ON CIRCUMSTANCES FAVORING CODIFICATION

Mirjan Damaska

Introduction

The term "code", as it is generally used, may denote any of a broad spectrum of legal texts. Our focus, here, is more narrow: we are concerned only with those written works that embrace a system of principles and rules applicable to a given area of the law.1 These codes are essentially directive: the interaction of their principles and rules is expected to describe the solution to most problems that can arise within the area they regulate, at least in the sense of providing starting points for analysis and argument. This inspiration to inclusiveness results in a relatively high level of abstraction; rather than trying to provide in detail for every foreseeable situation, such codes tend, by marking out lines of inquiry, to suggest contours of the solution. And practical application calls for further elaboration, on concretisation of their provisions.

The theme of this essay is to review circumstances that favor the enactment of such legal texts and that sustain their vital role in the legal system.

* Ford Foundation Professor of Law, Yale University.

1 We are not here concerned with legal texts that are collections, rather than a system of provisions. The codes we are interested in set out rules rather than guidelines, i.e., factors that should be taken into account in making a decision. We must also distinguish "technocratic" codes that set out instructions as to how consequences of alternative courses of action should be evaluated, so that certain posited goals can best be realized. Rather than containing "normative programs" such codes contain formulae for "instrumental calculations".
Our emphasis will be on the typical, so discussion of actual historical developments will be by way of illustration. Nevertheless, the reader will easily recognize that we are proposing to inquire into some prerequisites of a successful codification of the type that appeared on the continent of Europe in the period of Enlightenment, and characterized the continental legal landscape throughout the nineteenth century.\(^2\)

This cynosure has been chosen because “classical” codes still appear attractive in many countries, and are still expected to play a pivotal role in the administration of justice. But such attraction and these expectations are seldom based on a sufficient understanding of factors that brought “classical” codes to life. If circumstances that favored their birth and sustained their vitality are no longer present in the late twentieth century, then codifications of the classical type are bound to have an impact on the legal system that is different from that which classical codes originally exerted. Our essay is intended to provide some basis for reflection on what this different impact might be.

I. Factors Favoring the Emergence of Codification

1. Epistemic Assumptions

There are two philosophical positions that can support the enterprise of systematically and comprehensively regulating social interaction. One position is that social life is rationally structured; it exhibits a design that can be comprehended by human intellect and expressed in comprehensible language. The degree to which the future can be anticipated is sufficient to warrant an attempt to codify entire spheres of social life. The other position is that—although reality is not rationally structured, or alternatively, although the human intellect cannot possibly “mirror” reality—it is nevertheless possible to create and to impose a rational structure on human interaction, a structure that can perdure for a substantial period of time. If, however, social life is regarded as a product of random forces, or if the belief obtains that there is no match between the complexities of social life and powers of human comprehension, systematic and inclusive regulation appears illusory. And, instead of attempting to cast a web of norms over the current of social life, it seems better to adopt an empirical, piecemeal approach to regulation.

\(^2\) These codes attempted to cover vast areas of law, so that this reach is often included in the definition of the classical code. See, e.g., A. Watson, *The Making of the Civil Law*, 100 (1981). For our purposes the scope of regulation is not as important as the idea that a field of social interaction is seen relatively independent and can thus be regulated as an ideally “closed” system. The relatively general and abstract nature of regulation distinguishes the continental codes from those in common law countries. See, e.g., P.M. North, *Problems of Codification in a Common Law System*, 46 Rables Zeitschrift für auslandisches und internationales Privatrecht, 490, 503 (1982).
It is well known that the period of the Enlightenment provided an intellectual climate favorable for a drive toward comprehensive codification. Classical codifications thus possessed a secure epistemic anchorage.\(^3\) Seventeenth century developments in the natural sciences, inspired the belief that society was governed by a few first principles, clear and unalterable, from which comprehensive schemes of social regulation could be deductively elaborated and applied—more mathematico.

2. Type of Legal Thought

The approach to law that favors classical codification and can supply its drafters with adequate conceptual tools deserves more detailed examination.

