revolt for re-taking their human dignity. For, enthused by the success story of the Atlantic

world, we may have scarcely realised that the uninhibited universalisation of rights is not only a gesture by our own enlightenment but also a burden which we mostly generously (but effectively) pay at—mostly—others' cost.

For sexual licentiousness is also a budget and social capital item (just like AIDS) in the households of nations, and an economy based on free labour market squanders the resources just as the retirement at the meridian of life does at the cost of offsprings born in a decreasing number. The global division of labour (when even toothpicks may be produced within transcontinental co-operation in Europe), too, imposes a tremendous burden on the energy-household of the Earth, just like dumping prices resulting from the rivalry of airlines competing for the market of leisure do. This is to say that rights, too, cost. As the extension of the sheltered sphere of privacy results in increasing costs and decreasing efficiency in the maintenance of public order, also massive malpractice litigation implies costs rocketing in health and social care.[16] This may be a vicious circle, for the richer a nation, the more resources it can spend to meet the standards set by its own enlightenment. However, the more unlimitedly it provides rights, the more reserves it has inevitably to spend on overall societal reproduction.

It may be intellectually exciting an experience to watch from a distance the game of some wealthy nations, if they are self-destructive and counter-productive beyond a certain extent; however, it is by far not worth risking our own modest existence (in the small states of the Central European region) with no giant reserves in this game. Strategic planning is mostly undertaken by big states, because there is more for them to win or lose by predicting the future. Conversely, nevertheless, smaller states run a relatively bigger risk, because it is their sheer existence with their chance for survival what is eventually at stake. For they not only risk a relatively greater part of their financial chances (or channel it on a forced track) but may thereby also seriously risk their moral reserve and future prospects as well. Let us contemplate, for instance, the disproportionately huge costs to be borne by Hungary, due to her geographical location, to enforce the internationally renowned high standards of human rights to manage her part in the global migration, pushed by the misery in a number of wrecked societies in either our neighbourhood or major parts of Asia and Africa. Or let us think of the additional obligations arising from the

[16] Cf., from the author, 'Law, Ethics, Economy: Independent Paths or Shared Ways?', presented at the Saint Thomas Education Project Conference in Barcelona in 2005 <http://www.thomasinternational.org/projects/step/conferences/20050920barcelona/varga1.htm>.

necessity widely felt as vital to re-socialise parts of the Roma population.

Nowadays it is popularly held among those considering themselves enlightened that the state is growingly losing ground. Whereas, the operation of the rule of law, human rights, constitutionalism, parliamentarianism and democracy presume the unquestioned operability of the state. Although the state of the future may not be a powerful one, it ought not in the least to be a weak one either; it shall be an organisation strong enough despite its relatively modest extent.[17] Anyway, what else is being built for decades now under the aegis of the United Nations, the North Atlantic Treaty Organisation, or the European Union? And what else is the political game all about? Well, any of our large-scale decisions requires a firm conception, and as soon as mental anticipation is replaced by resolution, a readiness to act is also required, so that deeds can no longer be prevented by any further hesitation. For any administrative action to become effective, determination is needed, which in turn presupposes smoothly functioning communication channels to spread information. It is firmness and readiness to act that are a *sine qua non* for the maintenance of public order. The pre-requisite of administering justice is a sense of responsibility, mature enough to morally face the consequences of a decision.

Now, let us examine from the other—positive—side all what our call-words must not degenerate into. We have to serve the dignity of the human person with humility and moral commitment, striving for justice and equity, aware of the truth of our belief in the basic honesty of man as filled with a sense of responsibility, in a way that our behaviour can serve as a pattern for others. We have to serve human dignity to be able to live in a social community, in the natural bonds of family and nation, with equal sensibility for rights and responsibilities, building law and order invested with all authority as may be needed.

The assumption of responsibility, personal commitment and the inevitability of making decisions do not apply for everyday life-situations only. Even if we should find ourselves to have no spouse, or to be childless, jobless or homeless,

[17] Cf., e.g., Arthur Fridolin Utz *Zwischen Neoliberalismus und Neomarxismus* Die Philosophie des Dritten Weges (Cologne: P. Hanstein 1975) 184 pp. [Gesellschaft, Kirche, Wirtschaft 8] {*Entre le néo-libéralisme et le néo-marxisme* Recherche philosophique d'une troisième voie, trad. Morand Kleiber (Paris: Beauchesne 1975) 206 pp.} and Taketoshi Nojiri 'Values as a Precondition of Democracy' in *Democracy* Some Acute Questions [The Proceedings of the Fourth Plenary Session of the Pontifical Academy of Social Sciences, 22–25 April 1998] ed. Hans F. Zacher (Vatican City 1999), p. 105 [Pontificiae Academiae Scientiarum Socialium Acta 4].

or, let us say, find ourselves to have no honesty or self-control, we should not act as vegetative beings, resorting to accusing others, trying to find excuses and raise pity for ourselves as innocent victims of some social disease, easily identifiable anywhere at any time on principle. Well, one of the most noble objectives of training lawyers now is to convince future generations of the inevitability of personal commitment and of the necessity of the acceptance of one's own personal fate when defining and undertaking our individual life-missions.[18] It is obvious that the responsibility for any choice and decision has to be shared by those who make the law and also by those who just apply it.

One and a half decades ago, after the collapse of Communism in the middle part of Europe, there were only sporadic voices warning against the possible damages by a purely mechanical extension of the patterns taken from the Western routine of the rule of law, and the Western law-exporters themselves rejected these fears in outrage.[19] By now it has become obvious that our vast Euro–Asiatic region of Central and Eastern Europe, spanning from Vladivostok to Tallinn to Dresden to Ljubljana, was reduced to a field of experimentation by the rhetorical champions of tolerance, imbued by merciless uniformisation and theoretical arrogance. [20] And after their "Law and Development" programme, propagated and implanted as a panacea by the wishful American liberal doctrines had failed all through Latin America, they now decided to test it again against a by far more difficult terrain, on the ruins of communist dictatorial regimes. What a wonder, this missionary zeal has all but aggravated the bankruptcy in a number of ex-Soviet countries (maybe

[18] Cf., e.g., from the author, *Lectures...* [note 4], and 'Búcsúírás' [Farewell writing] in Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar *2003-ban végzettek évkönyve* [Yearbook of the class graduating at the Faculty of Law of Pázmány Péter Catholic University in 2003] ed. Emese Boros & Nóra Ohlendorff (Budapest: Alumni 2003), pp. 119–122.

[19] "Laws [...] were made for people and not people for the laws; and they have to conform to the character, the customs and situation of the people for which they were made; [...] and it would be absurd to indulge in the absolute ideals of perfection in things that are only suitable to realise the relative good [...]." Portalis in Fenet, I [note 1], pp. 466–467. As one of the case-studies, see Stephen F. Cohen *Failed Crusade* America and the Tragedy of Post-Communist Russia (New York & London: W. W. Norton & Company 2000) xiv + 304 pp., reviewed by the author, 'Kudarcot vallott kereszteshadjárat: Amerikai önbizalom, orosz katasztrófa' [American self-confidence, Russian catastrophe] in *PoLíSz* (December 2002–January 2003), No. 68, pp. 18–28 & <http://www.krater.hu/site.php?func=polisz&file=cikkek&cnr=81>.

[20] See, e.g., Ugo Mattei *Introducing Legal Change* Problems and Perspectives in Less Developed Countries [manuscript of a lecture delivered at the Session of World Bank Workshop on Legal Reform in Washington D. C. on April 14, 1997] (Berkeley & Trento 1997) 19 pp.; Paul H. Brietzke 'Designing the Legal Frameworks for Markets in Eastern Europe' *The Transnational Lawyer* 7 (1994), pp. 35–63; Armin Höland 'Évolution du droit en Europe centrale et orientale: assiste-t-on à une renaissance du »Law and Development«?' *Droit et société* (1993), No. 25, pp. 467–488; Gianmaria Ajani 'La circulation des modèles juridiques dans le droit post-socialiste' *Revue internationale du Droit comparé* 46 (1994) 4, pp. 1087–1105 & 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' *The American Journal of Comparative Law* XLIII (Winter 1995) 1, pp. 93–117.

except partly for the Baltic states[21]) and also in Albania.[22] (Meanwhile, in the heart of the Hungarian capital and as housed in the building of the one-time communist National Planning Office, the so-called Central European University was established with a missionary dedication to theoretically promote abstract universalism in the entire former socialist bloc.)

Since the euphoria of the transition's honeymoon period in Central Europe is over, public opinion (fed-back by accumulating practical experience) is already more critical concerning the adoption of ready-made recipes and wonder-working gestures, miracle-expecting attitudes and the like.[23] More importantly, those in Parliament and government are more about to realise as a truth of our landmarking present that simplistic and rapid methods, smuggled from somewhere by elitist groups as showing the exclusive road, have most probably no potential to become organically integrated into ongoing social processes and can therefore scarcely serve our own interests with the optimum effectivity in the long run.

No need to say that foreign models can be useful as raw material, as an emphatic notification about solutions developed elsewhere by others at another time, maybe and mostly even under different conditions, only provided that there and then they operated with reliable success.[24] We should, hence, be aware that no reference to outside authorities can substitute for own decision on principle. Being necessarily partial and selective as conceived within differing paradigms, such references are unsuitable to replace a personal stand to be taken.

No matter how such international fora and world powers may represent 21st-century Atlantic civilisation (self-closing in its underlying individualistic

---

[21] Cf., from the author, 'Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations (The Experience of Lithuania)' *Acta Juridica Hungarica* 46 (2005) 1–2, pp. 10–29 <http://www.akademiai.com/media/37knultrmmv9b6ykpee7/contributions/m/3/2/9/m3296v37841w54h0.pdf> and forthcoming in *Rechtstheorie* 38 (2007) 1.

[22] See, e.g., Vladimir Shlapentokh *Russia* Privatization and Illegalization of Social and Political Life (Michigan State University Department of Sociology: September 25, 1995) 44 pp. [NATO CND {Chris Donally} (95 459)].

[23] "The State of Law is Not a Gift"—this is how the first ombudslady of Poland summarised her sobering experience half a decade after the expiry of her office term. Cf. Ewa Łętowska [with husband Janusz Łętowski] 'Poland: In search of the »State of Law« and Its Future Constitution' in their *Poland: Towards to the Rule of Law* (Warszawa: Wydawnictwo Naukowe Scholar 1996), p. 11.

[24] Cf., as a global overview with theoretical backing, from the author, 'Reception of Legal Patterns in a Globalising Age' in *Law and Justice in a Global Society* Addenda: Special Workshops and Working Groups (IVR 22nd World Congress, Granada, Spain, 24–29 May 2005), ed. J. J. Jiménez & J. Gil & A. Peña (Granada: International Association for Philosophy of Law and Social Philosophy – University of Granada 2005), pp. 96–97 & 'Transfers of Law: A Conceptual Analysis' in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 21–41.

ideology and therefore by far not safe from the threat of a crisis some day), it is just their absolutising universalism that makes them not only dated but reminiscent of the ages before modern science. For in their underlying approach, they mistake the edifice of (any) society, continuously rebuilding upon traditions, convictions, collective and personal beliefs, for a primitive system made up of interchangeably ready-made, mechanically connected elements (like, e.g., standard engine-blocs of a motor-vehicle).[25]

*

(Theological and Anthropological Foundations) As an axiomatic starting point, it has always been obvious that

"all the balance of the CHRISTian thought is based on two antinomic statements. On the one hand, the person is prior to society. On the other, public good is superior to personal goods."[26]

Not only recognitions based upon natural law—drawing conclusions, in addition to connections obvious for common sense, also from theological truths—but also insights drawn from social sciences (based on anthropological, psychological, sociological, as well as criminological investigations and empirical data) are growingly definite in concluding that

- *ordo*,[27] that is, human order in society, is inconceivable without the agreed-on practice based upon the acknowledgement of some kind of authority, and this authority has to be founded—unless it contents itself with a new fist-law, ensuing from actual anarchy and deviance, tolerated as normal by now, disguised with some minimum and superficial maintenance of public order[28]—through collective experience and traditions with a

[25] Cf.—reviewing H. Patrick Glenn's *Legal Traditions of the World* Sustainable Diversity in Law (Oxford & New York: Oxford University Press 2000) xxiv + 371 pp.—by the author, 'Legal Traditions? In Search for Families and Cultures of Law' in *Law and Justice in a Global Society* [note 21], p. 82 & *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>.

[26] "*Tout l'équilibre de la pensée chrétienne tient dans deux affirmations antinomiques. D'une part, la personne est antérieure à la société. D'autre part, le bien commun est supérieur aux biens particuliers.*" Pierre Bigo *La doctrine sociale de l'Église* Recherche et dialogue (Paris: Presses Universitaires de France 1965), p. 168.

[27] "But it must not be imagined that authority knows no bounds [...]." *Pacem in Terris* Encyclical of Pope John XXIII [1963], 47.

[28] "A person who is concerned solely or primarily with possessing and enjoying, who is no longer able to control his instincts and passions, or to subordinate them by obedience to the truth, cannot be free."

commonly shared vision of future and an ethical world-view;[29]

- any way of life accepted with procedural techniques in society has to be based on values originating from the unalienable entirety of human person. Therefore, not even democracy is able to embody values without genuine eternal values to implement, that is, on the sheer foundation of ethical neutrality and the total relativisation of values;[30]
- dignity and responsibility are inseparable from one another, because the former arises from the autonomy of the person, and the latter, from the freedom of man. Therefore, no form of social care or generous provision of rights can reduce the minimum responsibility to be irrevocably borne by the person for his decisions and actions and for the development and exploitation of all his potentials (that is, for his conduct in private, in family and professional life, as well as in his larger communities);[31]
- as a result of the inviolable dignity and undiminishable responsibility of the human person, rights and obligations go hand in hand.[32] Otherwise, reciprocity and balance would be unthinkable,[33] and the *societas* as a whole would fall apart.[34] Therefore, in the last analysis,

---

Encyclical Letter *Centesimus Annus* issued by the Supreme Pontiff John Paul II [1991], 41.

