# THE FUNCTION OF LAW AND CODIFICATION

This paper is not concerned with tre function of law *in general or* to study how the law by giving expression to the interests of a definite class or classes of society discharge its political and normative functions. As is known, in Marxist theory the law appears as a phenomenon depending on other social, in the first place economic and political conditions. This dependence, however, far from being undirectional or complete one, implies determinedness *in the last resort* only, and so it does by far not preclude the *relative* emancipation of law as an element of the superstructure from the economic basis or other superstructural elements, and its repercussions on these exactly owing to its relative autonomy. In the overall process of social evolution the evolution of law, with the effect of advancing the former or hempering it, is directed to promote the preservation of established or enforced social relations on the one hand, and the creation of social relations earlier unknown or not sufficiently general and their acceptation by force, on the other. Here in the funtion of law, in the service of preservation and change what role codification has undertaken, or may do so, in the realization of that function by defining the patterns of preferable, permissible or prohibited conducts in a *comprehensive, systematic form.*

## 1. *Dialectics of the social change and preservation in the historical development of codification*

The delimitation of codification as a possible technique of law-making will by itself reveal but little. As a matter of fact historically codification is not a wholly homogeneous phenomenon: its physiognomy is influenced by the evolution of its ideologies, by the modification of its functions to an extent that retrospectively we hape to speak of formation of more or less autonomous types of it.

The historical types of codification manifest themselves as dependent.

on the components of social and legal evolution, embedded in the interrelations of them. In the definition of these types, however, exactly owing to their adhesion to the function of law, an extremely decisive role has been played by the *concrete* prevalence of the dialectics of change and preservation, by the extent to which the type in question has undertaken the conservation and development of the relations characteristic of the given social formation. As a matter of fact change and preservation accompany codification throughout its life as a dialectic unity. In the relative equilibrium of this unity, bowever, the stress on the change on the preservation, their ratio, parallelism, on the the mutual transformation of one into the other constitute the characteristic, determining sign of the particular types.

If now the codificational pre-forms of *antiquity* are surveyed, it appears that the *birth* of codification were somewhat clung to the change of law. In the exclusiveness of customary law organically combining with social life and its slow evolution, written law, i. e. the externalization and objectivization of the law made their appearance at a time when the metamorphosis of the earlier communities into widespread empires giving rise to accelerated development and social differentiation demanded law-reforms of *impèrial*, dimensions, to be enforced *immediately* and *uniformly*. The codificational products of more than seven centuries extending from the «reforms» of Urukagina to the Code of Hammurabi, with their prologue, intentional want of completeness and as appears from other knowledge we have, bear testimony to their birth from the demand for reforms and from the need for a conscious, planned and controlled change of society and law. These reforms and changes served the creation of a separate order, however, they did *not* have the relief of customary law as their goal. At least primarily their purpose was not the comprehensive establishment of the law, and so the function of preservation was in all appearance a merely subordinate one.

Whereas at the cradle of these early codificational products there stood *material* complaints referred to the actual conditions, it was characteristic of the following codifications of Antiquity the laments were more of a *jurisdictional* nature, —forthcoming from the confused, uncertain or rather anarchic state of the sources of law of the time. Thus in the development of the pre-forms of Antiquity codification extending from the collections of the Hittites, through the early Chinese codes and the Law of XII Tables /as told by Livy/ to the codification of Justinian almost exclusively the function of *preservation* with special stress on it comes to the fore. The intention to supersede customary law and

other non-written forms of law, to eliminate them and to transform the system of the sources of law manifests itself here. Incidentally as a means of social change, in particular in Rome, it is *not* codification that acts a part; codification has as its end preservation and comprehensive establishment of the law, and only by way of exception, and in conjunction with them, its inevitable actualization. The work of Justinian, as is known, succeeded neither in preserving earlier conditions presenting a higher degree of development, nor in superseding the earlier system of the sources of law. Thus the Code of Justinian served as a *tabula rasa*, which became the foundation of a new judiciary and customary development of law.

