

BÉLA POKOL

Professor Emeritus at Eötvös Loránd University, Hungary, Faculty of Law
and Political Sciences, Constitutional Judge,
Constitutional Court of Hungary

**CLARITY OF NORMS AND LEGAL HISTORY: HISTORICAL PATHS OF
DIVERGENCE FROM LEGAL RULES TO GENERAL NORMS**

Abstract

If we look at the development of European law from the mature period of Roman law to the development of the law in recent decades, we can see that the pattern of legally binding behaviour has become increasingly distant from the behaviour in specific situations. In Roman law, even the legal norm itself was a norm tailored to specific cases, but by the 1500s the law in European countries was largely made up of rules formulated at a more general level or merely settled in customary law. In the Enlightenment of the 1700s, however, the often-experienced judicial arbitrariness in interpreting the law led to the goal of a law consisting of completely precise rules, and even the prohibition of judicial interpretation of the law was considered possible. In comparison, since the 1970s, we have seen, in the whole European civilisation, including the countries of the Americas and other continents, the practice of law fixed at the level of constitutional values and general principles of law, rather than at the level of law with precision, which is merely a legal declaration. In this process, although the law is laid down in the laws of representative assemblies, in accordance with the principle of democracy, the law that is actually in force in individual cases is pronounced by judges, in a way that is far removed from the literal meaning of the law.

As a more general theorem of legal theory, the conceptual scheme of the structure of the legal system can be described as a layer of legal doctrine above the text of the law, and a layer of judicial precedents below it, which give concrete form to the rules contained in the text. However, a deeper historical and theoretical analysis can also show these layers of law in a more disaggregated way. This will be done in the following analyses.

If we look at the development of European law from the mature period of Roman law to the development of the law in recent decades, we can see that the pattern of legally binding behaviour has become increasingly distant from the behaviour in specific situations. In Roman law, even the legal norm itself was a norm tailored to specific cases, but by the 1500s the law in European countries was largely made up of rules formulated at a more general level or merely settled in customary law. In the Enlightenment of the 1700s, however,

the often-experienced judicial arbitrariness in interpreting the law led to the goal of a law consisting of completely precise rules, and even the prohibition of judicial interpretation of the law was considered possible. In comparison, since the 1970s, we have seen, in the whole European civilisation, including the countries of the Americas and other continents, the practice of law fixed at the level of constitutional values and general principles of law, rather than at the level of law with precision, which is merely a legal declaration. In this process, although the law is laid down in the laws of representative assemblies, in accordance with the principle of democracy, the law that is actually in force in individual cases is pronounced by judges, in a way that is far removed from the literal meaning of the law.

As a more general theorem of legal theory, the conceptual scheme of the structure of the legal system can be described as a layer of legal doctrine above the text of the law, and a layer of judicial precedents below it, which give concrete form to the rules contained in the text. However, a deeper historical and theoretical analysis can also show these layers of law in a more disaggregated way. This will be done in the following analyses.

1. Regulae iuris and Maxims

Roman law was essentially a collection of case decisions, and the great jurists of the classical period of this law adopted only subsidiarily some of the rules (*regulae iuris*) that had been emphasized by Greek philosophy in the century and a half before Christ. The real success of these rules came rather in the Late Classical period and after, in the period of massive legal work of the imperial apparatus, where the administrative and legal affairs of a vast empire had to be handled in simple formulas for the many small officials, rather than in the fine diction of the great classical jurists. This period also saw the beginning of the development of maxims to accompany the broader aspects of the rules. These were even simpler and shorter summaries of aspects that were often common and therefore inadequate in some cases where they overlapped with other normative aspects. Nevertheless, in the Roman imperial period, especially after the establishment of the Eastern Roman centre of gravity, maxims were also taken from ancient jurisprudence and incorporated into classical texts. The Justinianic summary of the *Digesta* of 533 and the other summary volumes contained this casuistic material, but the more comprehensive rules and maxims that became important during this period were summarized as the final title of the *Digesta* and thus bequeathed to posterity.