To begin with, a synthetic understanding of the law is required: the legal landscape must be made surveyable and must be neatly chambered into relatively independent units. Furthermore, it is necessary to develop a sufficiently clear idea of potential problems that may arise within the unit of law to be regulated. Observe that such panoramic vistas are unlikely to be thrown up by litigation: cases and controversies do not present themselves in a fashion sufficiently representative so as to permit reliable guesses about the universe of possible problems within a sphere of social interaction. Cases provide only a fragmentary and perhaps false illumination, an ignis fatuus of possible regularities underlying social life, or of matters calling for rational ordering. A more reliable data-base is furnished by hypotheticals that occur in scholarly and theoretical thinking; phantoms of future cases conjured up by such thinking are more revealing.\(^4\)

The ability to anticipate the terms of future application depends, in part, on a propensity to think about the law at a level of abstraction where legal problems become relatively free of their enveloping factual context. Where law cannot be disentangled from factual detail, or where this divorce appears undesirable, the proper “raw material” for a classical codification cannot be obtained: attempts at systematizing in terms of broad ordering schemes collapse under the weight of the contextual and the situational. Perhaps it is also difficult, in the absence of this penchant towards abstraction, to imagine the code as desirable. To favor the classical code, one must view the core of law as an “autonomous” written text, a text that merits analysis on its own terms, quite apart from its application to contingent circumstances. But where legal thinking is interwoven with the contextual and the situational, the “law” without application hardly deserves to be

\(^3\) For details, see F. Wieacker, Aufsteig, Blüte und Krisis der Kodifikationsidee, in Festschrift für Boehmer, pp. 35 ff (1954).

\(^4\) It is, of course, important that theoretical thinking not be divorced from practical experience, or, at least texts based on it. Theoria sine praxi rota sine axi.
tered law: it resembles unperformed music.

The raw material of codification must be logically digested: simplified rules, for the sake of which many particulars were disregarded, must be expressed in proper (relatively invariant) language and integrated into a coherent system. The development of a proper language requires a move from an arithmetic to an algebra of the law. And integration into a system puts a premium on a classificatory scheme that does not depend on analogic use of relatively concrete data. For example, in ordering the law of causation one does not extrapolate and expand from the distinction between lethal and non-lethal wounds in homicide cases. Instead, classification proceeds according to logical relationships among legal concepts. Thus, in ordering the law of civil liability, intent and negligence are not classed together with strict liability as units on the same conceptual level. Only the higher concept of fault (encompassing both intent and negligence) is placed on the same plane with strict liability (i.e., liability without fault). Much less would torts, such as defamation or trespass, be located next to negligence, in that the criterion used in defining these torts is not the same: one does not mix torts based on the type of injury with those based on the type of fault.

One need not go on describing this type of approach to law—let us call it "logical legalism"—to realize that a variant thereof is firmly embedded in the continental legal tradition. The roots of this approach reach back to the work of those twelfth century legal scholars who analyzed the Justinian compilation not as a law in force but—as we would now express it—as a text representing an ideal system of structuring relationships. It is true that their systematizing effort and achievement were very modest; generalizing ordering schemes were products of later centuries. Nevertheless, even twelfth century scholars believed in an order underlying the Byzantine compilations: "discordances", they thought, could be made "concordant". And the ideal of a systematic written exposition of the law was held even in those continental lands that relied on customary law, and did not acknowledge the Justinian compilation as authoritative. The habits of logical analysis

---

5 An example is the search for recurrent patterns in legal regulation, so that the recurrent pattern can be "bracketed out" as a common feature. If, for example, misrepresentation is similarly treated in a variety of legal contexts, a "general doctrine" of misrepresentation should be isolated and incorporated by reference in all applicable contexts.


7 Some such variant of legal thinking has often been described, especially in the context of counterposing continental and Anglo-American legal cultures. The most fruitful, although somewhat obscure, is Max Weber's dichotomy of legal thought involving "the logical interpretation of meaning" as opposed to a thought that relies on "external characterization of facts". M. Weber, Economy and Society, vol. 2, Ch. 8, pp. 655-657 (1968).

in the law, and the view that the core of law is an authoritative text, continued for centuries to dominate continental legal culture. In fact, a variant of logical positivism, continental "legal science", is still an influential strand in the legal culture of many continental countries.⁹

By contrast, logical legalism has always been a peripheral element in the legal culture of Anglo-American countries, even in those moments of their history when analytical formalism was at its apogee. Traditionally, law has not been associated with a written text and has appeared inseparable from decision-making in concrete cases. Of course, where one thinks about law against the background of professional anecdotes, with all their factual complexity, particulars cannot easily be neglected for the sake of erecting large conceptual schemes. Thus, even when inclusive regulations are attempted in common law countries, they are usually too detailed and insufficiently systematized from the perspective of logical legalists.¹⁰