[29] Most expressly—first of all, from the aspect of social psychology and sociology—see, e.g., Robert Nisbet *The Quest for Community* (San Francisco: ICS Press 1990), chs. 1–3. It is to be noted that the same objection is formulated in criticism of the new doctrine in formation on the practice of precedents. For a theoretical context, cf., from the author, 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44, para. 1.

[30] "With regard to civil authority, LEO XIII [in the Encyclical on the *Condition of Workers* (1891), 48], boldly breaking through the confines imposed by Liberalism, fearlessly taught that government must not be thought a mere guardian of law and of good order, but rather must put forth every effort so that »through the entire scheme of laws and institutions [...] both public and individual well-being may develop spontaneously out of the very structure and administration of the State.«" Pius XI *Quadragesimo Anno* [1931], 25. "Hence, before a society can be considered well-ordered, creative, and consonant with human dignity, it must be based on truth [...]. And so will it be, if each man acknowledges sincerely his own rights and his own duties toward others." John XXIII *Pacem in Terris* [1963], 35.

[31] Michel Schooyans has termed—'Droits de l'homme et démocratie à la lumière de l'einseignement social de l'Église' in *Democracy* [note 14], pp. 50–51—the process by which newer packages of human rights are acknowledged (and, then, responsibility for them is shifted upon the state) through global lobbying and pressurising via international organisations as a "tyranny of consensus" which, due to its positivistic voluntarism and by trampling on the principle of subsidiarity itself, results in an end to any genuinely democratic thought.

[32] "[M]an's awareness of his rights must inevitably lead him to the recognition of his duties. The possession of rights involves the duty of implementing those rights, for they are the expression of a man's personal dignity. And the possession of rights also involves their recognition and respect by other people." John XXIII *Pacem in Terris* [note 27], 44.

[33] "Since men are social by nature, they must live together and consult each other's interests. That men should recognize and perform their respective rights and duties is imperative to a well ordered society. But the result will be that each individual will make his whole-hearted contribution to the creation of a civic order in which rights and duties are ever more diligently and more effectively observed. *Ibid.*, 31.

[34] See, for the comparative criminological analysis of the individualistic, resp. communitarian backgrounds of the policing in the USA, resp. Japan, concluding in a dazzling difference between the

- our social achievements are—as human freedom itself is (if valuable at all) also a historical achievement and not simply the product of a mere declaration of right[35]—by no means built on the sand randomly formed by momentary taste, delight and fancy, but upon the awareness of the cognisability of our world and upon the belief that a sensible order can be developed in it, at the heart of which one finds the vocation of man to both recognise the values dormant in him and, then, carry them into effect in his environment.[36]

This being the case, would it not be acutely necessary to reconsider what follows therefrom in terms of state organisation? And shouldn't we, responsible citizens, try to find answers to our concerns through this realisation, instead of just relying (with vacuous idleness, by shifting responsibility on others) upon patterns devised by others under differing conditions, which can only result in a failure for us? By claiming this, I do not mean alone anomalies, excesses and disproportions (by, e.g., one-sided extension of rights and competencies, which can only lead to dysfunction and irresponsibility, moreover, to irradiating chaos), recurring abundantly in our

---

expenses invested and the results achieved, Denis Szabo *Intégration normative et évolution de la criminalité* {lecture at a conference on value, behaviour, development, modernity, or the cultural factors of development and backwardness in development, as organised by the *Institut de France* [Paris] on September 16–17, 1995 [manuscript]}, as based upon the research by D. H. BAYLEY. For a Central European stand on the complementarity of rights and obligations, cf. Alfonsas Vaišvila 'Legal Personalism: A Theory of the Subjective Right' in *Ius unum, lex multiplex* Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy) ed. István H. Szilágyi & Máté Paksy (Budapest: Szent István Társulat 2005), pp. 557–573 [Philosophiae Iuris / Bibliotheca Iuridica: Libri amicorum 13].

[35] For one of its latest formulations, see, e.g., Robert Grant *Oakeshott* (London: The Claridge Press 1990), p. 63 [Thinkers of our Time].

[36] "Authentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person. It requires that the necessary conditions be present for the advancement both of the individual through education and formation in true ideals, and of the »subjectivity« of society through the creation of structures of participation and shared responsibility. Nowadays there is a tendency to claim that agnosticism and sceptical relativism are the philosophy and the basic attitude which correspond to democratic forms of political life. Those who are convinced that they know the truth and firmly adhere to it are considered unreliable from a democratic point of view, since they do not accept that truth is determined by the majority, or that it is subject to variation according to different political trends. It must be observed in this regard that if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism." John Paul II *Centesimus Annus* [note 25], 46. It should be remarked that Schooyans [note 28], pp. 55–56, sees our days' developments—maybe in sign of an impending Apocalypse—as the beginning of a "total war waged against man", because the so-called "anthropological revolution" (p. 53)—(de)grading man from a genuine person to sheer individual, utterly free to choose any truth, value and ethics he pleases to—eradicates from the human being exactly what is Divine in him, depriving him from his being an *imago Dei*, i.e., an image of God. And man practically becomes incapable of survival when his own reason and will are eliminated.

transition process,[37] which—even if heralded mostly in the majestic robe of the defence of constitutionalism[38]—are only apt to eventually shake the foundations of collective order, undermine its reliability and cohesive force, shattering its foreseeability and, on the final analysis (even if sometimes dragged out of the cloak of constitutional justices or ombudsmen), subjecting it to the "logic" of fist-law, where only the stronger, the more persevering and uninhibited of us are awarded, those who resort to the arbitrament of—maybe, just a legalistic—war.

Let us contemplate: if the ideal of the rule of law as developed in the European continental (or German) idea of *Rechtsstaatlichkeit* preserves at its focal point the maintenance of law and order by means of statutory regulation (and, in supplementation, through judicial decision-making guided by principles), binding those governing and those governed alike, and if the smooth and safe realisability of this is the purpose of the separation between the (executive) power of the government, the legislative (regulatory) power of the Parliament and the (decisional) power of the judiciary, both latter controlling the former, then how can our present scheme of the rule of law respond to challenges, regarding which the classical system of checks & balances, developed nearly two centuries ago in a classical way, is hardly able to operate functionally and efficiently any longer? That is, how can it react to the power (or sheer monopoly) of printed press and electronic media, the pressure by big organisations, the financial extortion by the international

---

[37] Cf., from the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] as well as 'Legal Scholarship at the Threshold of a New Millennium (For Transition to Rule of Law in the Central and Eastern European Region)' *Acta Juridica Hungarica* 42 (2001) 3–4, pp. 181–201 & in *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot) [= *Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn], pp. 515–531, and, focussed on one single issue—concealing in the guise of constitutional principles the politically motivated rejection of coming to terms with the past in criminal law by constitutional justices as legally irresponsible professional defenders of abstract constitutionalism in Hungary—, *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub] and 'Legal Renovation through Constitutional Judiciary?' in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 287–312, as well as, as a diagnosis of the problems of our age, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* Várkonyi Nándor: Az ötödik ember című művéről [Mankind adrift: About Nándor Várkonyi's work »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom [2000]), pp. 61–93.

[38] As a case-study, cf. Catherine Dupré *Importing the Law in Post-communist Transitions* The Hungarian Constitutional Court and the Right to Human Dignity (Oxford & Portland Oregon: Hart Publishing 2003) xx + 217 pp. [Human Rights Law in Perspective] and, in reflection of outer—Western—criticism of the political over-activism of the first, founding period of Hungarian constitutional adjudication, from the present author, 'Legal Renovation through Constitutional Judiciary?' in *Hungary's Legal Assistance Experiences* [note 21], pp. 287–312.

agents of globalisation and the crime organised without frontiers—acting sometimes with assistance of the state, asserting themselves increasingly arrogantly with no responsibility, on a field practically freed from whatever regulation but actually assisted by world-wide economic trends and newest high-technologies? Well, the classical regime of the rule of law offers neither regulation nor ideas[39] to control the interference on behalf of such new powers, weighing down heavily on our future. Even by a benevolent comparison, all that is available does not even reach a fraction—say, one thousandth—of the European regulation standardising, e.g., the size of holes in cheeses. And since we keep proudly and imperturbably thinking in terms of stubborn principles, our eyesight still not reaches farther than the hand-operated printing press of heroes of classical liberty like MIHÁLY TÁNCSICS (preparing in Hungary the bourgeois revolution by means of mass journalism from the 1830s), or the channels of communication between Pest, then alone the capital, and Szolnok, a town by the river Tisza in the Great Plain, hardly a hundred kilometres from the capital, a distance that could be run in a post-chaise muddling through marshes, often threatened by highwaymen, yet allowed, at times of good weather, by carrigeable trails to reach its destination within some two to three days in the 1860s.[40] So, it is little wonder if we are not able to rise above the shortest re-assertion of the freedom of press by a total lack of its regulation.

*

(An Irreplaceably own Task) If such is the case, what are we to do? We are not likely to serve with a solution here and now. The most our message can

[39] Although focussed mostly on considerations of legal policy in present-day Hungary, Béla Pokol *Médiahatalom* Válogatott írások [*Media Power* Selected writings] (Budapest: Windsor Kiadó 1995) 198 pp. is a refreshing exception in this respect. Another remarkable fact is that a professor once at Yale, constitutionalist and not long ago the acting Attorney General of the US, identifies two main moments as having lead to the present-day situation in the United States of America, notably, the liberal re-interpretation of the Constitution, undertaken by the lead of the Supreme Court, and the limitless destruction by television (having also brought about virtual illiteracy as a side-effect). Robert H. Bork *Slouching towards Gomorrah* Modern Liberalism and American Decline (New York: HarperCollins 1997) xiv + 382 pp.

[40] Reference to the artists' colony at Szolnok, actually born in result of a nostalgy-tour in 1851 by an Austrian officer of the Emperor's army, after the defeat of the Hungarian bourgeois revolution of 1848. The officer, painting as an amateur (AUGUST VON PETTENKOFEN), had been so much enchanted by the landscape of the Hungarian Great Plain that he started later on inviting also his friends to this end point of 'Far East'—for this was then the farthest South-East reachable at all by railroads on the European Continent at the time, changing over the then rather inconvenient land communication. Cf. *Die Szolnoker Malerschule* (Wien: G. Gistel [1975]) pp. 126 + 40 and Christine Strasser *August von Pettenkofen* Die Szolnoker Bilder (Salzburg 1983) 185 pp. [Salzburg Universität, geisteswissenschaftliche Dissertation].

convey is that we have to contemplate about history; and if we already know what we want, we have to look for paths, draw lessons from human experience, take responsible decisions, and go along the road we have chosen. No one shall take decisions instead of us, and whatever we have once sowed, it will be us who shall have to reap it. We have to assume responsibility for our people, our age, our fate, our conviction and our rule of law in the undivided collectivity of mankind, but also individually, for the talent entrusted to each of us, for which we are accountable in person.

*

(Recapitulation) To summarise the issue, the relationship between rights and duties cannot be but logically complementary. They necessarily supplement each other. As none of them can be posited without the other, no one is entrusted to select only rights from them.

What we have claimed about the role of legal culture in general also applies to the law's practical action. Notably, most decisive changes in the law's life may take place amazingly often through considered (re)interpretation, without the slightest modification of the law's posited wording. Only such silent (yet practically irresistible) shifts, e.g., in prevailing ideas, can explain how the ordering concepts of 'common good', 'public interest', 'public order', 'public security', 'public health' (etc.) that had once set the boundaries of rights provided for by basic codes to the individual from the early 19th century on (serving as a general basis of interpretation and also as general clauses in limiting cases, restricting or refusing the enforceability of rights in given situations, thereby justifying a legal exception),[41] seem to have step by step disappeared from our juridical discourse. For what my generation used to learn (back in the mid-sixties in both Western Europe and socialist Hungary) as a joint heritage of European civilisation, has all of a sudden become dated, referred to in fact by no one any longer. And this has resulted in a dramatic change for relations between the public and the individual, too. In our new cult of nothing but rights, public affairs can at most take hold in the periphery of, or gap in-between, our increasingly expanding individual entitlements.

Albeit in its social teaching, aware of the danger of such dubious age-

[41] Cf., first of all, by the Hungarian scholar in exile, Vera Bolgár 'The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law' *Journal of Public Law* [Emory University Law School] 12 (1963) 1, pp. 13–52.

dependent fashions, the Church has been declaring its stand more and more firmly from the third third of the 19th century on, according to which (1) also secular institutions have to be built on the recognition and in service of the person; in consequence, (2) no civilisational achievement has its value in itself (i.e., even democracy is only valuable through the values implemented and materialised by it); (3) the dignity of human person presupposes the undertaking of responsibility through the unity of rights and duties, among others. Rule of law, human rights, constitutionality, parliamentarianism and democracy? No achievement of Western development, however sublime and enlightening they may be, is free from criticism: their given form and output (as a few papal encyclicals do remind us) may suffer from infantile disorders with various excesses, that is, from mistakes and false emphases as well.

In addition, also the principles of (4) representation and (5) participation are to be mentioned, particularly to understand the genuine foundations of democracy. For democracy in a Christian view is not something just happening to us but rather a chance of getting realised through true representation and participation.[42] It costs a lot, requires sacrifice, and may involve the potential of errors in addition to its demand of time, which is another potential source of short-run disillusionment.

