THE FUNCTION OF LAW AND CODIFICATION

This paper is not concerned with the 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 function 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 have 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, however, 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 cling 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 imperial, 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 droits» (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 comprehension 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 reforms with their modern codification solution. Advance or challenge of social change by way of codification manifested itself in an even more drastic form in

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 exegetical 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 and 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 maintenance of association with social change 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 legitimization 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 suit 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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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-
codification within periods of a decade or two may hardly appear as expedi- 
dient or possible. Within the basic form of feedback of codification - re-co- 
dification, 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 separa-
tion 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 alrea-
ady 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 asssis-
tance 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 formulat-
ing rules, principles or clauses of a general content the comprehensive 
policy-making framework of the regulation in question, offer an oppor-
tunity for those responsible for law-application to set aside an other-
wise 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 
recognizing the laws. By this the atypic here appearing, strict 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 pre-
supposing necessarily law-developing or law-modifying effect: an oppor-
tunity 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 bet-
 tween the general and the individual on the level of particular; its struc-
tural elements, before all the preamble owing to its evaluating character
providing a direct transition to the social content of regulation and offe-
 ring guidance equally in the interpretation, gap-filling and continued
development of law, and the general rules, principles or clauses provid-
ing 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 codifying 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 preser-
vation demanding continuous feedback it is this determinedness which
furthers to realize the reform of reform: à la continuous and, because
embedded in the code-system, pre-planned adaptation and a re-codifica-
tion starting new processes of change and preservation, built upon the
foundations, framework, structure and perhaps system of the earlier
codification.

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