3. Favorable Political Environment

Once a code has been drafted, those with political power to participate in its enactment may become embroiled in controversy over the proposed regulation. In the ensuing struggle of political forces, unprincipled adjustment may be demanded—or "messy" compromises required—that seriously affect the coherence of the proposed regulatory scheme. Deadlocks are, of course, a clear possibility. Assume that the text is returned to the drawing board so that the implications of political compromises can be traced and a new coherent scheme worked out. By the time a new draft is completed, it is possible that a new constellation of political forces calls for new adjustments and creates new animating standstills in the codification process. It would thus seem that for the classical code to be enacted the subject-matter of regulation must be relatively free of controversy among those with authority to legislate or with power to influence legislation.¹¹

It goes without saying that when political power is concentrated in a single person or a homogeneous group the problems described above

---

¹⁰ The greater sensitivity of common law legislation to situation and detail is noted in P.M. North, supra note 2.

¹¹ For a receptive treatment of this problem, see F. Kübler, Kodifikation und Demokratie, 24 Juristenzeitung 645-651 (1969).
disappear or are alleviated. An authoritarian ruler espousing a comprehensive social theory can pick his own chief draftsman, and faces little difficulty in avoiding unprincipled compromises. In non-authoritarian regimes, however, the chance that a comprehensive code will be enacted is present only in those spheres where there exists a political consensus, or where the subject matter appears so arcane and technical as to exceed the grasp of those who hold political influence.

The linkages between classic continental codes and autocratic power are easy to establish. Long before Napoleonic time, advocates of French royal absolutism favored the codification of laws. In fact, the first codes were enacted by absolutist rulers, such as Maximilian of Bavaria, Frederick the Great of Prussia and Joseph II of Austria, who did not have to juggle shifting political coalitions in order to ensure passage of regulations worked out by their officialdom.

Where representative bodies were entrusted with the enactment of codification, as was the case in Switzerland, a large measure of consensus existed on the subjects regulated, and many provisions were regarded as technically neutral. Nor should it be forgotten that codification was often undertaken in areas where codes did not prescribe what citizens must do, (a controversial topic!) but rather defined those forms in which freely chosen goals might be pursued. In other words, codes often contained rules of the road, as opposed to binding instructions that map out the rate to a predetermined destination. Where legal science was very influential and respected, many matters seemed politically neutral—fit subjects for disposition by dispassionate scholars. And the abstract and technical language in which proposed texts were expressed reinforced this impression.

4. Receptive Judicial Apparatus

It is important, here, to examine some characteristics of those judicial

---

12 This is important because the draftsmen, even if they share a common legal outlook and technical discourse, may, if they nonetheless disagree, be disposed to endless argument. It takes a Tribonian, or an authoritative minister of justice, to put an end to scholarly scuffles.


14 All these codifications had already appeared in the second half of the eighteenth century. Their motive was not the preservation (for civil society) of a sphere of freedom, but rather clear direction and guidance for the absolutist bureaucracy bent on managing society. The most poignantly example is the introduction, by Joseph the II of Austria of the now generally accepted principle of nullum crimen nulla poena sine lege. What is now hailed as a guarantee of liberalism originated as an instrument of orderly, absolutist bureaucracy.

15 This yielding, formal nature of regulation is now commonly associated with the impulses of market society to provide a framework for a self-regulating society.
organizations to which a classical code appears a desirable guide to decisionmaking.

Consider first an organization in which the principal decisionmakers are lay persons, enlisted ad hoc in the administration of justice. Lay ad
docracy finds it undesirable to strain the dense texture of real-life situations through a network of abstract rules. Decisionmakers having little percep
tion of the need for consistency and uniformity of decisionmaking that a code facilitates, if left on their own, are likely to decide cases according to their own conceptions of common sense, equity, or other ingredients of "substantive justice". And, where abstract regulatory schemes are imposed on them from the outside, but they are nonetheless left to decide independently, it is unlikely that such abstract schemes will play more than a negligible operational role.

Imagine next a judicial system in which decisions are made by professional judges organized in a network of trial courts. Superior review occurs only sporadically, so that there is, typically, a single level of decisionmaking. One can expect that well-known mechanisms involved in any professionalization will lead to case-hardening: the professional decisionmaker does not view the individual case as a truly "single instance" packed with human drama. A sense of consistency across cases can also be expected: judges meet, exchange experiences, etc. In this ambience advance guidance by legal standards is much more acceptable than a system of lay adjudication where each case tends to be viewed on its own. Nevertheless, the outlook of professional trial judges is generally too inclusive to generate an attachment to a system of logically ordered abstract rules. To the trial judge, who is directly exposed to the intricacies of real-life situations, a more pragmatic attitude to decisional standards is more congenial. The ability to respond to the situational and to make fine distinctions seems more important than the manipulation of normative schemes inspired by respect for logical symmetry and systemic concerns. Thus, even this second type of judicial organization has little affinity for classical codes.