*

(A Final Remark in Comparison) Let us consider the issue once again, this time by recalling the dilemma of the American supreme command in 1944, when the deployment of the first atomic bomb in warfare had to be decided. For the radical ending of WWII in the Far East by such a bombing would have forecast and did also actually involve a certain, yet though immense but limited number of civil and uniformed victims on the enemy side. In case of any other option, destroying the enemy in a protracted jungle war would have inevitably presumed a far huger number of victims both on the enemy and the own side, in a number and time-schedule both uncertain and unlimited. Well, which option is more humanitarian, which one should have been resorted to in

[42] Cf., as theoretical synthesis in general, Utz [note 14], passim, and as one of the applied fields in particular, Chantal Millon-Delsol *Le principe de subsidiarité* (Paris: Presses Universitaires de France 1993) 127 pp. [Que sais-je? 2793], also put by him in a historico-comparative context in his *L'État subsidiaire* Ingérence et non-ingérence de l'État: le principe de subsidiarité aux fondements de l'histoire européenne (Chicago & London & Toronto: Encyclopaedia britannica 1992) 232 pp. [Léviathan].

this fatal and tormenting dilemma, to be decided unambiguously anyway in this superhumanly dramatic choice faced by both the politicians and the relevant general staff?[43] Not too far away in time, let us continue our reconsideration with the example of the termination of World War Two which, dividing the world into defeaters and defeated, burdened the task of pacifying the latter to the shoulder of the former. The naive question may arise whether or not this has perhaps meant that the victors' democracy was just extended to the liberated one? We know the answer: not in the least. For it would have been at the formers' own costs and by risking their own human lives. Therefore, actually they chose the continued use of their armed forces. And that what followed included in fact military occupation, suspension of basic freedoms, occupying administration with unlimited foreign power intervention, reckoning with the past through military tribunals by the suppression of principles of the rule of law and finally also a forced "re-education to democracy" process which was originally designed to span about one decade of transition before anything like democracy could be implemented.[44]

We may have realised by now that in the Central and Eastern European region, transition after the downfall of red dictatorship (distinguished favourably by the Western mainstream double measure from the brown one) took place differently. Could any decision-maker have one and a half decades ago presented an alternative to the democratic jungle-war, to its tiresome roughness, pitfalls, costs, and even its disillusioningly meagre and counter-effective self-prolonging performance? Everything considered, it seems that there has been no genuine alternative. So this is to be taken by us as acquired and to be fought through as our way, fate and mission. And the sequence of generations to come has to assume the task of incessantly caring for, protecting

---

[43] Cf., from the literature, Peter Weyden *Day One* Before Hiroshima and After (New York: Simon and Schuster 1984) 414 pp., on the contexture, *The Atomic Bomb* The Great Decision, 2nd rev. ed. Paul R. Baker (Hindale, Ill.: Dryden Press 1976) viii + 193 pp., Len Giovannitti & Fred Freed *The Decision to Drop the Bomb* (New York: Coward-MacCann 1965) 348 pp. and *Tje Atomic Bomb* The Critical Issues, ed. Barton J. Bernstein (Boston: Little, Brown 1976) xix + 169 pp., with archives' background in Barton J. Bernstein & Allen F. Matusow *The Truman Administration* A Documentary History (New York: Harper & Row 1966) viii + 518 pp. and Louis Morton 'The Decision to Use the Atomic Bomb' in *Command Decisions* ed. Kent Roberts Greenfield, Office of the Chief of Military History (Washington: U.S. Army 1960) viii + 565 pp.

[44] Cf., from the author, 'Transition to Rule of Law: A Philosophical Assessment of Challenges and Realisations in a Historico-comparative Perspective' in *Hungary's Legal Assistance Experiences* [note 21], pp. 185–214 in general and 'Transformation to Rule of Law from No-law: Societal Contexture of the Democratic Transition in Central and Eastern Europe' *The Connecticut Journal of International Law* [Hartford] 8 (Spring 1993) 2, pp. 487–505 in particular. For the background, see, e.g., John D. Montgomery *Forced to be Free* The Artificial Revolution in Germany and Japan (Chicago: The University of Chicago Press 1957) xiii + 210 pp. and Wolfgang Friedmann *The Allied Military Government of Germany* (London: Stevens 1947) x + 362 pp.

and eventually perfecting it within the given frameworks but not without the sight of the once contemplated ends.

Codification on the Threshold of the Third Millennium

VARGA Csaba *

(Codification Now) What are the developments of the past quarter of a century in the field of codification?[1] The practice appears to have been following the already covered paths undisturbedly, driven by its own impulse. At the same time, setting new targets by re-dreaming thousand-year-old European and commonly shared dreams in response to the present-day policies of the European Union, theory seems to be ready to revise, moreover, reverse earlier perspectives apparently thoroughly established and conventionalised, hoping to beat new paths now. Debating policies and methodologies in terms of codification is fashionable again: it is in the focus of discussions and its dilemmas appear as vital as regards our decisions on the future.

Considering the distinctive episodes of the recent past in terms of mere data,

* Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences [H–1250 Budapest, P.O. Box 25]; Professor, Pázmány Péter Catholic University, Director of its Institute for Legal Philosophy [H–1428 Budapest 8, P.O. Box 6] <varga@jak.ppke.hu> <http://varga.jak.ppke.hu>

[1] As antecedents, cf., from the author, *Codification as a Socio-historical Phenomenon* [in its original version in Hungarian, 1979] (Budapest: Akadémiai Kiadó 1991) viii + 391 pp. and 'A kodifikáció és határai' [Codification and its limits] *Állam és Igazgatás* XXVIII (1978) 8–9, pp. 702–718 as well as, in a recent summary, 'Codification' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland 1999), pp. 120–122 [Garland Reference Library of the Humanities 1743]. Cf., as reviews on previously published chapters of the monograph, Gérard Conac in *Revue internationale de Droit comparé* 29 (1977) 4, pp. 861–862; M. A. Супатаев [M. A. Supataev] in *Советское Государство и Право* [*Sovetskoe gossudarstvo i pravo*] 1978/12, p. 148; in *An Overview of Sociological Research in Hungary* ed. Tamás Szentes (Budapest: Akadémiai Kiadó 1978), p. 86; in *Strane pravne zivot* [Belgrade] (1978), No. 98, pp. 26–28; Jörgen Dalberg-Larsen in *Retfaerd* [Copenhagen] (1978), No. 8, pp. 86–93; Braun-Otto Bryde in *Rabels Zeitschrift für ausländisches Privatrecht* 42 (1978) 3, pp. 587–588; Karl Eckhart Heinz in *Archiv für Rechts- und Sozialphilosophie* LXV (1979) 1, pp. 146–148; María del Refugio González in *Boletino Mexicano de Derecho Comparado* XII (1979), No. 34, pp. 300–302; on the monograph in Hungarian, in *Jogtudományi Közlöny* XXXII (1977) 4, pp. 233–240; Fausto E. Rodríguez in *Boletino Mexicano de Derecho Comparado* XII (1979), No. 35, pp. 672–673; Péter Malonyai in *Magyar Nemzet* XXXVI (1980) 199, p. 4; Antal Visegrády in *Állam- és Jogtudomány* XXIII (1980) 3, pp. 534–539, F[erenc] Majoros in *Revue internationale de Droit comparé* 32 (1980) 4, pp. 873–876; J[ózsef] Szabó in *Österreichische Zeitschrift für öffentliches Recht* 32 (1981) 1, pp. 123–128; L[eonard] Bianchi in *Právny Obzor* [Bratislava] 64 (1981) 1, pp. 60–63; Stefan Sipos in *Universitate Babeş-Bolyai: Iurisprudentia* [Cluj] 26 (1981) 1, pp. 76–78; in *Реферативный Журналь по общественные науки за Рубежём* 4: Государство и Право [*Referativniy zhurnal po obshestvennie nauki* Gossudarstvo i Pravo, Moscow] 1981/4, pp. 26–29; György Bónis in *Századok* CXV (1981) 6, pp. 1325–1327; Endre Nagy in *Állam és Igazgatás* XXXII (1982) 6, pp. 506–514; Vera Bolgár in *The American Journal of Comparative Law* 30 (1982), pp. 698–703; Georg Brunner in *Rabels Zeitschrift für ausländisches Privatrecht* 46 (1982) 3, pp. 579–580; Imre Szabó in *Magyar Jog* (1983) 7 and in his *Ember és jog* Jogelméleti tanulmányok [Man and law: studies in legal theory] (Budapest: Akadémiai Kiadó 1987), pp. 94–106; on the monograph in English, Denis Tallon in *Revue internationale de Droit comparé* 44 (1992) 3, pp. 740–741 and Pierre Legrand 'Strange Power of Words: Codification Situated' *Tulane European & Civil Law Forum* 9 (1994), pp. 1–33.

more than fifty codes have been promulgated since the end of the World War Two. The complete re-drafting of the classical civil codes in Portugal (1967), in the Netherlands (1992) and in Quebec (1994),[2] of the penal codes in Spain (1995),[3] in France and in Belgium, as well as the civil law re-codification in Louisiana, in Germany (for the law of contracts) and, in the Central and Eastern European region, in Russia (1996), and in preparation in Poland and Hungary (supplemented also by re-codification of criminal law in the latter), all represent developments of the recent past.[4]

*

(With Ethos Changed) First, in guise of general observation, a rather striking statement can be made. Notably, as the end of the second millennium was approaching, codification itself started increasingly to lose in purity and in the consistency of its classical ideals that once used to constitute a strict and coherent system. And this holds good of more than one aspects. On the one hand, the supremacy of statutory law with its function of exhaustively embodying the law gradually shows the signs of waning.[5] On the other hand (and in result of the above), the requirement developed half a century ago as a logical perfection of the European ideal of codification, namely that a codificational determination of the law be maintained through re-drafting law-codes periodically recurrently, by keeping pace with changing historical,

[2] Cf., e.g., Pierre Legrand 'De la profonde incivilité du Code Civil de Québec', pp. 1–13 and Sylvie Parent 'Le Code civil de Québec: incivilité ou opportunité', pp. 15–25, both in *Revue interdisciplinaire d'Études juridiques* (1996), No. 36. The fact that the doctrine, masterly deepened with exemplary accuracy, of the Civil Code was completed in practically the last moment of its effect—*Quebec Civil Law* An Introduction to Quebec Private Law, ed. John E. C. Brierley & Roderick A. Macdonald (Toronto: Edmond Montgomery Publications Ltd. 1993) lviii + 728 pp.—, just to be replaced by an utterly new concept of codal implementation, indicates the defencelessness of mere theorising at all times.

[3] Cf., e.g., Marta Gracia Blanco 'Codification et droit de la postmodernité: La création du nouveau Code pénal espagnol de 1995' *Droit et Société* (1998), No. 40, pp. 509–534.

[4] Cf., e.g., *Renaissance der Idee der Kodifikation* Das neue niederländische Bürgerliche Gesetzbuch 1992, hrsg. Franz Bydlinski & Theo Mayer-Maly & Johannes W. Pichler (Wien–Köln–Weimar: Böhlau 1992), 157 pp. [Schriften zur Rechtspolitik 5]; Rodolfo Sacco 'Codificare: mode suprato di legifare?' *Rivista di diritto civile* XXIX (1983) 1, pp. 117 et seq., specially at p. 120; as well as Konrad Zweigert & Hans-Jürgen Puttfarken 'Allgemeines und besonderes zur Kodifikation' in *Festschrift für Imre Zajtay* hrsg. Ronald H. Graveson (Tübingen: Mohr 1982), pp. 569 et seq.

[5] According to F. Kübler 'Kodifikation und Demokratie' *Juristenzeitung* (1969), pp. 645 et seq., especially at p. 651, the crisis of the law in general is "nothing but normal in a democratic industrial society [where] the fragmentary and periodical character of the statute is a part of the ordinary state of affairs". A similar view can be found in, e.g., Josef Esser 'Gesetzesrationalität im Kodifikationszeitalter und heute' in *100 Jahre oberste deutsche Justizbehörde* Vom Reichjustizamt zum Bundesministerium der Justiz, hrsg. Hans-Jochen Vogel & Josef Esser (Tübingen: Mohr 1977), pp. 13 et seq. [Recht und Staat in Geschichte und Gegenwart 470].

economic and social conditions given at any time, has itself weakened. (As is known, it is socialist codification having set itself the objective of the codal embodiment of the law that realised this requirement in the most principled way, purely and consequently, also as a pattern which later became—upon the pressure of the need for modernisation—a model enthusiastically followed by the Afro–Asiatic developing countries as well.)

For practical considerations, this leap into the opposite extreme can be perceived as a pendulum-effect. From now on, it is not re-codification any longer but the utter negation of codification itself (i.e., the abandonment of codification in order to reach a state of "de-codification"[6]) that comes to the forefront more and more forcefully as a new landmark. More precisely, the emphasis is increasingly shifting from the code itself to the actual filling of one-time codal functions. In other words, the systemic form of objectivation of the law suitable to provide a gapless response to any question at will within its field of regulation seems to be eventually substituted by the actuality of whatever reply only channelled by the code, maybe by providing nothing but systemic or taxonomic loci to which, conceptually or institutionally, the freely contextualisable judicial stand may refer.[7] According to the new mainstream opinion—regarded as exclusively justified by the ideologies of postmodernity—, the alleged "authoritarianism of codification" of the past will have to yield its place (both as an ideal and as the technique of regulatory practice) to a kind of "democratic openness", [8] in pursuance to some development typologies mostly rooted in American experience but increasingly generalised so as to include European practices as well.[9]

---

[6] Natalino Irti *L'età della decodificazione* 3rd ed. (Milano: Giuffrè 1989) 195 pp.