The revival of Roman law from 1100 onward in northern Italy and southern France continued its casuistic character, and serious systematization did not begin until around 1500, but the rules were highly valued from the beginning. In fact, according to Detlef Liebs, an expert on legal maxims, the development of Latin maxims, which emphasized the common core of many detailed rules, began in this period out of the traditional Roman legal heritage, initially for teaching purposes:

“The historical framework of Latin legal rules was thus, as a rule, neither classical Roman law nor a legal revelation before all time nor natural law (...) The main place of origin of Latin legal rules is rather the late medieval and early modern schoolroom”.¹

Of the second generation of glossators, Bulgarus, a student of Irnerius, had already written a gloss in 1140 that summarized the 17th title of the *Regulas* of *Digesta* in a separate work. These more comprehensive rules gradually spread beyond legal thought, so that in the second half of 1200 Dinus Mugellanus also prepared the rules for his summary of canon law, drawing on the rules of *Digesta* and revising and supplementing them. This transmission then, because of the essentially ecclesiastical character of medieval education, led to the gradual impact of these rules as part of the entire European cultural heritage. Let us look at this process in detail.

From normative individual case decisions to rules, the starting point for the Romans can be traced back to the end of the second of the second century B.C. when, for the first time, a generation of jurists appeared who not only compiled collections of case decisions, but also reflected more generally on emerging legal issues and dilemmas and expressed their views on them in legal treatises. We know from the fragments of Pomponius' *Digesta* that P. Mucius Scaevola, M. Junius Brutus, M. Manilius, and M. Porcius Cato were the most prominent members of this generation, and that they attempted to summarize specific areas of Roman law in a series of treatises. In the decades before their time, Greek philosophers began to come to Rome en masse from declining Greek cities to teach in the community, and the simplified ideas of Aristotle's logical works gradually spread among the jurists who wrote legal treatises. This Greek influence on the development of Roman legal thought in this period of Roman legal thought was the result of the extraction of common norms from the many individual cases and the replacement of the individual

¹ Liebs, Detlef (1983): 12: *Lateinische Rechtsregeln und Rechtssprichwörter*. (Dritte, überarbeitete Auflage.) Verlag C. H. Beck. München.

description by a more comprehensive classification of cases and, besides, a more comprehensive expression of the norm. In fact, this influence did not first appear in Rome in the jurists, but in the emerging linguistic thought, and the linguistic and logical knowledge of Rome began to influence the jurists, and the Roman jurists already absorbed these influences.

The first generalization from a mere ad hoc rule to a more comprehensive rule came from Cato, who formulated a more comprehensive rule in the area of testamentary disposition, namely the exclusion of the subsequent validity of an invalid will. In his time this was known as *sententia Catoniana*, but the Greek technique of generalizing ideas, which spread over a few decades, led to dozens of more comprehensive rules, and Cato's *sententia* became the

“*regula Catoniana*”. Q. Mucius Scaevola had already begun to elaborate comprehensive definitions of entire areas of law, drawing out commonalities from a variety of cases. “Q. Mucius not only made definitions, Pomponius (...) says that he was the first to arrange the law by genera (...) in a work of eighteen books. We know, for example, that he distinguished five genera of guardianship and that, in his opinion, there were as many genera of property as there were *causae* of acquiring the property of others”²

The Greek influence on Roman legal thought was the main impetus for the generalization of scattered cases that would become Cicero, who wanted to unify all of Roman law into a single system through generalizations and by emphasizing common concepts (“*ius civile in artem redactum*”), but this plan was not preserved for posterity.

In the first century of classical Roman law, beginning with the Principate, the first century A.D., there was a reluctance to abstract law, and generalisations were seen as distortions of jurisprudence. Although the more general legal norms established earlier, which went beyond the case, were retained, others were created during this period more for the purposes of legal education. For example, the *Institutions of Gaius*, intended as an introduction to law, also contained general rules and definitions for this purpose. In the Late Classical period, however, general normative material regained importance, and extensive collections of rules were produced:

“The first was Neratius Priscus, who was active during the reigns of Trajan and Hadrian. His *Regulae* are not only the earliest, but with fifteen books also the longest. From the middle of the second century come the works