What the *Middle Ages* inherited was the idea of a comprehensive law-establishing code. In this manner the mediaeval and early modern precursors of codification present a striking similarity to the pre-forms of late Antiquity. It appears as if they had in reality laid the foundations of an in its intentionally absolutistic form unquestionably distorted statement namely that «à côté de la forme et du contenu qui lui sont propres le code est caractérisé par divers atributs, qui ont tous en commun qu'ils contribuent à permettre une meilleure connaissance du droit» (1). These were *law-books*, statute-*books* in the strict sense of them: they had as their end the change of neither society nor the law. In the majority of the cases they did not even purport such changes. Strictly speaking their function was merely preservation of law and social conditions as transmitted by the comprehensive establishment of law.

The first examples of the *classical* type of codes were some German attempts at codification. In these codes, unlike the precursors referred to earlier, instead of the quantitative comprension of the sources of law the *qualitative* grasp of definite branches of the law came clearly to the fore. The classical age of codification was at the same time the age of bourgeois revolutions whose most typical manifestation was the Code civil of the French Revolution. Breakink away from the casuistic system-creating attempts of the previous forms the *Code civil* served as an example not only for the creation of a more abstract *system*, but before all for the use of codification as a means of social change. From the *Code civil* to the Swiss codification and even beyond there is the process of intertwining the demands for social and legal *reform* wich their modern codificational solution. Advance or challenge of social change by way of codification manifested itself in an even more drastic form in

(1) VANDERLINDEN, J.: *Le concept de code en Europe occidentale du XIII^e au XIX^e siècle*, Brussels, 1967, pág. 163.

their South-American and Afro-Asian receptions. A further characteristic of this type is given by the fact that its trend towards reform, transmitted by the rigidity of an exegetic spirit, soon swings into the exclusiveness of *preservation*. This change of function before long will necessarily turn up as the *barrier* of further progress: as is known, the exigencies of monopol-capitalist development has primarily found expression in judicial practice, *opposed* to the codes. And the code more and more become the memory of times bygone. It survives as a skeleton, as a fossil kept alive. And recodification, before it takes place, becomes obsolete: somehow it has lost its timeliness.

*Socialist* societies have revived recourse to codification as means of consolidating far-reaching social, anl legal changes under the conditions of the socialist revolution. All this has presupposed the use of earlier experience. Still socialist codification constitutes a qualitatively self-dependent autonomous type. Among the sources of its new quality there is one which at present calls for a study. Namely, socialist codification does not end with a fundamental change of society and law: it strives for the *maintenance* of its reforming character and of its living, unbroken association; at least periodically actualized, with the processes of social change. This codification does not merely purpose the maintenance of a relatively stable framework, but by undertaking and willing re-codification to become the conscious and controlled means of planning the future, resorted to as fundamental and established.

## 2. *The problem of codification as a basic legislative means of social change*

As regards the translation into reality of the dialectics of social change and preservation, the types preceding socialist codification may, for their historical existente, be considered such as have given evidence of the performance of their functions under given conditions. On the other hand, apart from certain sporadic experiences, the reality of Anglo-American codificational conceptions is still an open question. For more then two centuries all *Anglo-American* efforts tending to the comprehensive re-formation of the system of sources of law are essentially on the level of the *pre*-forms of Continental codification. As an open question of today the endeavours of the *developing* states manifest themselves to codify their law. Codification in these countries have as its ideal classical Continental type, or type of reception, or Anglo-American or socialist type, or combination of these ones.

The socialist type of codification is to some extent a transitory one. As a matter of fact experience dating back to several decades are already at disposal, still development of the systems of socialism cannot by far be considered fully completed. In general socialist codification has completed the radical transformation of the legal system, in a way also affecting the system of sources of this law. What may therefore turn up as a problem is whether codification may be resorted to as a standardized, *established* means of planning the future development.

The limits of codification partially coincide with those of the law. Therefore the changes of codification in the overall process of social evolution in general do *not* imply a specific problem for codification. On the other hand in a manner characteristic of codification the problem of the *maintenence of association* with social chnage may turn up. As a matter of fact codes are written legal instruments which offer the regulation of a definite *quality* of a considerable /coherent/ *quantity* of relations brought under regulation. I. e. already pursuant to this quantitative factor, social evolution affects the products of codification, their adequacy with greater frequency and intensity. Special stress will be laid on this by the qualitative determinedness of codes, by the specificity of their *system-creating character*, which operates towards the increase of their *power of resistance* to changes of any kind. As is known from the practice of centuries, comprehensive or partial amendments of the codes call for the suppression of a considerable internal resistance: they necessitate rather circumspect preparatory work and the acceptance of a greater number of risks. Hence the code with its established form in any case stands for *discontinuity* in the continuous development of society. This contradiction will, if it looms up, be first mostly lifted by judicial practice . On the other hand when social evolution enforces the adaptation of the code in this manner, when legal practice discharges such an occasionally unlawful, yet *de facto* sanctioned corrective function, it may happen that notwithstanding its original reformatory trends re-codification will *not* bring about, perhaps not even advocate, social change. Moreover its function in legal change might become limited to the mere *legitimatization* of the results of law-making by judicial practice.