[7] According to the expression of Sacco [note 4], p. 125, it is no longer the code-form that is superior but the idea of its (suit)ability to offer a solution: *"Il codice non è [...] superato. È superata l'idea che un codice possa nascere privo di lacune, e che la sua sola lettera possa offrire une buone soluzione per tutti i possibili casi del futuro."*

[8] According to Kübler [note 5], p. 651, there is a "change of the authoritarian codification state towards a system aiming at democratic openness where legislation has become a political instrument of a permanently required adjustment" in progress. According to Valérie Lasserre-Kiesow—'La codification en Allemande au XVIIIe siècle: Réflexions sur la codification d'hier et d'aujourd'hui' *Archives de Philosophie du Droit* 42 (1998), pp. 215–231, quotation on pp. 223 and 231—, "the future is no longer to be found in the past. [...] [C]odification based on paradigms of statism as well as on perfection of form and contents certainly does not have any future any longer."

[9] See, as a first formulation, from the author, 'Átalakulóban a jog?' [Law in transformation?] *Állam- és Jogtudomány* XXIII (1980) 4, pp. 670–680 and 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives' in *Legal Development and Comparative Law* ed. Zoltán Péteri & Vanda Lamm (Budapest: Akadémiai Kiadó 1981), pp. 45–76, particularly para. 5, as inspired by Richard A. Wasserstrom *The Judicial Decision* Toward a Theory of Legal Justification (Stanford: Stanford University Press 1961), pp. 122 et seq.; Per Olof Bolding 'Reliance on Authorities or Open Debate? Two Models of Legal Argumentation' *Scandinavian Studies in Law* 13 (Stockholm: Almqvist & Wiksell 1969), pp. 65 et seq.; Roberto Mangabeira Unger *Law in Modern Society* Toward a Criticism

As a logical consequence to this, present-day legislators tend to leave behind all former endeavours for systemic purity and consistency (as if these were nothing but instances of a kind of doctrinarian atavism), only to make way for the pragmatism of borrowing from just anywhere, and thereby accepting both the partialness and fragmentation of results.[10] In addition to all these, a new kind of localism, transitionalism and pragmatism making headway under the aegis of globalism rapidly gaining ground, explain the attempt at absolutising currently ongoing endeavours with the wish to also re-write the past (a practice far from unfamiliar in France of the earlier days). Notably, a paradigmatic shift is at stake as a tendency becoming more and more general, in terms of which the codification once completed by NAPOLEON and also its magnificent and lasting type-framing features seem nowadays to be swept out of collective memory and taken notice of, if at all, rather as a historically incidental exception in the birthplace of classical codification, only to relativise the very term 'codification' (along with the idea and the historical achievement represented by its one-time realisation), by reducing its meaning to the practice of rationalising one aspect of the mass-scale and all-inclusive management implied by today's public administration, that is, to the continuous consolidation of its legal normative staff (from statutes to governmental decrees, including also administrative regulations).[11]

This short-sighted and extreme simplification (forecasting "the end of history" with all the a-historical conceptual misrepresentation inherent in FRANCIS FUKUYAMA's contemporary Utopianism)—in addition to its rather controversial nature, as such a 'codification', taken as the genuine piece of consolidation, has to first "transcript", then "transgress" the positivated legal staff processed by it, tearing this staff out from its original texture, by placing

---

of Social Theory (New York & London: The Free Press 1976), ch. II; and, especially, Philippe Nonet & Philip Selznick *Law and Society in Transition* Toward Responsive Law (New York: Harper & Row 1978).

[10] According to Jean-Louis Bergel 'Les méthodes de codification dans les pays de droit mixte' in *La formation du droit national dans les pays de droit mixte* (Aix-Marseille: Presses Universitaires d'Aix-Marseilles 1989), pp. 21–34, "from now on, there is nothing but mixed laws" (p. 34), because "the mixed character grows widespread by becoming the general rule" (p. 35).

[11] As a vice-president of the National Committee for Codification, Guy Braibant—'Codification' in *Encyclopaedia Universalis* 6 (Paris: Encyclopaedia Universalis 1995), pp. 39–42—has visualised today's practice, drowned in everyday hygiene and poorly lacking any concept, as the great universal achievement of mankind. Because, although "codification has been an ancient dream of mankind" (p. 39), yet its manifestations "hardly have more value than the texts adopted or issued by them". Namely, "codification itself is nothing else than the operation or policy of the fabrication of codes, through re-arranging former norms or creating new norms." (p. 39) Accordingly, the term 'codification' itself has a twofold meaning. True, there was once also "a great work of codification", the *Code civil,* yet, today also "systematic codes" are available to us. For—he goes on—"the renaissance [of codification] took place after the [Second World] War" (p. 40).

it into another context, and thereby finally "transdict" it[12]—is not only sheer "conceptual abuse"[13] but is obviously indicative of decline, too.[14] All this slowly starts to characterise our age to an extent that some observers believe to discover exactly opposite, counter-running tendencies among the trends in the United States of America and in the European Union, pointing out that while there the re-assertion or the launch of codification, here, on our continent, de-codification has been put on the agenda.[15]

*

(Undermined by Disappointment) A kind of scepticism has become general—first in the form of disillusionment, then as a general awakening, due to the vanishing of the myths of the European ideal of codification[16]—which, as extended also to the past, has gradually but surely been transferred from the loss of confidence placed in the regulatory force of and normative foresight by the law, to the general disappointment in codification itself. Some present-day sober explanations trace this back to the expectations over-intensified yet puristic (and, in this regard, also doctrinarian), thus excessive all through (and, therefore, impractical, consequently proving unsuitable to stand the test of time), fixed back in the age of the Enlightenment, of the birth of classical

[12] Terms by Gérard Timsit 'La codification: transcription ou transgression de la loi?' in his *Archipel de la norme* (Paris: Presses Universitaires de France 1997), ch. V, pp. 145–159, especially at pp. 151, 155 and also 159. Actually, TIMSIT speaks about consolidation, yet, indicative of uninhibited actualisation, he terms it codification all along [as done also by both Elisabeth Catta 'Codification et la loi fétiche' in *Interpréter le droit* Le sens, l'interprête, la machine, dir. Claude Thomasset & Danièle Bourcier (Bruxelles: Bruylant 1997), pp. 63–69 and Denys de Bèchillon 'L'imaginaire d'un code' *Droits* (1998), No. 27: La codification 3, pp. 173–184], and blames it basically for "transcendence of the limits of the law" (p. 151) and for "a mummification of the law" (p. 159), that is, for the fact that exactly this false codification, operating with original sources of the law, falsifies them unpronouncedly, because it re-positivates them in a new context and medium.

[13] This conceptual extension is expressly considered as an abuse by, e.g., Dominique Gaurieu 'La rédaction des normes juridiques, source de la métamorphose du droit? Quelques repères historiques pour une réflexion contemporaine' *Revue générale de droit* [Ottawa] 31 (2001) 1, pp. 1–85.

[14] Having apparently passed the great moments of codification once and for all (accompanied by the gradual erosion of the belief in rational plannability and in any *Gesamtplan*'s logical executability, in addition to the lack of appropriate political and legal circumstances) may perhaps account for the fact that "The importance of codes will decrease, and the drafting of truly new ones—capturing and organizing new realities—will be, at least for the moment, an almost impossible task." Mirjan Damaska 'On Circumstances Favoring Codification' *Revista Jurídica de la Universidad de Puerto Rico* LII (1983) 2, pp. 355–371, quotation on p. 370.

[15] Shael Herman 'The Fate and the Future of Codification in America' in *Essays on European Law and Israel* ed. Alfred Mordechai Rabello (Jerusalem: The Harry & Michael Sacher Institute for Legislative Research and Comparative Law [of the Hebrew University] 1996), pp. 89–129, especially p. 124.

[16] E.g., André-Jean Arnaud *Pour une pensée juridique européenne* (Paris: Presses Universitaires de France 1991), p. 294 [Les voies du droit] speaks about "reassuring, alleviating myths of the simplicity, permanence and abstract character of the law".

codification.[17] This is the recognition from which immediately a consequence is also drawn, according to which only the kind of codification could prove successful with lasting effects and applicable in the long run, where its drafters were the least inclined to over-enthusiasm.[18] We seem to have left behind once and for all—as the one-time children's room of our (post)modernity—the claim for codifying the law with the intent of "establishing a new unified legal system", and we are going only to draw on codification in as much as it is inevitable "to safeguard the interests of the community by restricting, as far as possible, the political aspects and influence of different lobbyists"[19]—not excluding out the possibility either that the instrument of classical codification will one day be replaced by artificial intelligence and its new media technicalities.[20]

*

(Systemicity as the Core Element) Well, what is codification like and where is it heading at the threshold of the new millennium? Most responses seem to confirm my earlier monographic stand,[21] which is found by certain dreamers of our future as something hopelessly embedded in (as formed by) the ideals of the past, therefore statist, and, as to declare what the law is, authoritarian—or, briefly stated: atavistic and, as such, to be transcended. In sharp contrast with this, there is only an elastic, wishful image formed about the character of the future European civil code, vaguely sketched with exploratory uncertainty, far from being discernible in any aspect.

---

[17] E.g., Karsten Schmidt *Die Zukunft der Kodifikationsidee* Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts (Heidelberg: Müller 1985) 79 pp. [Juristische Studiengesellschaft "Karlsruhe" 167].

[18] "The reason why in Countries with old Civil Codes the courts are still able to find their way lies in the fact that legislators did not attempt too much." Werner Lorenz 'On the »Calling« of Our Time for Civil Legislation' in *Questions of Civil Law Codification* ed. Attila Harmathy & Ágnes Németh (Budapest: Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences 1990), p. 128.

[19] Hein Kötz 'Schuldrechtsüberarbeitung und Kodifikationsprinzip' in *Festschrift für Wolfram Müller-Freienfels* hrsg. Albrecht Dieckmann et al. (Baden-Baden: Nomos 1986), p. 397 and, for contrasting past and future, cf. also Attila Harmathy 'Codification in a Period of Transition' *U[niversity of]C[alifornia] Davis Law Review* 31 (Spring 1998) 3, pp. 783–798, quotation on p. 789. It is worthwhile to notice the irony inherent in the fact that the image of the past formed by such prominent civilian authors about codification, taken once as a creative power, is nothing else than the image of future major expectations formed within the European Union. Or, this is a proof that even if history does not repeat itself, we do ourselves. Thanks to our urge to adapt, we again and again draw on the past, its experiences and instrumentalities.

[20] "The arduous road to new integration will probably be paved by artificial intelligence better able to detect patterns in the complexity of the modern social life." Damaska [note 14], ibid.

[21] Cf., Varga *Codification*... [note 1], passim.

According to the theoretical literature (leaving, at the moment, the deconstructive reconstructions of the near future out of account), the core of codification is still the idea of a system manifested in both its composition and structuring, doctrinal reflection and conceptual building up, including the judicial practice of referring to codal definitions of institutions, legal constructs and dispositions as well:[22]

"Putting an end to the rule of the fuzzy and uncertain, wrongly cut boundaries and of the only approximate classifications, by applying definite cuts and creating sharp boundaries, replacing the former by setting up clear classes."[23]

Or, codification invariably appears (1) as an exclusive body of law, (2) implementing unity in its regulatory field (3) with logical coherence and consequentiality;[24] or, showing the features of (1) completeness, (2) freedom from contradictions and (3) regulatory economy;[25] or, furthermore, of a (1) comprehensive and (2) systematic (3) enactment by the legislature,[26] (4) promulgated as a code.[27] The theoretical attitude is conservative here: once the

---

[22] See, first of all (though tacitly admitting to be unable to comprehend the entire continental approach to law beyond the separation of what is systemic and what is non-systemic), M. D. A. Freeman 'The Concept of Codification' *The Jewish Law Annual* 2 (1979), pp. 168–179, especially at p. 169. For the development in history of the concepts 'system' and 'legal system', see, from René Sève, 'Introduction', pp. 1–10, and, for their analysis by example of the *Code civil*, his 'Système et code', pp. 22–86, both in *Archives de Philosophie du Droit* 31: Le système juridique (1986).

[23] Pierre Bourdieu 'Habitus, code et codification' *Actes de la recherche en siences sociales* (1986), No. 64, pp. 4–44, quotation on p. 42, claiming that the "the system is built on [...] cognition as universal, through the inseparably logical and ethical necessity of it" (p. 4).

[24] Michel Humbert 'Les XII Tables, une codification?' *Droits* (1998), No. 27: La codification 3, pp. 87–112, applies the collective incidence of all these characteristics to qualify the *lex duodecim tabularum* as a code (pp. 110–111). According to Arnaud [note 16], p. 135, codification is a "coherent and systematic regulation" achieved through "exhaustive totalisation" which, according to R. C. van Caenegem *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press 1992) viii + 215 pp., especially at p. 12, denotes "a general, exhaustive regulation of a particular area of law", by "involving a coherent programme and a consistent logical structure".

[25] François Ost 'Le code et le dictionnaire: Acceptabilité linguistique et validité juridique' *Sociologie et sociétés* XVIII (avril 1986) 1, pp. 59–75.

[26] Reinhard Zimmermann 'Codification: History and Present Signification of an Idea' *European Review of Private Law* 8 (1995) 1, pp. 95–120, especially pp. 96–97. R. C. van Caenegem *Judges, Legislators & Professors* Chapters in European Legal History [Goodhart Lectures 1984–1985] (Cambridge: Cambridge University Press 1987) x + 205 pp., on p. 42 defines the code as a comprehensive and systematic exposition replacing all previous laws in a new text promulgated as a law. Barbara Dölemayer 'Zivilrechtliche Kodifikationen in Europa im 19. Jahrhundert' in *Evolution of the Judicial Law in XIX^th^ Century* ed. Grzegorz Górski {= *Law in History* [Lublin] 1 (2000)}, pp. 117–130, on p. 118 identifies it simply as the "materially comprehensive, systematic, abstract and rational regulation of an entire area of law summarised in a code (*codex*)" ["*materiell umfassenden, systematischen, abstrakten und rationalen Regelung eines ganzen Rechtsgebiets in einem Gesetzbuch (codex)*"].