² Stein, Peter (1966):39: *Regulae Iuris. From Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

of Pomponius, Gaius and Cervidius Scaevola. Both Paul and Ulpian wrote *regulae*, and in the late antique period Marcian, Modestinus, and Licinius Rufinus all wrote in this literary genre”³

As early as the period of classical Roman law, controversy arose over the relationship between the rules, legal concepts, and legal principles emphasized by legal scholars, on the one hand, and the relationship between authority, the law established by the organs of state power on a case-by-case basis, on the other. The school later called Proculians, led by Labeo, held that general principles and rules of law or definitions taken from previous case decisions have a life of their own and can later be applied as a rule of law, unless an exception is made in a case to limit the general principle of law. In contrast, the Sabine school, cited by Sabinus, held that these amendments were merely a product of jurisprudence and not of law itself, and therefore had no binding character on subsequent case decisions. Not coincidentally, it was Neratius, the leading figure of the Proculians, who later wrote an extensive work of the *Regulae* in fifteen volumes. The renewed role of the *Regulae* in late antiquity is evidenced by the fact that Emperor Hadrian appointed Neratius to the Imperial Council, the supreme imperial judicial body, whose main task was to prepare an answer and a jurisprudence after asking the emperor for a decision on a difficult case in any part of the empire, which was sent back in a rescript, a tract. For local judges in all parts of the empire, only a simplified legal presentation and general points of view were understandable, so the emphasis on general legal points of view and their simplified formulation came to the fore. This explains the focus on legal norms during this period: “The subordinate officials in the offices had no time for the subtleties of legal discussion contained in such works. What they wanted was a guide that provided a shortcut to the official view of the law”.⁴

The earlier debate on the legal force of legal norms and principles, based on the results of the glossators’ works, finally ended in the first half of the thirteenth century with the compromise, as Bartolus put it, that they did not create law in already decided cases and extracted the legal norm in question as a general legal idea from the concrete case law on the subject. But for the future cases for which rules of jurisprudence have not yet been established,

³ Stein, Peter (1966):51: *Regulae Iuris*. From *Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

⁴ Stein, Peter (1966): 81: *Regulae Iuris*. From *Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

these rules constitute the law, and on the basis of these rules these cases are to be decided.⁵

The abstraction of law from case norms to rules has not stopped, however, and the same pressures that have led from elaborate, case-specific rules to simpler and more general normative foundations have produced an even more general legal fixation in the form of legal maxims. This process was particularly evident among authors of late antiquity. While the rules still contain more or less precisely the contours of the particular group of cases, and thus the applicability of the normative clues contained in them is not too much diluted, the generalization at the level of maxims fixes only a mere legal idea for a whole area:

“The *regulae*, with which we were concerned hitherto, were all rules whose scope of application was quite clear (...) In late antiquity the word *regula* was applied to propositions of a different kind, to maxims so abstract that no reference to a concrete situation is discernible”.⁶

While the *regula* can still be regarded as a rule, although its broad formulation often necessitates the introduction of exceptions-and thus the limitation of its scope-because other legal principles must limit its application, the maxim permeates entire areas of law without any case limitation. The brevity of the formulation does not offer any closer clue due to its broadness and memorability, so that in most cases the maxim can only be concretized by reference to other normative references and is not directly applicable. E.g., a maxim of Paul from Title 17: “Non omne quod licet honestum est. Not everything is fair that should be done”.⁷ Of course, those interested in the uncompromising application of a particular maxim in a particular case may proclaim it as the truth set in stone and label those who argue against it from a different normative standpoint as violators of the “noblest right”.

The maxim usually results from a generalization of a normative point of reference developed for a concrete case by freeing it from the words of the concrete case and formulating it in general terms. Such a maxim is known, for example, from the legal history of the regulation of the guardianship relationship, where there were several guardians and in many disputes of

⁵ Stein, Peter (1966): 155: *Regulae Iuris*. From *Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

⁶ Stein, Peter (1966) 105: *Regulae Iuris*. From *Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

⁷ Hamza Gábor/Kállay István (ford.) (1973): 35: *De diversis regulis iuris antiqui*. (A *Digesta* 50. 17. *regulái latinul és magyarul*). Budapest ELTE.