Such a practice of codification and its renewal already owing to its conflict with rule of law considerations, cannot be preferable for socialist codification. In general in order that in the process of social evolution law might serve as the means of change, yet at the same time not become unreal, conditions have to be brought about for a continuous interaction between law and its determinants within a permanent process of *feedback*.

As is known, the first attempts of socialist legislation were permeated by revolutionary *illusions*. Bukharin and the law reviewer of the Hungarian Republic of Councils of 1919 almost simultaneously gave expression of their belief that codification of the fundamentals of revolutionary law would produce a *general* source of law which would throw out *no* problems of legislation anymore (2). The Hungarian version of this tendency was formulated in the following manner: «the order of production of Communist society will be a planned one, simple and natural and the legal order suiting it will be *no* need for *voluminous codes* of the kind of the Talmud, *only* for basic principles clearly formulated and understandable by all, whose consequences for particular details may be drawn by anybody both at the management of his own affairs and at the settlement of the causes of other proletarians.» This expectation was, however, confuted by life. Still it would appear as if the generalization of the content of code *increased* its useful life in the same way as the «reinterpretation» of its superannuated institutions might operate towards the maintenance of its validity. And although cases of this kind may occur, still it would amount to *self-deception* to believe as if in this manner codification had become a factor of social change, as if it had accepted a creative part in putting forth one phenomenon or another one. To assume this would be as preposterous as to consider the present day revival of centuries old English precedents the reaping of the fruits of a provident «social engineering» of yore in the present age.

Socialist legal order, after completing the task of its foundation and elaboration, has anyhow reached a point in the development of its codification where what may be termed the *second* phase of codification begins (3). The reformation of codes bear testimony to the fact that socialist codification in a truly unsophisticated manner wants to remain the factor of social *change*, and not only one of preservation. Therefore it is before all important that within the sphere of particular, circumscribed by the general and the individual, we discover the *optimum* level of regulation where it will in an appropriate depth even from the point of view of the application of law, be able to anticipate the social relations to be shaped; i. e. to grasp the *typical* in a way not detached from

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(2) BUKHARIN, N.-PREOBRAZHENSKY, E.: *The ABC of Communism*, Alfavit kommunizma, Peterburgo, 1920, ed. by E. H. Carr, Harmondsworth, 1969, Section 72; FÖLDES, I.: *Laikus bíráskodás és anyagi jogszabályok*, Lay juridiction and provisions of substantive law, Proletárjog, 1919, N.º 7, pág. 50.

(3) Cf. SZABÓ, I.: *A kodifikáció időszerü általános kérdései*, Current general problems of codification, Jogtudományi Közlöny, XXIV, 1969, N.º 10, pág. 494-495.

the future; to anticipate a development which during lifetime of the code might *simultaneously* figure as the factor of change and preservation. Furthermore it is indispensable that theory and practice of socialist law unambiguously make it clear that the act of codification, be it ever so fundamental, is but a *single* act in the evolution of law: birth and decay of the codes are *equally* necessary processes. Thus when the legislator is lagging behind with the adaptation of his code to the new needs of development, correction will of necessity break a way for itself through judicial practice. Therefore it may be argued whether the standpoint which in the otherwise rather sporadic cases of judicial law-making wants to discover abuses only, and in the shadow of these considers the critical element of a socially sometimes well-defined necessity negligible in its totality, is theoretically properly founded. Finally in view of this contingency it is essential that for its possible possible restriction socialist codification should not only undertake the advancement of social change and be willing to bring it about, but also accept as *natural* consequence the inevitable obsolescence and the need for repeated replacement by newer ways and means. As a matter of fact the need for planning will entail the further need for repeated re-planning: the reform will be permanent in codification only when it is conscious of the necessity of its own wear and tear, if it accepts the reform with its outlook of continuous self-reformation.