[27] Of course, there are softer definitions as well. According to Tullio Ascarelli 'L'idea di codice nel diritto privato e la funzione dell'interpretazione' [1955] in his *Saggi giuridici* (Milano: Giuffrè 1949), pp. 48–49, for instance, "The code is characterised by a claim to construct a »new«, »complete«, and »definitive« legal order that includes amongst its formulations solutions for all possible cases", and, as stated by Pio Caroni *Lecciones catalanas sobre la historia de la codificación* [Lezioni catalane sulla storia della codificazione] (Madrid: Marcial Pons 1996), 177 pp., especially at pp. 22–23

paths of the mere collection and textual embodiment of laws, once termed by me as the quantitative, and later on, the systemic reshaping of the law according to the logical ideal of a system, once termed by me as the qualitative, types of codification have started to diverge, also the notion implied by the terms 'code' and 'codification' has become reduced to mean just the latter, that is, the qualitative type, carrying—as a *sine qua non*—the criterion of systemicity regarding the law processed all through.

(Challenge by the European Union) Well, it is exactly this differentiation that seems to be disappearing as an outdated past achievement from the postmodernist visions of the political voluntarism of the European Union, not yet equipped with any encouraging practical experience in an all-comprehensive codificatory regulation.

The first guinea pig for experimentation in this immense ongoing endeavour is the effort at elaborating, one way or another, the codification of private law of the European Union. For the time being, we know less about the underlying motives and perspectives of common European legislation (including the clarification of the theoretical foundations and necessity of a systematic codification), reminiscent of the classical period of drafting constitutions and law-codes as well, than about the nature of "democratism" characterised by constant hesitation and the easy readiness to launch the bureaucratic machinery of common legislation in motion. No doubt, the dilemmas regarding the legal expression of the foundation of national states in the 18th to 19th centuries will gain new aspects in the current rush for the foundation of a truly inter-national state. Therefore, I still find the lessons drawn two centuries ago invariably remarkable, according to which "codes and constitutions have performed analogous institutional roles" in the legal performance of the political and civil foundation of a society, as supporting and complementing one another in the historically parallel rush for providing basic chartae and law-books.[28]

Well, returning to the issues pertaining to the common European codification, all we could experience about its outlines so far is that

- it does not aim at abstract conceptual clarity, consistence or exclusive

[Publicaciones del Seminario de Historia del Derecho de Barcelona 1], the code is a "written presentation aiming at plenitude, with a unificatory function".

[28] Cf. Antonio Gambaro 'Codes and Constitutions in Civil Law' in *Italian Studies in Law* 2, ed. Alessandro Pizzorusso (Dordrecht–Boston–London: Nijhoff 1994), pp. 79–104, quotation on p. 79.

pursuance of any ideal or actual model:[29] it will presumably represent the entire European and even all-Atlantic heritage in the tradition of values and techniques as a practical whole in a (perhaps even mosaic-like) new quality. At the same time,

- it does not aim at perfection, nor at any exclusive completeness.[30] As the result of a new definition of the law, it will have to openly accept—in the context of constantly changing interests and depending on the institutional moves at any given time—a sheerly temporary and mediatory role. Therefore, having drawn the lesson from the failures of codification up to now,
- it can be nothing more than just "creeping".[31] As soon as this figurative expression has reached consensus among the students of law taking part in the debate (revealing also the poet, dreamer, innovator and/or social revolutionary hidden in each of us even if mostly suppressed by our scholarly discipline), the doctrinal (and maybe dry, yet systematic) reasoning of treatises in jurisprudence has become substituted (in a way unheard of in juridical literature at earlier times) by a rhapsodic subjectivism with lists of desires and the boundlessness (almost reminiscent of the ecstasy of the so-called 'honeymoon-period', characteristic of early modern and modern revolutions), even unrestraint and randomness, of a credo of "Anything is possible, because by virtue of the power of such a giant club, we are in a position to target anything at will!".

Accordingly, some keep day-dreaming hoping that a kind of the desired end-result will after all emerge one way or another, in one form or another, upon the pattern and with the automatism of the '*Volksgeist*' once active in CARL VON SAVIGNY's thought, due to the emerging clarification of principles through their continuous testing in practice, their unfatiguing re-consideration and adjustments, combining the effect of scholarship and doctrine with the socialising force of living practice and the educational efforts available

[29] Jürgen Basedow 'Codification of Private Law in the European Union: The Making of a Hybrid' *European Review of Private Law* 9 (2001) 1, pp. 35–49.

[30] According to Lasserre-Kiesow [note 8], what once, in the period of classical codification, embodied "the totalisation of knowledge" (p. 221), is nothing else on the final analysis than "a patriotic and habitual juridical exaggeration [...] which only hinders the ideal of a legal Europe" (p. 223). In a similar sense, see also Wolfgang Wiegand 'Back to the Future?' *Rechtshistorisches Journal* (1993), Nr. 12, p. 283.

[31] The term 'to creep' denoting 'to develop slowly and steadily [...] in the hope of advancement' was first used by Klaus Peter Berger *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International 1999).

through general and vocational training.[32] – According to other opinions, the desired unity of the European Union can, at most, emerge as the result of endeavours, in which the accumulation of principles (to be further shaped, re-asserted and represented all through by a truly inter-national European legal profession, capable of rising above national fragmentation) will be conceived in the womb of common European professional education and business practice, with a unifying legal scholarship and doctrine in the background. Therefore, it is practicality what the new European creed calls for and not pure scientism or self-complacent authorial egoism; for the latter can merely lead to selfishness, yielding only unnecessary complexity and contradiction, i.e., abstract and doctrinaire conceptuality which, as dried-out and lifeless fruits, cannot genuinely respond to the present, truly practical challenge. – Or, new PORTALISes are needed, since only the humility of traditions can provide bases for a codification achieved at the level of foundational principles.[33] – Among the authorial convictions, it seems to be a bit too daring to dream farther about—reminiscently, first of all, of the patterns offered by the American Restatement of the Law and the uniform legislation—experimental preparation of such projects as the Principles of European Contract Law or of European Civil Procedure, so as to be able to decide, given the newly acquired practical experience, how to go on (if one will be decided to go further at all);[34] or, partly preconceiving the response, leave the consummation of the codifying process to legal practice from the outset, whose result appearing some time in future can, of course, be applied to further refine either the normative material itself or any of its official commentaries.[35] – No matter how the European

[32] Klaus Peter Berger 'The Principles of European Contract Law and the Concept of »Creeping Codification« of Law' *European Review of Private Law* 9 (2001) 1, pp. 21–34.

[33] Ole Lando 'Some Features of the Law of Contract in the Third Millennium' *Scandinavian Studies in Law* 40 (Stockholm: Almqvist & Wiksell 2000), pp. 343–402, especially pp. 361–363.

[34] Ewond Hondius 'Towards a European Civil Code' in *Towards a European Civil Code* ed. Arthur Hartkamp, 2nd ed. (Nijmegen: Ars Aequi Libri & The Hague, Boston: Kluwer 1998) xiii + 652 pp., pp. 3–19.

[35] As formulated by Christof U. Schmid 'Legitimacy Conditions for a European Civil Code' *Maastricht Journal of European and Comparative Law* 8 (2001) 3, pp. 277–298, on p. 296, there will be an "integrative Restatement with a common European commentary section", onto which—more and more acceptedly anyway in West-European practice [cf., e.g., Reinhard Schulze 'Vergleichende Gesetzauslegung und Rechtsangleichung' *Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht* (1997), pp. 183. et seq. and G. Monateri & A, Somma '»Alien in Rome«: L'uso del diritto comparato come interpretazione analogica ex art. 12 preleggi' *Il Foro Italiano* (1999), p. V47]—a so-called comparative interpretation is going to be built. Although this seems to contradict the established practice according to which, from the very beginning, a "CARTESian style" has been dominant in the exclusive European judicial forum properly designed so far, i.e., the European Court of Justice, which is allegedly "inspired by the French tradition, in which judgments are more set up as binding conclusions of a quasi-scientific nature than justified argumentatively" [cf., e.g., J. H. H. Weiler 'The Function and Future of European Law' in *Function and Future of European Law* ed. V.

legal profession may decide, we have to be aware of the fact that even in case any codification is eventually completed, "It could then take decades before today's level of predictability and rationality of decisions would be reached again."[36] At the same time and in an evident interrelation with this,

- the question of the future duality and/or eventual convergence of the British Common Law and the continental Civil Law is still raised as a vital issue.[37] This old-new question (earlier only a favourite delicacy for legal comparatists in generating intellectual pleasures) has now become, from the vague presentiment of the presumable consequences of a political resolution, the *sine qua non* of such a resolution and its feasible future realisation. For the common European administration of justice as practised in Luxembourg, Strasbourg, etc. for a few decades now has only required the commonality of results, with no relevance to the issue how these have been actually reached, with which ways and what procedures resorted to and which sources referred to in the process. However, a common European codification, contemplated now, already penetrates straight into the heart of the law. It presupposes the unification of all the intellectuality and underlying approach, conceptual thinking, subordination to logical and systemic forms—that is, sensitivity, skills and styles—which, on their turn and throughout the sequence of centuries, not only offered our continent a scope of law-positivations diverging in nature from those on the British Isles but, so to say, embodied a route and direction diametrically opposite to the hopes placed in this converging European future, both in the historical experiences and their scholarly reconstruction, in the conceptual and methodological frameworks of political and constitutional thinking, in the stake and nature of

Heiskanen & K. Kulovesi (Helsinki: Helsinki University Press 1999), pp. 17. et seq. and S. Leible 'Die Rolle der Rechtsprechung des EuGH bei der europäischen Privatrechtsentwicklung' in *Auf dem Wege zu einem Europäischen Zivilgesetzbuch* hrsg. Dieter Martiny & N. Witzleb (Berlin: Springer 1999), pp. 55. et seq. and pp. 73. et seq. [Schriftenreihe der Juristische Fakultät der Europa-Universität Viadrina Frankfurt]. This is a practice that will, if not accompanied by a total shift in character, be downright inoperable in a kind of regulation carried out mostly on the level of mere principles.

[36] Schmid [note 35], p. 287.

[37] The Clifford Chance Millennium Lectures *The Coming together of the Common Law and the Civil Law* ed. Basil S. Markesinis (Oxford & Portland, Oregon: Hart 2000) vii + 255 pp. and, in it, especially Basil S. Markesinis 'Our Debt to Europe: Past, Present, and Future', pp. 37–66; Vivian Crosswald Curran 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union' *The Columbia Journal of European Law* 7 (2001) 1, pp. 63–126. One of the authors—R. H. Helmholtz 'Continental Law and Common Law: Historical Strangers or Companions?' *Duke Law Journal* 1990/6, pp. 1207–1228—remarks in conclusion (p. 1228) that "Common lawyers always wished to avoid some aspects of Continental law, but they also habitually regarded it as a companion and resource to be called upon in need, not as a stranger."

philosophising—or, in sum, in taking the choice between the pragmatic reliance on human and social experience or the mere pursuance of the barren logic of preconceived conceptual schemes, and, thereby, also between the empirical (inductive) and the principled and methodical (deductive) ways of construction—from the one-time accomplishment of the entire revolution in natural scientific thought.[38]

Or, to put it briefly, quite simply and also professionally simplified: those of us who, ready for action, await orders to carry them out, or those who, attending to each other benevolently, hope the diligent acts of the detail work (invisible in the humane everyday responsible practice) to produce the long desired result one day, can, at the highest, be specialists of comparative law in their entrenchment into legal texts, but by no means historically and anthropologically sensitive thinkers who have, at the same time, to bear in mind the essentials of comparative legal cultures as well.[39] For the latter are those who already know—or, at least presume at the level of hypothesis substantiating their approach and explorations—that law is not simply a mechanism built up of interchangeable parts, according to a product-type and operated as a machine, but an aspect of living human culture, separated relatively and only for professional purposes from the other factors and bearers of the order in making at a community level, only to be able with foreseeable security (as having stepped out from the everyday circulation of interests) to direct, influence and control the practice of conflict-resolution according to ready-made patterns, as the case may be, thereby also rendering it impersonal in the spirit of the ethos of the order itself, that is, an external Order which is, like the veil of *Justitia*, necessarily depersonalised.

(As a matter of fact, we can by far not be sure whether or not at all, and in which sense, the Anglo–American legal mentality may mean indeed 'rule' by 'law'. For instance, the early failure of the reformist effort by the British Law Commission (aimed at considering codification as late as in 1964) was

[38] For the differing mentality, cf., from the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] and 'Összehasonlító jogi kultúrák?' [Comparative legal cultures?] *Jogtudományi Közlöny* LVI (2001. október) 10, pp. 409–416.

[39] For their conceptual—and disciplinary—separation and the requirements of the new approach, see, from the author, 'Comparative Legal Cultures: Attempts at Conceptualization' *Acta Juridica Hungarica* 38 (1997) 1–2, pp. 53–63 and 'Comparative Legal Cultures?' [note 38], passim, pondering upon the topic covered by *Comparative Legal Cultures* ed. & introd. Csaba Varga (Aldershot, Hong Kong; Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] and *European Legal Cultures* ed. Volkmar Gessner & Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I].

indicative of an utter confusion as to the generalisability of the law as broken into and embodied by a series of concepts, as well as its arrangement and ordination according to abstract logical forms, with the implied possibility of also subordinating (subsuming) facts to rules.[40] For in their codificatory thought, the Britons used to maintain that if law were traced back to a (re)posited series of rules at all, that what would be most meaningful of all this settlement for the judges could only be the rather informal reasoning based upon the *travaux préparatoires*, indeed worthy of the human intellect. And this *is exactly what the 19th-century British-Indian codifier wanted to express when* he remembered as follows: "we added as many illustrations as we thought necessary for the purpose of explaining it", and, therefore, it would be most beneficial to include these rules' grounds along with the rules themselves into such codes.[41] Well, they were actually, then and now, trying to beat a path lagging centuries behind GOTTFRIED WILHELM LEIBNIZ' age and recognitions. Actually, the very idea of codification arises from the theoretical understanding that codal law cannot indeed be anything else than a sheer sequence of abstract and general rules, while the underlying understanding of the common law is still related with the idea of something that can exclusively be grasped empirically, placed somewhere between the casual decision and the grounds for decision, equally drawn from tradition.)