The outlook of professional judges situated in the higher echelons of judicial hierarchies and entrusted with the review of decisions rendered in lower reaches of authority is different. Cases reach these higher echelons in mediatized form, already ordered around selected matters subject to hierarchical supervision. To such higher judges regularity and consistency of

---

16 There is truth in the broad claim that—compared to its continental counterpart—the Anglo-American legal culture is more pragmatic. The greater emphasis by continentals on order and logic is usually attributed to the smell of the schoolman's lamp: continental "legal science" originated in the universities. Observe, however, that an inclusive vision and a pragmatic approach come easily to trial judges. And, as we shall see in a moment, the traditional English administration of justice revolved around trials and problems of original jurisdiction much more than was the case on the continent.
decisionmaking are very important concerns. Moreover, their place in the judicial system facilitates sensitivity to these values: Fitting decisions within larger ordering schemes seems to them be the quintessential legal job. Particulars, never fully perceived, are sacrificed with relative ease. From their hierarchical *hauteur*, the activity and the discourse of trial judges look impure: law is intertwined with facts. Of course, because higher authority sets the tone, attitudes that higher judges share toward the law affect the lower judges as well, and influence the judicial organization as a whole. To conclude: the more an apparatus of justice is organized hierarchically, the more an abstract and inclusive vision of the law becomes important. And it is this vision that can find a type of regulation represented by classical codes attractive.

Let us ground this discussion in the historical context. Beginning in the late middle ages, continental princes gradually created hierarchically organized professional judicial organizations. There was, then, a match between the conception of law on which classical codifications are based and attitudes toward the law shared by high continental courts. At least some absolutist rulers clearly conceived of their codes as decisional guidance for their judicial officialdom.

By contrast, English administration of justice continued the medieval reliance on lay participation; the judicial apparatus set up by the Angevins contained only rudimentary mechanisms of appellate review. As the impulses toward bureaucratic centralization were arrested in the seventeenth century, no hierarchical judicial organization existed in the Enlightenment period. In such an institutional setting an abstract and systematic codification of the law could hardly appear attractive. Nor is it easy to imagine how such codification could assume a pivotal role in the life of the law.

With this suggestion of historical developments, we have already moved from factors favoring the enactment of a classical code to circumstances that prevent its stillbirth and preserve its vitality.

II. Factors Sustaining the Life of Codification

It is well known that many circumstances can negatively affect the viability and the vitality of a codification. Rapid social change, for example, can make segments of the code, or even its basic scheme obsolete. And we shall have something to say on the *accelerando* of social change and some other circumstances in the last section. But two factors are of special

---

17 Pervasive superior review, for example, reduces the trial judge's leeway in responding to "equities" of the case.
19 A telling example is Frederick the Great of Prussia.
importance to one whose vision encompasses both the common law and
civil law cultures and deserve special emphasis here. One factor is the
supportive judiciary, the other the supportive role of legal scholarship.
When these two factors are absent, a code of the classical type need not
necessarily become a text without practical importance, but its place in the
life of the law cannot be that expected on the basis of continental expe-
rience. Discussion of these two factors requires that we expand on themes
already sounded in the preceding sections.

1. A Supportive Judiciary

If the code is to assume and maintain a central position in a field of law,
judges must be willing to seek guidance in the network of its principles and
rules. And even if there is no precise answer in the text to the issue in point,
judges must be reluctant to seek solutions, or rationalize them, outside of
the Code's normative network. Especially for as long as codification is in its
infancy, a judicial inclination to fall back on pre-existing law is threaten-
ing. Where, like Orpheus, judges cannot resist the temptation to look
back, the new code has little chance of securing its intended role as a central
legal source, or, at least, as a central referent in legal discourse. This is not to
say that pre-existing law cannot be used to inform the new code. But, once
the code as so informed is enacted, such prior law must suffer the fate of the
drone who dies having fertilized the queen bee. Solutions must be sought,
or justified, within the network of code's provisions. A strong judicial
impulse to decide cases on their merits, in accordance with perceptions of
individualized justice is fatal to the life of the code. Where this attitude
prevails, decisionmakers are not likely to take seriously the question of how
a solution they favor (under the equities of the case) can be fitted into the
comprehensive scheme of the code. A legal discourse revolving around the
code finds a serious competitor; its "culture" is destabilized.