### 3. *Parallelism of changes in society and its codes: feedback in the socialist codification*

We have seen from what has been set forth that socialist codification cannot become a lasting factor of social change unless it effectively guarantees feedback, and that as its *basic* form we accept *recodification* following upon codification. This is as a matter of fact the form which primarily guarantees the *renewed* recourses to codification as a means of conscious and controlled social planning *without* prejudice to the sphere of activity reserved for the legislator. Re-codification may manifest itself as codificational amendment, supplementation, or repeated new codification. The choice will be influenced partly by the rate of development of social conditions, partly by the demand for constancy operating against any kind of change of law.

Re-codification, with its frequency defined by the rate of social development, however, will in legal evolution bring about discontinuity and *abrupt* adaptation in all instances. This will be the case the more because when practical considerations are borne in mind, repeated reco-

dification *within* periods of a decade or two may hardly appear as expedient or possible. *Within* the basic form of feedback of codification - re-codification, within the field circumscribed by their terminal points, such *further* forms of feedback will have to be developed as will guarantee the *continuity* of adaptation whilst the discontinuity of the change of law. This continuity of adaptation, not prejudicial to the constitutional separation of law-making and law-applying activities and transmitted by the structural-systematic formation of the code is embodied by the judicial practice. Thus the grasp of typical in the sphere of particular will already in the province of level of regulation afford facilities to the legislator which will permit him to define the social relations in their *flux*, in the dialectics of their preserving by termination, And the way of presenting them in their dynamics affords the possibility of a *simultaneous* assistance of social change and preservation, which presupposes *creative* work on the part of the judge, yet does not of necessity assume an actual law-developing or law-modifying effect of this work.

This definition leaving elbow-room for regulation and its level is in this way calibrated to the *typical*. However, the codes reckon also with the subjective *atypic* arising in the wake of shortcomings of the formulation of law, and with the objective atypic forthcoming from new development. In the settlement of these problems socialist codification has opened a new path. Essentially this means that codifiers by formulating rules, principles or clauses of a *general* content the *comprehensive* policy-making framework of the regulation in question, offer an opportunity for those responsible for law-application to set aside an *otherwise* relevant provision and determine the case on the ground of *other* norms. By declaring the obligation of proper use of rights, or more precisely, by making these rights conditional on this principle /a principle which appears as the generalized reversal of the prohibition of the abuse of rights introduced by nonsocialist Continental codes, socialist civil codes e.g. have relativised the legal consequences specified for the typical by a mobile evaluation gaining a concrete form in the process of law-application. By this the atypic here appearing, *strung* to the proper use of rights, will become the component of a *special* order: it will not anymore demand either for an artificial /but formally unlawful/, or a socially unacceptable /though formally lawful/ solution. In criminal codes the segregation of the atypic takes place in a way that the codifier combines the factual elements defined in the general and special parts of the code /and known also in classical Continental codes/ of the existence of crime and/or the imposition of punishment, with the con-

crete danger the act constitutes to society. Since the codifier has by this drawn the limits of the typic, he has at the same time offered the judge the opportunity for a *creative* confrontation with social reality not presupposing necessarily law-developing or law-modifying effect: an opportunity for both correction and adaptation.

The systemic determinedness of the code, its division into general and special parts; the dialectics of its level of regulation mediating between the general and the individual on the level of particular; its structural elements, before all the preamble owing to its evaluating character providing a direct transition to the social content of regulation and offering guidance equally in the interpretation, gap-filling and continued development of law, and the general rules, principles or clauses providing normative basis for the segregation of atypic —i.e. *all* components of the code-system taking part in the regulation jointly and severally help to close down codifyin work *and* to keep it relatively open, to resist modifying interference *and* to encourage its development, or at least to channel them into a given river-bed. Hence as for its material the code is from the outset with itself identical only as far as the *trend* of its movement is concerned. It carries a structural content, determinedness developing even in its fixedness, and unfolding in its closedness. In the service of the dialectics of social change and preservation demanding continuous feedbak it is this determinedness which furthers to realize the reform of reform: a continuous and, because embedded in the code-system, pre-planned adaptation and a re-codification starting *new* processes of change and preservation, built upon the foundations, framework, structure and perhaps system of the earlier codification.

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