(The Issue of Convergence) Even just a glance through the literature pouring in this topic is enough to see that there are already painstaking case studies about the intensifying "Europeanisation" of the British jurisprudence[42] and all

---

[40] The effort of Jeremy Bentham—"The unity of a law will depend upon the unity of the species of the act which is the object of it" [in his *Of Laws in General* ed. H. L. A. Hart (London: Athlone Press 1970), p. 166]—was reasserted to ordain the proper obligation or empowerment to each and every behavioural situation as a 'law/right' befitting it; JOLOWICZ' whole venture—*The Division and Classification of the Law* ed. J. A. Jolowicz (London: Butterworths 1970) vi + 905 pp.—set itself the aim of replacing this BENTHAMite dependence on acts by a dependence on social facts; while Julius Stone pointed out—in his *Legal System and Lawyers' Reasonings* (London: Stevens 1964), p. 269—that even the most elementary natural facts (like, e.g., the rotting scrap of a snail found in the beverage, as referred to in *Donoghue v. Stevenson* [1932] A.C. 562), may mean "dead snails, o r any snails, o r any noxious physical foreign body, o r any noxious foreign element, physical or not, o r any noxious element"; as other authors—Twining, O'Donovan & Paliwala 'Ernie and the Centipede' in *The Division...*—have also ventured to prove that "a black female poodle puppy can be classified by colour, sex, species or age". Freeman, pp. 172–173.

[41] *Black v. Clawson* [1975] A.C. 591; Lord THOMAS BABINGTON MACAULAY's letter to Lord AUCKLAND, quoted by J. Farrar *Law Reform and the Law Commission* (London: Sweet and Maxwell 1974), pp. 58–59; F. Vaughan Hawkins in *Juridical Society Papers* 3 (1865), pp. 110 et seq., especially at p. 112; as well as Farrar, p. 159. Quotation by Freeman [note 22], pp. 176–177.

[42] E.g., Reinhard Zimmermann 'Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen *civil law and common law*' *Zeitschrift für Europäisches Recht* I (1993), pp. 4 et seq.; J. Levitsky 'The Europeanization of the British Legal Style' *The American Journal of*

those "myths of codification"—according to which, to make mention of just one formulation,

"I. A codification can provide an accessible and complete formulation of the law and can enable the development of the law in a planned manner. II. Codal regimes are rigid and not adaptable. III. The common law's emphasis on case law techniques makes it admirably adaptable to new circumstances."[43]

—which, of course, as dreams and Utopian expectations, can be justified neither in the domain of Civil Law, nor that of Common Law. It may seem paradoxical, yet it is a truth worth considering that even, for instance, French law is more flexible, more suitable for practical adaptation and fertilising application from many aspects, than case-law directly made by judges. After all, the continental law-applying process steps out from general principles calling, by their nature, for interpretation, and it may initiate debate on the meaning and applicability of rules independently from the question of the very existence and systemically co-ordinated arrangement of the same rules—as opposed to English judge-made law reduced to an amalgam(ate) of casual decisions, which, like "an amorphous mass [...] [in which] there is no organizing principle",[44] directly carries on—because of the undifferentiated unity of the rules and their casual application—the legal character and self-identity of the whole, up to its last component as well.[45] Well, expectations

---

Comparative Law 42 (1994), pp. 347 et seq.

[43] Basil A. Markesinis 'The Destructive and Constructive Role of the Comparative Lawyer' [originally in *Rabels Zeitschrift* (1993), pp. 438–448] in his *Foreign Law and Comparative Methodology* A Subject and a Thesis (Oxford: Hart 1997), pp. 36–46, quotation on pp. 37–38.

[44] Alan Watson 'The Importance of »Nutshells«' *The American Journal of Comparative Law* 42 (1994), pp. 1–23, quotation on pp. 11 and 12.

[45] See André Tunc 'Codification: The French Experience' in *Problems of Codification* ed. S[amuel] J[acob] Stoljar (Canberra: The Australian National University 1977), pp. 73–74, as well as René David *French Law* Its Structure, Sources, and Methodology, trans. Michael Kindred (Baton Rouge: Luisiana State University Press 1972) xviii + 222 pp., especially at pp. 80 and 83.

It is to be noted that this is the line by which the question of the g e n e r a l p a r t of civil codes becomes directly a regulatory problem of codification—as it defines, in principle, the upper layer of normative axiomatism (without which the "lawyer at sea in the law like a pilot without a compass" would helplessly roam [cf. Joseph Unger *System des österreichischen allgemeinen Privatrechts* I, 5th ed. (Leipzig: Breitkopf und Härtel 1892), p. 641, as well as Konrad Zweigert & Hein Kötz *Introduction to Comparative Law* I: The Framework, 2nd rev. ed. trans. Tony Weir (Oxford: Clarendon Press 1987), p. 167]—, as well as the g a p - f i l l i n g t e c h n i q u e of the Swiss *Zivilgesetzbuch*, commissioning the judge to become eventually an accidental substitute to the legislator (§ 1), the specific feature of which lays not only in the fact that it can be traced back via IMMANUEL KANT even to ARISTOTLE (*Nicomachean Ethics*, 1137b) but it also reasserts the continental regulatory principle (the judicial empowerment notwithstanding), by eventually declaring that "in order to be legal a decision must be based on a rule which can be formulated as a general one" [Franz Wieacker *A History of Private Law in Europe* With Particular Reference to Germany {Privatrechtsgeschichte der Neuzeit, 1952, 2nd ed. rev. 1967} trans. Tony Weir (Oxford: Clarendon Press 1995), p. 391].

linking positive or negative Utopianism to codification mostly appear mixed with manifestations of either the euphoric belief in a Common Europe[46] or, just to the contrary, an extremist rejection of it.[47] Any analysis of the signs, steps and events of actual rapprochement (or, at least, of effective interaction and mutual influence) is relatively rare a phenomenon. For instance, in Germany, the jurisprudence of the *Bürgerliches Gesetzbuch* has arrived from the one-time exegesis reached as a "juristic game of chess" to a "case-law revolution", [48] while in the English legal thought, there is emerging an "increased self-assertion of a kind of doctrinarism" (as a feature indicating that "these peculiarities and jagged edges, on both sides of the Channel, are in a process of being with away"[49]). Or, what is wanted is a disillusioning cold voice that would neither applaud, nor oppose, just remind us that, given the second millennium elapsed in European history, what has happened until now is not too much and not necessarily new either. Therefore, one can state that

"To conclude on that basis that the common law is being »Europeanised« is

[46] Basil Markesinis *The Gradual Convergence* Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century (Oxford: Clarendon Press 1994); James Gordley '*Common Law and Civil Law:* Eine überholte Unterscheidung' *Zeitschrift für Europäische Privatrecht* I (1993), pp. 498 et seq.

[47] Cf., e.g., from Pierre Legrand, 'Legal Tradition in Western Europe: The Limits of Commonality' in *Transfrontier Mobility of Law* ed. Robert Jagtenberg & Esin Örücü & Annie de Roo (The Hague–London–Boston: Kluwer 1995), pp. 63–84 and 'How to Compare Now' *Legal Studies* 16 (1996), pp. 232 et seq.; similarly S. Paasilehto 'Legal Cultural Obstacles to the Harmonisation of European Private Law' in *Function and Future of European Law* [note 35], p. 99 and M. Bussani '»Integrative« Comparative Law Enterprises and the Inner Stratification of Legal Systems' in C. Feiden & Schmid (ed.), *European Review of Public Law* 8 (2000), pp. 57 et seq., especially at p. 85.

According to several opinions—e.g., W. Flume 'Vom Beruf unserer Zeit für Gesetzgebung' *Zeitschrift für Insolvenz- und Wirtschaftsrecht* (2000), pp. 1427 et seq., especially at p. 1429, as well as H. Collins 'European Private Law and the Cultural Identity of States' *European Review of Public Law* 3 (1955), p. 353—, national legal arrangements with their codal expression are parts of the cultural heritage anyway, whereby they, being cultural monuments, can hardly be relinquished by any state without simultaneously giving up something of own statal identity.

For instance, Luigi Mengoni *L'Europa dei codici o un codice per l'Europa?* (Roma: Centro di studi e ricerche di diritto comparato e straniero 1993), p. 3 [Saggi, conferenze e seminari 7] excludes unification through codification from the circle of possible alternatives: *"reconoscere che l'un codice per l'Europa non è un'alternativa realistica".* Pierre Legrand 'Brèves réflexions sur l'utopie unitaire en droit' *Revue de la common law* 3 (2000) 1–2, pp. 111–125 quotes from the work of P. d'Oribane *Cultures et mondialisation* (Paris: Seuil 1998), pp. 324–325, according to which "The reason according to the taste of the French is more noble, more devoted to the beauty of theory, more attached to the pure and gratuitous things, more based on general systems and ideas, more brilliant, more abundant in elegant demonstrations, and more sharing the characteristics of *grandeur* than the English do".

[48] Josef Partsch *Vom Beruf des römischen Rechts in der heutigen Universität* (Bonn: Cohen 1920), 50 pp. at 39, as well as John P[hilip] Dawson *The Oracles of the Law* (Ann Arbor: University of Michigan Law School 1968), p. 432, quoted, among others, by Reinhard Zimmermann *Roman Law, Contemporary Law, European Law* The Civilian Tradition Today (Oxford: Oxford University Press 2001) xx + 197 pp. [Clarendon Law: Lectures].

[49] Reinhard Zimmermann 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' *The Law Quarterly Review* 112 (October 1996), pp. 576–605, especially at p. 590 and quotation on p. 589.

probably as rash as to imagine that it was ever isolated in the first place."[50]

And indeed, we cannot be so oblivious as to forget that, just a few decades ago, the very idea of applying any universal abstract formulation, such as in case of the direct and uniform judicial enforcement of transnational human rights charters, had filled the House of Lords with dread. Similarly, English lawyers have proved to be unable or unwilling to propose (perhaps out of pretension) a means more suitable for the internal division of their own law than factual classification (i.e., the one arranging facts according to the initials of their English names)[51]—acknowledging with complacency that human mind has never produced and could probably never produce anything more fitting than the purely alphabetical "chaos with an index"[52] of the words identifying legal loci and contexts.

*

(Reconsidering Early Past) Now, looking back from the coming future to the past, what is codification of the various historical epochs like in the mirror of analyses by recent literature?

As far as the early occurrences preceding the Greek and Roman codal forms are concerned, it is ascertained that they were, for the most part, not normative sources of law[53] but "pious hopes and moral resolve rather than effective law"[54] or, at times, simply traditional literary compendia used for the official

[50] Xavier Lewis 'The Europeanisation of the Common Law' in *Transfrontier Mobility of Law* [note 47], pp. 47–61, quotation on p. 61.

[51] The aim of *The Division and Classification of the Law* ed. J. A. Jolowicz [note 40], is admittedly nothing less than "A plea for a factual classification of the law [...] a factual division of the content of the law" (p. 7). The situation has not changed since. As Bernard Rudden states in his 'Torticles' *Tulane Civil Law Forum* (1991–1992) 6–7, p. 105, "the alphabet is virtually the only instrument of intellectual order of which the common law makes use".

[52] The expression of Sir THOMAS HOLLAND is quoted by N. Marsh in *International & Comparative Law Quarterly* 30 (1981), p. 488.

[53] "Neither in the prologues nor in the epilogues nor elsewhere do the law-codes order any one to observe their provisions. Judgments in lawsuites pay no regard to the law-codes." A. Walther *Das altbabylonische Gerichtswesen* (Leipzig: Hinrichs 1917), p. 227. Also cf., in the same sense, B. Landsberger 'Die babylonischen Termini für Gesetz und Recht' *SDIOP* II, pp. 221–222.

[54] J. J. Finkelstein 'Ammi-Saduya's Edict and the Babylonian »Law Codes«' *Journal of Cuneiform Studies* 15 (1961), pp. 91–104, quotation on p. 102. "Their primary purpose was to lay before the public, posterity, future kings, and, above all, the gods, evidence of the king's execution of his divinely ordained mandate." (p. 103) – Accordingly—as A. Leo Oppenheim *Ancient Mesopotamia* Portrait of a Dead Civilization, rev. ed. (1977) states—, HAMMURAPI's code (similarly to all former Accadian and Sumerian codifications) has no connection whatsoever with the legal practice of the age. Its contents can, from several main perspectives, be regarded rather as a traditional literary formulation of the King's social obligations and as the expression of the King's awareness of the differences between the existing and the desirable state of affairs. (And it is to be remembered that this edition also remarks in

training of clerks,[55] which could of course serve also as reference manuals for the judges faced with troublesome cases.[56]

It is surprising how early the idea of order arose, so to say contemporarily with JUSTINIAN, but thousands of miles further, also in the West.[57] And in conceptual arrangement, substantive regulation is the first to get separated from procedural and evidentiary rules in early compilations, so that it can finally be declared that

"all questions for which there is no regulation have to be answered upon the basis of the regulation given in the law. [...] The law becomes, out of something inherent in the things, a kind of order posited above the things, an autonomous power."[58]

New realisations are now made available about the substitutes for codification from antiquity up to the present day. On the one hand, we not only learn how widespread it was for official compilations to enter into effect in form of manuscripts—either due to lack of printing press or to some local custom—, but there were even times when they were expressly designed to be made public by way of being deposited (for example, at the Town Hall in case of the

---

notes—rather thought-provokingly for the understanding of the all-European development—that the fatal approach trying to squeeze reality into a series of formal requirements is unknown in Mesopotamia and probably also in the entire ancient Near East. It was only a later and definitely peripheric development, notably, Judaism—having originated from the desire to generate, due to certain ideological motives, specific social relationships—that managed to bring about such a behavioural pattern.)