We can clearly illustrate this development if we consider judicial atti-
dudes toward the precedent, not all of which support a classic code. Discussion
of the role of precedent turns so quickly to the problem of its binding nature
that one many lose sight of varying conceptions of what "precedent" is all
about. For contrast, let us first outline a conception that does not fit into a
system of classical codification. Under this view a prior judgment works by
way of example: it shows how a life situation has been treated by a court.
Confronted with a new case, the judge compares the new situation with past
examples: the greater the degree of similarity between the new and the old,
the greater the force or weight of precedent. The premium is on resem-

20 For an interesting debate on the relative "closeness" of the codification in Israel, see A. Barak,
Toward Codification of the Civil Law, 1 Tel Aviv University Studies in Law, 9-34 (1975).
blance; the symmetry of professional anecdote counts more in decision-making and argumentation than anything else. And, it follows that if a classical code is imposed on the judiciary of this type, its ordering scheme and its conceptual instruments are apt to lose operational significance.21

A different conception of the role of precedents glides smoothly into a code culture and supports the code's central role in decisionmaking and legal discourse. Here, precedents are treated as repositories of more concrete formulations of the code's general provisions.22 The judge who looks at prior decisions is impatient with their factual context and prefers those that ruthlessly strip facts to their shadows. Thus what conventional common law doctrine would devalue as a dictum is welcome precisely because it stands independent of the concrete constellation of facts in the case. This conception of the role of precedent complements the general scheme of the code; precedents work to fill the code's conceptual vessels with more specific content. The code is "further elaborated"; its centrality remains unchallenged.

Although conceptually compatible, this normativistic approach to precedent may nevertheless endanger the longevity of the code. As the process of judicial norm-concretization unfolds, decisional standards may become increasingly rigid: the flexibility that inheres in the disposition to make subtle factual distinctions is absent. The accretion of ostensible elaboration may gain its own momentum, so that each new decision becomes a drop in the formation of an ever larger stalaclyte of norms. As a result of this process, the underlying code becomes increasingly incapable of adaptation to changing circumstances—a need that becomes more pressing as the age of the code advances. Observe that this danger is particularly acute in a setting of hierarchically organized judiciary, where obeisance to superiors is encouraged and the desire for uniformity (no dissenting opinions!) very strong.

It should thus come as no surprise that precedents so conceived will seldom be given formally binding force. But the resulting leeway should not be exaggerated, at least not in the setting of hierarchically organized, civil service judiciary. There is little danger that judges will enjoy a sense of independence so exuberant that it endangers the stability of the system.23

---

21 What we have sketched in the text in the form of a caricature, is, of course, an interaction of traditional common law judiciary with a classical code.

22 An early definition of this attitude can be found in Montesquieu: "les jugements ne soient jamais qu'un texte plus précis de la loi". See De l'esprit de lois, Liv. 11, Ch. 6. Observe that such precedents are not accorded variable weights: the norm located in the decision either applies or not. See M. Damaska, Structures of Authority and Comparative Criminal Procedure, 84 Yale L.J., 480, 497-8 (1975).

23 Stare decisis may, perhaps, be necessary as an internal stabilizer in the institutional framework of loosely hierarchical, fiercely independent judiciary. Observe that our discussion in the text offers an explanation of the continental rejection of binding precedent that is independent of historical circumstances in revolutionary France.
Firmly tied to the mast of civil service, they hear the seductive music of decisional freedom as Ulysses heard the singing of the sirens.\textsuperscript{24}

2. Supportive Legal Scholarship

There is, typically, a wide gap between the general provisions of the code and standards that can offer actual guidance in contingent cases. We have observed how judicial precedents narrow this gap. But this does not of itself suffice to maintain the centrality of a code in the life of the law. This is not simply a problem of weight, although we have seen that judicial gloss may become so voluminous as to submerge the code. There is also another problem: Practicing judges usually do not have sufficient time, proper inclinations, or the right perspective with which to establish the desirable linkage between code provisions and those mediating standards that can more realistically be regarded as outcome-shaping in legal practice.\textsuperscript{25} Praxis sine theoria caecus in via. It is here that the supportive role of scholarship comes in.

Scholars engage in intellectual weed control. With one eye on the systematic regulation of the code and the other on the resulting court decisions, scholars prune out the “aberrational” or “redundant” decisions, weaving the remainder—those that are truly representative—into the scheme of the code.\textsuperscript{26} But this is not all. They also engage in “norm concretization” of their own, by imagining future contingencies courts have not yet addressed. With scholars of the logically legalistic brand this activity is far from negligible; they are not devotees of the relevant and the topical. Observe also that—in imagining future cases—scholars proceed, as it were, under the veil of ignorance: where they would come out in an actual case or controversy is imperfectly know to them. And thus distanced from identifiable political positions, their role in forging the links between the generalities of the code and more concrete standards has a claim to neutrality.

In either of its variants this gardening role is best illustrated by commentaries to the code, whose supporting role in the life of a classic code can hardly be exaggerated. It may be wondered, however, whether scholarship

\textsuperscript{24} Another danger with this conception of precedent is that “norm concretizations” become too numerous to be surveyable: the code could be buried under judicial gloss. A hierarchical judicial apparatus, however, has its own internal devices to obviate this danger. For example, a committee of highly placed judges decides which decisions deserve to be publicized. There is also a role for legal scholarship to which we now turn in the text.

\textsuperscript{25} It is true, however, that specialized judicial officials can be given responsibilities in this area. Their activity leads, in some countries, to the development of instructions on how the code should be applied. These instructions are typically followed and are sometimes binding even in a formal sense. See M. Damaska, supra note 22 at p. 496.

\textsuperscript{26} Thus even where a code provision is of such extreme generality that it implies a delegation to the judiciary to shape a sphere of the law, the latter is relatively neatly ordered and surveyable.
may not have too many voices, and whether these voices may not be mutually cancelling. There is real danger in proliferation of scholarly work, so that scholarly "gardening" can be helpful to the code culture only on some conditions. A certain amount of logical self-discipline must be exercised: scholars must refrain from following all possible paths of analysis and reopening first questions. A spirit of cumulative scholarship should obtain. It is also possible that overchoice may be avoided where the judiciary informally follows only a limited number of scholars ("leading commentaries"). Where some such mechanism is at work, the proper linkage is established between the practice of the law and the generalities of the code, a linkage necessary for the code's vitality.27

III. A Postscript on Modern Tendencies

Although in varying degrees, circumstances supportive of classical codification existed in many continental countries for a considerable period of time. Are tendencies of development discernible in the late twentieth century likely to strengthen or to weaken these circumstances? Before closing, let us review several well-known trends and offer a few conjectures about their significance for our theme.

1. Intellectual Climated

Rapid technological advance has greatly accelerated the rate at which our broadening knowledge has revealed previously unsuspected complexities and interconnections among both natural and social phenomena. As a consequence of this development, old conceptualizations often appear simplistic and sometimes disintegrate. One wonders: is reality rationally structured around a few first principles, or is it much more complex? Can the human intellect, at least for the moment, match the complexity of life and control human organization?

These questions are differently answered in unified states and in pluralist societies. The former are guided by an ideology of progress, predicated on the view that society follows regularities the human mind can master: the future can be anticipated and inclusive social and economic planning can be attempted. Suckling on the milk of so many nurses, pluralist societies are more sceptical; efforts at regulation are here more tentative, fragmentary and spasmodic.28

27 It may well be that perceptions of indeterminacy of the law are not independent of the contrast between adversarial and nonadversarial proceedings. Where the responsibility for supplying the law is shouldered by two competing counsel, rather than (mainly) the judge, the range of possible choice of legal solutions is apt to increase. All other things remaining equal, there are likely to be more "hard cases". If the bureaucratic dislike of controversy and variety is absent, this tendency is reinforced.

28 On such contrary ideas on the role of intellect in humanorganization, see C. Lindblom, Politics and Markets, 248 ff (1977).
But everywhere the rate of social change has picked up considerably. This circumstance alone is not propitious for the coherent and relatively long-term regulation that a classical codification assumes. In brief, then, would-be codifiers face much more formidable difficulties than those encountered by drafters of classical codes at the crossroad of the eighteenth and nineteenth centuries: not only is the subject matter of regulation more complex, it is also quite unstable. Nor should it be overlooked that lawyers employing their conventional approaches and conceptualizations face an increasingly serious competition from practitioners of various modern disciplines, disciplines that have developed powerful methodologies and conceptual instruments to deal with social problems in novel ways.