[55] A. Leo Oppenheim *Ancient Mesopotamia* (Chicago: University of Chicago Press 1964), pp. 14–21.

[56] Raymond Westbrook 'Biblical and Cuneiform Law Codes' [*Revue Biblique* 92 (1985), pp. 247–264] in *Folk Law* Essays in the Theory and Practice of *Lex Non Scripta*, ed. Alison Dundes Renteln & Alan Dundes (New York & London: Garland 1994), pp. 495–511, especially at p. 503. For the entirety of these early forms, see also Raphael Sealey *The Justice of the Greeks* (Ann Arbor: The University of Michigan Press 1994) xiii + 164 pp.

[57] Notably, it appears already as a programme in title 1 of the book II of the version of the unified (Visigothic and Roman) code of RECCESWINTH (654) as amended by ERWIG (681) that the law-book has to provide "a clear and honest meaning, expressing clear precepts for the doubtful [...] in orderly arrangement [...] in ordered titles". Quoted by Katherine Fischer Drew 'The Barbarian Kings as Lawgivers and Judges' in her *Law and Society in Early Medieval Europe* Studies in Legal History (London: Variorum Reprints 1988), pp. 7–29 and 15.

[58] [*"alle nichtgeregelten Fragen sich aus der im Gesetz gegebenen Regelung beantworten lassen müssen. [...] Das Recht (Gesetz) wird aus einer den Dingen innewohnenden eine über die Dinge gesetzte Ordnung, eine autonome Macht"*] Wilhelm Ebel *Geschichte der Gesetzgebung in Deutschland* (Göttingen: Verlag Otto Schwartz 1958) 107 pp. [Göttinger rechtswissenschaftliche Studien 24], on p. 75. According to his examples, such is the promulgation of a *Gerichtsordnung und Landrecht,* auch Polizei-, Holz-, Hütten-, Bergordnung und Reformation (1592) on the estate of Wildenburg a. d. Sieg or of a *Rechtsordnung* consisting of 16 titles (1663) as based upon the reformation of the *Bericht über Erbfälle und über etliche Mißbräuch* on the estate of Kurköln (1538) (p. 73); and, as a conceptual systematisation, the issuance of a *Gerichts- und Landordnung* (verf. Joh. Fichard, 1571) in the county Solms and, as parts of it, a *Von den Landrechten* (with 32 titles) and a *Von Gerichen und gerichlichem Prozeß* (with 40 titles) (p. 74).

Coutumes de la ville d'Ypres, 1535) as accessible to anyone to ask for a copy on payment of a certain amount [59] —just as the Icelandic law-speaker [*lögsögumaður*] centuries earlier (back in the age of the *Konungsbók* [*Codex regius*], 930–1262) could be approached to reassert occasionally for those who looked after justice, what the law was.[60] On the other hand, not only revealed holy books (like, e.g., the *Bible* for the first founders of the state of Massachusetts) can provide a rudimentary guidance as the law's summation but, at times and for want of anything better, maybe even practical guidebooks, written originally for didactic purposes to students.[61]

Well, especially in case of the great oeuvres marking the emergence of the classical type of codification (like, e.g., the *Allgemeines Landrecht*[62] and the *Code civil*), despite the former's authoritarian and the latter's revolutionary origin, [63] their one-time embeddedness in traditions [64] is increasingly re-discovered and emphasised now—especially in the light of today's intellectual and institutional challenges that, as driven by a common "European interest"

[59] E.g., the *Statutes of the Grand Duchy of Lithuania* (1529), as well as the *Sud'ebniks of the Grand Duchy of Moscow* (1497 & 1550). Cf. Wacław Uruszczak 'Les codes de droit en Europe à l'époque de la renaissance' in *La codification européenne du Moyen-Age au siècle des Lumières* éd. Stanisław Salmonowicz (Warszawa: Polskie Towarzystwo Historyczne 1997), pp. 69–102, especially at p. 101.

[60] Sigurður Líndal 'Law and Legislation in the Icelandic Commonwealth' *Scandinavian Studies in Law* 37 (Stockholm: Jurisförlaget 1993), pp. 55–92.

[61] The *Hexabiblos* (1345), compiled by the Thessalonian learned specialist CONSTANTINE HARMENOPOULOS and usually referred to as the "miserable epitome of epitomes of the epitomes", was applied throughout the late Middle Ages as a substitute source of the law in Greece and the entire Balkans. What is more, it was even confirmed by an order of February 23, 1835 of the Kingdom of Greece so that, in lack of any custom or judicial practice to the contrary, it had to be applied as a general source of the law until a civil code was finally drafted (which was actually done as late as on February 23, 1946). Or, in South-Africa, the Thirty-three Articles that constitutionally established Transvaal had stipulated in section 31 that '*hollandsche wet*' had to be taken as the basis of the law. The new Constitution (*Grondwet*, September 19, 1859) defined, in Annex [*bijlage*] 1, first Johannes van der Linden's *Rechtsgeleerd practicaal en koopmans Handboek*, secondly Simon van Leeuwen's *Het Roomsch-hollandsche recht* and thirdly Hugo Grotius *Inleidinge tot de hollandsche Rechtsgeleerdheid* (1631) to serve as its framework. That is, it ordained practical handbooks published in a wide circulation during the 17th century as the basic reference to law in the second half of the 19th century despite the fact that the new civil code of the Netherlands (*Burgerlijk wetboek*, 1838) had by then left the old law for decades behind, as a sheer preliminary. Watson [note 44], pp. 20 and 19.

[62] According to Peter Stein *Roman Law in European History* (Cambridge: Cambridge University Press 1999) x + 137 pp., p. 112, the main drafter of the *Allgemeines Landrecht* was CARL GOTTLIEB SUAREZ who shared the views of CHRISTIAN WOLFF, in terms of which it is the ruler's duty to guide his subjects to lead a perfectly reasonable life. Therefore, the Prussian Code had to have an educational purpose and, as addressed to the public, it had to be comprehensive, clear and definite as well.

[63] According to the witty remark of Domenico Corradini *Garantismo e statualismo* Le codificazioni civilistiche dell'Ottocento (Milano: Giuffrè 1971), pp. 12 et seq. [Pubblicazioni della Facoltà di Giurisprudenza della Università di Pisa 39], the classical codes were originally drafted with the purpose of safeguarding either absolutism or basic freedoms. At the same time, Jean-Louis Halpérin *L'impossible Code civil* (Paris: Presses Universitaires de France 1992) 309 pp. [Histoires] points out that all the natural law, colouring the French Civil code, only served to conceal the novelty of its wording (p. 289), while "the text finally adopted after struggles of nearly one and a half decade was the longest among all the proposals yet at the same time the least revolutionary." (p. 287)

[64] James Gordley 'Myths of the French Civil Code' *The American Journal of Comparative Law* 42 (1994), pp. 459 et seq.

or under simple pressure of time and out of helplessness, look back rather on SAVIGNY instead of THIBAUT.[65] This is all the more remarkable because it appeared as the practical correction of the cardinal idea of the Enlightenment—namely, the ideals of rationality, logicality and universality[66] that once resulted in the emergence of the new, quality type of codification (and which ideals were once believed to have absolute validity)—at a time when all these revolutionary illusions, wish-dreams and incantations had to be put to the test of life by being implemented in practice.

(Reconsidering Late Modernity) Thus, it is no mere chance that PORTALIS' personal contribution to the drafting of the *Code civil* has now—in contrast to the disdainful tone once used when remembering him[67]—come to the limelight with the effect of revelation (revoking his bitter and disillusioned treatise with a non-mainstream picture of his age, once considered worthy of oblivion). Secondly, it is little wonder that it is through the interpretation of the *Code NAPOLÉON* as a sociological phenomenon that we now start collecting the following facts about J. E. M. PORTALIS (1746–1807) as features determining his personality: He fled to Northern Germany during the Revolution, where he got into contact with Pietists; his attraction to the oeuvres of BLAISE PASCAL and MONTESQUIEU deepened; it was also during that period that he started to castigate the one-time misery of his homeland in an essay only posthumously published. For in Germany, as he wrote, he had seen the materialisation of the good form of what he called *esprit philosophique:* small universities, closed intellectual circles without any major social or political irradiation, where ideas were not driven by the chance of materialisation, thus being unable to become directly dangerous either. The French Revolution had, on the other

[65] Anton Friedrich Justus Thibaut *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland* (Heidelberg 1814) and Friedrich Carl von Savigny *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg 1814), both reprinted in *Thibaut und Savigny* Ihre programmatische Schriften, hrsg. Hans Hattenhauer (München: Vahlen 1973) 298 pp., pp. 61 et seq. as well as pp. 95 et seq. As to the movement and their debates, cf. Hans Wrobel *Die Kontroverse Thibaut–Savigny im Jahre 1814 und ihre Deutung in der Gegenwart* [Diss.] (Bremen 1975) v + 307 pp.

[66] "A well conducted government must have a system as coherent as a system of philosophy, so that finance, police, and the army are coordinated to the same end, namely the consolidation of the state and the increase of its power. Such a system can only emanate from a single brain, that of the sovereign." S. Andrews *Eighteenth-century Europe* The 1680's to 1815 (London: Longman 1965), p. 119. And, as S. E. Finer *The History of Government* From the Earliest Times, I–III (Oxford: Oxford University Press 1997), p. 1456 continues this line of thought, showing the parallel between the great epochs of governmental bureaucracy and codification (p. 1458), all this preconditions "belief in uniformities in Nature, the logicality of Reason, and correspondingly, the need to rationalize, systematize, and codify the laws under which subjects were to live."

[67] E.g., Marcel Planiol *Traité élémentaire de droit civil* I (Paris: Librairie Générale de Droit et de Jurisprudence & Pichon 1900), § 80: "*n'a point dépassé la médiocrité*".

hand, originated from the *salons* of Paris, as launched by the "Sophists". The whole atmosphere of the Enlightenment in France with direct irradiation of ideas and mobilisation of the political elite itself, focussing on the idea of a mentally anticipated conceptual system with the urge of its systemic implementation, was suitable to tempt to both irresponsibility and extreme consistency, and, once inflicted on the Nation as a living practice, it might also elicit the eventual (ill)fortune of a whole country. Well, such a cry in PORTALIS' complaints[68] may remind the reader of present-day criticisms of the wantonly useless, bare intellectualism marking our modernity.[69] Accordingly,

"PORTALIS may have arrived at the philosophical conviction of empiricism transformed into philosophy. This knows no system, only adaptation, that is, the adaptability of thought to the different requirements of the moment."[70]

To recognise again the moment of tradition embodied (among others) by the French revolutionary breakthrough in codification, as well as of experience indispensable beyond reason and logic in the judicial profession, or to re-

[68] "How much we could have benefited since, if the idea of system had not thrown pernicious errors into the most useful truths, and if the wise lessons of experience had not been suffocated by exaggerated and absurd theories!" "It was the men of genius, of character and of vision, and not the Sophists who founded societies, built cities, and taught things to peoples. Sophists always appear at times when morals are corrupted. They are born therefrom and they are hardly suitable to raise, with their miserable influence, those spirits and hearts degraded. As soon as they formulate an idea, they believe to have brought about a kind of institution. But, as the ideas formulated do not, by themselves, capture people, they do neither take roots where they were sown. They just keep multiplying the laws, whereby they exactly achieve the debasement of legislation. And meanwhile everything gets lost: the false philosophical mind is like a deaf shell enclosing everything." J. E. M. Portalis *De l'usage et de l'abus de l'esprit philosophique durant le XVIII^e siècle* [Paris 1820] 3^e éd. (Paris 1834), pp. 300–301 and 402–403, with a selected reprint in J. E. M. Portalis *Écrits et discours juridique et politique* (Aix-Marseille: Presses Universitaires d'Aix-Marseille 1988), pp. 227 and 398–399.

[69] For present-day stands about intellectualism, see *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] ed. Csaba Varga (Budapest: [AkaPrint] 1998) 122 pp. [Windsor Klub könyvei II], especially with Jeane J. Kirckpatrick 'Introduction' to her *Dictatorship and Double Standards* Rationalism and Reason in Politics (New York: Simon and Schuster 1982), pp. 1–18 and—as a stand taken by the author—'A racionális jogszemlélet eredendő ambivalenciája: Emberi teljességünk széttörése a fejlődés áraként?' [The inherent ambivalence of a rational legal approach: development at the price of the fragmentation of our human integrity?] in *A jogtudomány és a büntetőjog dogmatikája, filozófiája* Tanulmánykönyv Békés Imre születésének 70. évfordulójára [Philosophy of law and penal law: Festschrift for Professor Imre Békés] ed. Béla Busch & Ervin Belovics & Dóra Tóth (Budapest: [Osiris] 2000), pp. 270–277 [A Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának könyvei] as well as 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man, elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi's *The Fifth Man*] ed. Katalin Mezey (Budapest: Széphalom 2000), pp. 61–93. In a philosophical and socio-theoretical context, cf. also *Hayek és a brit felvilágosodás* A konstruktivista gondolkodás kritikája [Hayek and the British Enlightenment: criticism of the constructivist thought] ed. Ferenc Horkay Hörcher (Budapest: Pázmány Péter Katolikus Egyetem 2002) xviii + 112 pp. [Jogfilozófiák].