2. Political Environment

It would seem that the social fabric increasingly needs self-conscious steering. In the light of new knowledge, the most innocent activity may suddenly appear a fit subject for regulation; the flushing of toilets may have to be regulated if millions of flushes can destroy a precious ecosystem. No governmental intervention in social life is spreading even in those states that on various ideological grounds would like to preserve a minimalist government. Even the penetralia of private law are not spared from regulatory intrusion that brings in larger issues of public policy. To use only one example, the humblest questions of tort law may afford a pretext to consider issues of wealth distribution, or some other “aggregate” concern. One offshoot of this often noted “public spiritedness” of law is that fewer and fewer issues are free of controversy and can safely be regarded as politically neutral. Also, previously semi-autonomous areas of law, such as property law, cannot any longer be conceived of as fit subjects for “closed” regulation; new interconnections increase, such as tax and zoning regulations in property law.

The implication of these developments for codification are easy to see in pluralist societies. The power to influence legislation is widely distributed, many “public policy” views compete, and “unprincipled” compromises in legislation are practically inevitable. Coherent normative schemes in any field of law have little chance of passage; even if the implications of some adjustments could ultimately be reconciled with the coherence required for a legislative text, there is simply not enough time to trace such interconnections. A coherent scheme has a chance to be enacted into law in those narrow and highly technical areas whose arcane nature prevents the partici-

---

30 Schwartz, *Contributory Negligence and Comparative Negligence*, 87 Yale L.J. 697, 708-710 (1978). As a further illustration, consider the changing landscape of civil liability as a result of the rise of social security schemes and insurance instruments.
pants in the political process from fully grasping the implications of proposed solutions. But, such technical regulations differ from classical codes on a variety of grounds (e.g. the level of generality and abstraction of the text).

In unified states the situation is different. If the political elite finds a statutory scheme desirable, the elite possesses political power sufficient to turn the scheme into law. But, even in unified societies few topics seem stable enough for a long-term regulation that a classic code represents.

3. The Changing Judiciary

A judiciary whose habits of thought are supportive of systematic codifications still exist in many countries.

Yet changes are in the offering. The domaine reservée of the codes in shrinking: they now compete with a disorderly heap of fragmentary statutes and even pieces of delegated legislation. The more new piecemeal regulations "trump" solutions to problems suggested by an analysis of code provisions, the less it makes sense to try to locate decision within the inclusive scheme of the code. This development is, of course, subversive of the pivotal role of the code in both legal discourse and decision-making. Even judges eager to attempt deductions from the network of code provisions (and decisions based on it) find it more and more futile to do so.

Alternative sources of guidance do not always take the form of outcome determinative rules—an important departure from traditional ideals. Traditionally, the continental judiciary was supposed to be guided by a network of rules, or a "normative program": where facts specified in a norm were found, a particular decision was expected to follow. Dispensation from rules was supposed to be tolerated only in areas where the matter to be

---

31 It is no coincidence that important codifications of law in this century were often products of an authoritarian regimes, both on the right (Mussolini) and on the left (Stalin).

Soviet theory celebrates legislation (and codifications) as "the highest form of law". The decline in comprehensive legislation and the move toward administrative regulations (and judicial law making) in pluralist societies is not attributed by Soviet scholarship to ramifications of technological change or the complexities of modern life in industrial states. Rather it is associated with the fear of "monopolistic capital" that people's representatives in the legislature might attempt radical social and economic reforms. In other words, the "ruling class" does no longer safely control the legislature. See, V.A. Tumanov, Burzhuaznai pravovai ideologiya, pp. 61, 77-84, 190 (1971).

32 Space does not permit us here to examine the extent to which judges have become " politicized" in many countries. Where they are authorized to assess the conformity of legislation with the constitution, it seems almost inevitable that they should see themselves as deciding political issues. And the sensitivity for political choices normally operates at the expense of concerns for a coherent codificatory scheme.

33 Whether traditional common law decisionmaking can be conceived as the application of rules is debatable. See the perceptive remarks of A. Simpson, The Common Law and Legal Theory, in Oxford Essays in Jurisprudence (Second Series), 88-89 (1973).
regulated was so changing and complex that legislators could not progress to a rule. But, as suggested a moment ago, it is a dominant characteristic of our time that old aggregations disintegrate and complexity increases. Thus one witnesses in many areas an expansion of guidelines that merely identify factors to be considered in decisionmaking, leaving the weight to be accorded to these factors undetermined.\textsuperscript{34} Incorporation of such guidelines, typically organized around shared exemplars, is contaminating; the code becomes impure. Decisional factors do not fit into the "strategic vision" of the code; they are too "tactical" and concrete in their language—and distort the abstractions and the parameter concepts of the codification.