[70] Jean Carbonnier 'Le Code Napoléon en tant que phénomène sociologique' *Revue de la Recherche juridique* Droit prospectif 1981/3, p. 335.

consider the debates revolving around codification having called to life the historical school of law in Germany from the second half of the 18th century on—well, all this cannot at all be alone attributed to an immanent interest in the history of ideas today. After all, we have to find fixed points that help us identify the paths of the future. More precisely, it is exactly the path to be followed in the near future about which we think we may ascertain that its uniqueness and the unprecedentedness of its venture are nothing but the extension, in European dimensions and with an all-European complexity, of the difficult and risky decision which had already been faced once at a national level in Germany of the 19th century, and for the intellectual dilemma of which perhaps the one-time movement of the German historical school of law can now be taken as the best example.[71]

Anyway, the recognition according to which the age of the series of pieces of national codification was limited in a social and political sense as well, as it embodied and emphasised a further stage of universal development, is reflected by the historical reconstruction of the birth of the Austrian *Allgemeines Bürgerliches Gesetzbuch*. For, according to its recent monographer,

"the codification of civil law was an attempt to reconcile the modern notion of the state as the supreme public authority holding a monopoly of government with the idea of the rule of law as an objective and, indeed, absolute category of social cohesion, and as such not subject to the supreme will of public authority [...]. On the Continent of Europe, codified civil law provided the legal basis for the social and political pattern of the nineteenth and early twentieth centuries: the state of absolute sovereignty which yet remained a Rechtsstaat".[72]

At the time and under the given circumstances, this reconstructive requirement of the codal function had completely fulfilled what I had, in my own monograph referred to above, described as the main (socio-legal) function of the national unification of law, on the one hand, and the apparently merely legal-technical function of the centralised state domination over the law, on the

[71] Cf., especially, Zimmermann *Roman Law*...[note 48], pp. 14–17.
[72] Henry E. Strakosch *State Absolutism and the Rule of Law* The Struggle for the Codification of Civil Law in Austria, 1753–1811 (Sydney: Sydney University Press 1967) vii + 267 pp., quotation in the Epilogue, p. 219.

other, in terms of which the state may, in turn, control the entire theoretical and practical staff of the law and, thereby, decisively shape its everyday implementation as well.[73]

(Transubstantiation of the Codal Function) How far has the fulfilment of such major vocations and expectations progressed, as assessed by critical retrospection from a present view?

"Obviously, some of the high hopes and expectations entertained at the time of the Enlightenment have not been fulfilled: neither have the codifications made the learned lawyer redundant, nor have they led to a lasting consolidation (or, to put it negatively: ossification) of private law. Still, however, they have significantly contributed towards the national fragmentation of the European legal tradition."[74]

Well, the realisation above may serve as a typical illustration of how certain evaluations can turn into their own opposite, depending on the historical evolution and practical developments, for—in the light of the present-day international process of unification in European proportions—that what once (just one or two centuries ago) was a landmark of the national legal unification is now (and not without any foundation) re-formulated as national fragmentation. Just as paradoxical is the following statement by the same historian of European law, well versed in English legal studies, according to which

"What German arms had achieved on the battlefields of France—political unity—had now also been peacefully accomplished in the area of private law: »One People. One Empire. One Law.«"[75]

---

[73] See Varga *Codification*...[note 1], passim.

[74] Zimmermann *Roman Law*...[note 48], p. 1.

[75] Ibid., p. 53, quoting Ernst Zittelmann 'Zur Begründung des neuen Gesetzbuches' *Deutsche Juristenzeitung* (1900), p. 2. Moreover, Bernhard Windscheid 'Das römische Recht in Deutschland' in his *Gesammelte Reden und Abhandlungen* hrsg. Paul Oertmann (Leipzig: Duncker & Humblot 1904), p. 48 desired the same: to provide "a German law for the German People" by building up "a cathedral of national splendour"—a wish common to Europe as an objective of all the national states from the age of NAPOLEON. Cf., e.g., Josef von Görres in *Rheinisches Merkur* (April 7, 1815): *"Ein Reich, ein Recht!"*—a quote by Jean Gaudemet in his 'La codification, ses formes et ses fins' *Revue juridique et politique* Indépendance et coopération 40 (Janvier–Juin 1986) 3–4, pp. 239–260, especially p. 257. It may seem ironic, yet can perhaps be explained by the historical conditions of contemporary criticism that the first draft of the German *Bürgerliches Gesetzbuch* (1888)—as characterised by Zimmermann, ibid.—"was condemned as being too abstract and pedantic, it was denounced as a pandectist textbook

Indeed, the requirement of both the overall popular knowledge of the law and regulatory completeness is not any longer featuring amongst the classical dreams and hopes regarding codification—at least, not in the sense of the law's easy accessibility, cognisability and manageability.[76] Therefore, the dream originating from the age of the Enlightenment, postulating that society and law have to be established in one consciously planned and realised act around which the real life would revolve as planets of the solar system, turned out to be quite irrealistic.[77]

The wish-dream of both total systemicity[78] and gaplessness,[79] effecting comprehensive and exhaustive regulation on principle, has proved to be a similarly vain hope, and even more so the attempt at enforcing this through the prohibition of judicial interpretation.[80] Well, all these new developments are definitely meant to reaffirm the trust to be placed necessarily by the legislator in those who administer justice,[81] as a reminder of the gradual construction of

---

cast in statutory form and thus as being too unGerman; it was attacked as being out of touch with the realities of life and as lacking even a drop of socialist oil." Cf. also Varga *Codification*...[note 1], p. 135, note 84.

[76] "Today, one has given up all hope that the average citizen can be expected to comprehend the law. [...] A code may or may not be desirable: that it fails to promote general knowledge of the law cannot be regarded as a decisive argument within this debate." Zimmermann 'Codification...' [note 26], p. 108.

[77] The HEGELian parallel—"Never since the sun has stood in the firmament and the planets revolved around it had it been perceived that man's existence centres in his head, i.e. in thought, inspired by which he builds up the world of reality." Gottfried Wilhelm Friedrich Hegel *The Philosophy of History* {*Vorlesungen über die Philosophie der Weltgeschichte* [1840] IV (Berlin 1970–1976), p. 926} trans. J. Sibree (New York: Dover 1956), p. 447, quoted by Varga *Codification*...[note 1], p. 302—is translated by Gambaro, p. 81, into a description of the doctrine of legal sources when he recalls: in the 19th century, "the so-called special statutes [were relegated] to the level of exceptional norms which rotated around the code, just as the planets of the solar system move around the sun". It is this same sense in which the root of the present decline of codification is seen by Irti [note 6], p. 27: "The *Codice civile* cannot be recognised as having [...] the value of general law, the seat of principles that are set forth and »specified« by external laws [...]. [For it] functions henceforth as a »residual law«, as a discipline for cases not regulated by particular provisions."

[78] "If you read the proceedings, you may be amused at finding the briskest of all the debate took place over the two little words »and hares« in a section relating to damage done by wild animals. Powerful language is used, and, for a moment, the given whole of the mighty project seem to be endangered by the conflicting interests of sport and agriculture. That is the touch of humour, required as a relief for so much civil virtue."—wrote Frederic William Maitland 'The Making of the German Civil Code' in his *The Collected Papers* ed. H[erbert] A. L. Fisher, III (Cambridge: University Press 1911), p. 482, declaring thereby that this was nevertheless the victory of the whole over each and all its individual components.

[79] Cf., e.g., Heinz Hübner *Kodifikation und Entscheidungsfreiheit des Richters* in der Geschichte des Privatrechts (Königstein: Hanstein 1980) 74 pp. [Beiträge zur neueren Privatrechtsgeschichte 8].

[80] For Frederick the Great—*Publikationspatent* (1794), art. XVIII—, judges are prohibited "to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the grounds of some allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statutes" [trans. in Zweigert & Kötz *Introduction*...{note 45}, p. 91].

[81] The necessary failure that can be traced back throughout our known history is described by Hans-Jürgen Becker 'Kommentier- und Auslegungsverbot' in *Handwörterbuch zur Deutschen Rechtsgeschichte* hrsg. Adalbert Erler & Ekkehard Kaufmann & Wolfgang Stammler, II (Berlin: Schmidt 1978), pp. 963 et seq.

the law and the inevitable division of law-making contribution, covering all stages of the entire process of the law's formation, by conceptualising them as "the two-graded process of the law's establishment" (to use the expression of KELSEN having written his second major treatise in 1922),[82] on the one hand, and they also reaffirm the function of the code which I had earlier characterised—in describing the life, posterior to the Second World War, of the *Code civil* and other classical civil codes—in a way that, in the process of the gradual building up of jurisprudence through merely referring to the code-text in the everyday practical development of the law, the code's genuine function gets reduced to nothing but providing and indicating systemic-taxonomic locuses for the judicial solution of the case, that is, to a most relative guidance by far not unambiguous or excluding alternatives, on the other.[83]

Thereby, methodologically we have returned to the expectations towards a common European codification of private law, to the possible methodology of its realisation and to the formulation of the main function to be filled by it. Accordingly,

"a codification [...] provides a system that all those who have to apply and interpret the law to see »varitat[es] inter se connexa[e]«[84] to appreciate and pay attention to the normative context within which a specific decision has to be seen, to avoid inconsistencies and to arrive at solutions that are not only fair and equitable per se but also fit in with the solutions found to other problems. [...] It provides a focus which enables him to relate seemingly disparate issues to each other and harmoniously to incorporate new strands of thought."[85]

(With a Methodological Conclusion) Everything considered, what underlies the above statement is nothing else than the replacement of the idea of a system, closed into its axiomatic self, by the idea of a half-open and half-closed *autopoietic* system that shuts itself back and also re-generates itself

[82] Hans Kelsen *Allgemeine Staatslehre* (Wien: [als Manuskript gedruckt] 1922).
[83] And this was already a total shift, equal to giving up the original function which had once historically brought about the phenomenon known as codification, because thereby the code fell back from the codal role of determining the law to the mere role of indicating the mere systemic loci of the practical (judicial) shaping and making of the law. Cf. Varga *Codification*...[note 1], especially ch. V, para. 5.
[84] Christian Wolff *Institutiones juris naturae et gentium* in quibus ex ipsa hominis natura continno nexu omnes et jura omnia deducuntur (Halæ Magdeburgicæ: Renger1750), § 62.
[85] Zimmermann 'Codification...' [note 26], p. 110.

each time it closes itself, utilising any of its original systemic definitions in any way only when it is closed back in practice and, therefore, changing its definitions and contextualisations any time it operates, depending on its given environment. Methodologically speaking, something similar may have been in mind after the Second World War was over, when the claim for "a natural law with changing contents" (as formulated by RUDOLF STAMMLER after the First World War) became filled with concrete contents. As concluded by a contemporary author,

"The eternal truths to be found in the sphere of the logic of things [...] do not constitute a closed system as once supposed by natural law, but arrive at various aspects through the entire material of the law, connected with powerful linkages to the decisions here and now to be made."[86]

With this, one has also formulated the new creed of the judicial profession in the light of the new, present-day conditions of codification. For

"difficult problems can simply be wrongly analysed because, without conceptual discipline, it is not possible to be sure that previous cases were indeed like the one now before the court. The elementary principle of formal justice, that like cases be decided alike, is thus offended. Again, whole areas of the law can be neglected if in the absence of a map nobody can see that they are being insufficiently visited [...]. There is also another kind of damage at a higher level, in that, in the absence of a common conceptual structure, lawyers loose faith in the rationality of their endeavour [...]. It is perhaps the most important feature to be kept in mind: a code has to be brought to life, and has to be kept in tune with the changing demands of time by active and imaginative judicial interpretation and doctrinal elaboration. This requires the legislature to exercise considerable self-restraint."[87]

*

[86] Hans Welzel *Naturrecht und materielle Gerechtigkeit* (Göttingen: Vandenhoeck & Ruprecht 1951), p. 198.

[87] Zimmermann [note 26], p. 114. See also in a similar sense Heinrich Kötz 'Taking Civil Codes Less Seriously' *Modern Law Review* 50 (1987), pp. 13 et seq. and Peter Birk 'The Need for the Institutes in England' *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* Romanistische Abteilung, 108 (1991), pp. 708 et seq.

(Arriving at a Crossroads Again) The lesson to be securely drawn is that notwithstanding the untroubled pursuance of domestic practice, we are getting closer to a crossroads. The perspective of the common codification of private law within the European Union not only brings back (breaking through walls of silence of several centuries) memories of accomplishments and expectations of a long and distant past (once made universally valid in continental dimensions) as actual experience, but, at the same time, also refers us back to those points and moments (regarded for centuries as buried by the bygone past) from which—upon the basis of the joint acquisition of the shared Greek–Roman heritage and its differentiating (yet in a way somehow united) re-adaptation—the paths of development characteristic of the Civil Law and the Common Law had started once to diverge.

The more the advancement of the European unification progresses, the more inverse the assessment of European codification becomes, reconsidering past trends, values and regulatory techniques. Thus, it is suggested as if we, on the Continent, had not so much become state-organised national units unified by a sequence of national laws but, being too conceited of our most promising collective heritage within the transitory phase of an infantile disorder, became rather fragmented in national isolation from one another. The meaning conveyed by our past and the paths actually covered have thereby become dubious again with open-ending alternatives.

The problem of codification in Europe seemed to be more or less settled for ever a few decades ago. Now, in the light of the new challenges that are coming from the facts of the newest European convergence, we have to resume not only our earlier investigations but, at the same time, also repeatedly re-consider the foundations and the historical (that is, as directed from the past towards the future, perspectivical) presuppositions of our thinking—perhaps not for the last time in our ever-changing world.

Implemented by
The (JSPS) Bilateral Program with Hungary: Joint Research Seminar on
"Recodification in the Age of Globalization"

Off-reprint (2007)

Address: Furo-cho, Chikusa-ku, Nagoya 464-8601 JAPAN
Phone +81 (0)52-789-2325 Fax: +81 (0)52-789-4902