But an even more dramatic shift in decisional standards may lie in the future. It has frequently been noted that regulations characterizing the contemporary states are primarily aimed at the short-range ordering of the future; assumptions about certain consequences lie close to their surface. This requires a clear orientation on the part of the decisionmaker toward assessing the consequences of whatever he chooses to do. Quite unsurprisingly, modern bureaucracies, other than judicial ones, are characterized by an increasing adoption—not of "normative programs"—but of various schemes for the calculation of consequences that will flow from alternative courses of action. The analysis of reciprocities of cost and benefit is only one example of this trend. Rather than relying on the subsumption of facts under rules, modern bureaucrats engage more and more in assessing consequences directly, without the mediation of rules.\textsuperscript{35} In some countries, such as United States, this "technocratic" thinking has already made inroads on the administration of justice, and this, according to some, presages the future. Just as bureaucracies guided by rules first appeared in general administration, only gradually "conquering" the courts,\textsuperscript{36} so, the argument goes, new technocratic approaches to law will gradually come to dominate in the temple of justice, replacing the traditional reliance on normative programs. It may well be that these predictions are wrong. But if there is some measure of truth in them, classical codifications will become increasingly impure (on the assumption that attempts will be made to

\textsuperscript{34} This "multi-factor approach is, of course, popular in America. On the continent it can be found in such areas as sentencing, or, more covertly, in the law of evidence.

\textsuperscript{35} It is true that decisionmaking under rules is not blind to consequences. The latter are considered in developing rules, built-in, as it were. Consequences are also considered in interpreting rules (interpretation with reference to "policy" or aim underlying the rule). Yet, at a point, the language of the rule establishes limits; without it "the rule of law" turns into "revolutionary legality". Moreover, the rule applier need not always embark on the sea of assessing consequences in the given case. At least in typical cases, he assumes that the role sufficiently considers desirable consequences and absolves him from the responsibility of assessing them. For a lucid and succinct discussion of the difference of deciding under rules and technocratic formulae, see T. Eckhoff/K. Jacobsen, \textit{Rationality and Responsibility}, 9-11 (1960).

\textsuperscript{36} This conquest was true more of the continent of Europe than of the Anglo-American countries. H. Coing, \textit{supra} note 18.
modernize them). Principles and rules will be mixed with guidelines, and technocratic formulae will be woven into the texture of the code.

4. Crisis of the Supporting Scholarship

The developments which we have sketched create great difficulties for the type of legal scholarship we have termed "logically legalistic". Old conceptualizations become increasingly obsolescent, because they are based on simpler, less dynamic data. Organizing principles lose their grip; the synthetic understanding of law seems to be disintegrating. New interconnections, such as the interpenetration of private and public law, endanger the vitality of classifications on the basis of which closed, coherent regulations were built.

The whole body of the law must be surveyed anew, and novel conceptualizations attempted. For the moment, however, this is a truly Herculean task. In the rapidly changing world it is difficult to detect larger and stable structures, so that the kaleidoscope of fragmentary statutes and regulations can be organized in a system and a new legal "algebra" developed. Perhaps more frustrating to the old approach is the modern orientation that represents a radically different type of thinking, and defies integration with "logical" or any other "legalism". In this situation many scholars give up their systematic and doctrinal concerns for the sake of dealing with narrow problems in a pragmatic fashion, refusing to consider how their solutions can be integrated into larger wholes. Even in countries that were until recently strongholds of "legal science", this type of scholarship is in a serious crisis.

If the foregoing diagnosis of contemporary developments and future trends is correct, then the impulse toward codification will weaken, at least in those countries that produced the first classical codifications. 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. 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.

57 They may be wrong because of the difficulties of making all decisions on "overall-appraisals", starting from first principles. Future bureaucracies are apt to develop regulations for "routine cases". Departing from them for the sake of over-all considerations may be as difficult to justify as it is difficult to reconcile mixtures of "act" and "rule" utilitarianism. In the end, then, the most important impact of technocratic thinking may be in designing regulations suited to our complex world, regulations that could be applied in more conventional ways (through mediation of rules).

All of which is not to say that old codes do not display *le dur désir de durer* in adverse circumstances. Nor does it mean that, somewhat refurbished, they may still not appear attractive in certain settings, if for no other reason than that of political symbolism. But the role of the Code as a political symbol falls outside of the purview of this essay.