this kind the question arose as to which guardian had the right to decide on the situation of the ward and the ward's property. In response, Emperor Justinian issued an ad hoc rule in a decision that matters concerning the guardianship of any guardian could only be validly decided by the consensus of all guardians. This was then adopted by his code into medieval canon law as a general maxim: "Quod omnes tangit debet ab omnibus approbari" – "what concerns all must be approved by all" – without any restriction to the original guardianship situation.⁸ Later, this maxim became the main battle cry within the ecclesiastical hierarchy for those who wanted to put the head of a monastery in office with the consent of the monks of the monastery, and even more generally, with the common European culture of legal maxims in the Enlightenment, it became one of the main battle cries of modern democracy: what concerns all must be approved by all!

But this nature of maxims is illustrated by the summary of many rules of evidence in Roman trials in a single short phrase: "ei incumbit probatio qui dicit non qui negat", the one who asserts something must prove it, not the one who denies it.⁹ Originally, the detailed rules provided that while the plaintiff bore the general burden of proof, it was up to him to prove the defendant's allegations in his defence, and the many contentious issues in this area and the detailed rules that developed in response were then expressed in the brief maxim above. In this context, it is also worth mentioning the reformulation of the rule on inheritance disputes, originally intended as a maxim – and thus extended to all law – the context being that in the case of a disputed question that could not be clearly decided on the basis of the facts, the interpretation more favourable to the heir should be chosen. However, the desire of the authors of the *Digesta* for comprehensive maxims has now given this regulation a formulation that can be used as an argument in any area of law without restriction: "semper in dubiis benigniora praeferenda sunt" – in case of doubt, the more favorable interpretation is to be chosen!¹⁰ But this statement, abbreviated as a maxim, leaves open the question of who should choose the better option! In the original context, however, it was clear that the heir gets the preference. In other words, the creation of a more general usage, expanded as a maxim, also provides an ambiguous norm in a number of cases and only seems to clarify it.

And this problem was constantly present in the use of Roman law revived in the Middle Ages, because one of the main concerns in editing the volumes

⁸ Stein, Peter, (2005): 70: A római jog Európa történetében. Osiris. Budapest.

⁹ Stein, Peter (1966): 108: *Regulae Iuris*. From Juristic Rules to Legal Maxims. Edinburgh: at University Press.

¹⁰ Stein, Peter (1966): 119: *Regulae Iuris*. From Juristic Rules to Legal Maxims. Edinburgh: at University Press.

of the Justinianic collection was to extract those arguments that could be read out of the textual description of individual cases and used as a general legal argument beyond the case. This was called *notabilia*, and a subgenre of it was the collection of overarching arguments that provided arguments in polar opposite directions in deciding cases. These pairs of pro and con arguments were called *brocadicums* or *brocardas*, and the dangers associated with them were recognized by Cinus de Pistoia as early as the early thirteenth century, for they meant arbitrary application of the law by litigious lawyers and consulting jurists.¹¹

In the commentatorial era, Baldus continued his master Bartolus's views on the binding nature of legal rules as opposed to case law in individual disputes, arguing that the party who can invoke a general rule reverses the burden of proof on the issue at hand because he is in a more advantageous legal position and is closer to winning a case. However, if the opposing party can show that the general rule does not apply in the case in question because of other rules, he loses this advantageous position, and the special rules take the place of the rule:

“The successor of Bartolus, Baldus, emphasized that a litigant who can invoke a rule favourable to him is *prima facie* in the right. There is a presumption that his case is the stronger one, and therefore it must be decided in his favour unless the other party expressly proves that the rule does not apply”.¹²

With this caveat, and with only subordinate legal force, the rules of law could not supplant the detailed case rules of the *Digesta* and the other volumes of the Justinian codification, while at the same time bringing the maxims and rules of Roman law in use outside of court proceedings up to the level of the more general arguments of rhetoric and logic in the common European cultural heritage. The result is that while jurists were trained in the variegation of thousands of detailed cases of jurisprudence, the overlapping normative bases and the constant introduction of exceptions to reconcile them forced caution in the use of certain legal principles and maxims, while non-lawyers in the intellectual world were most concerned to make them the basis of their reasoning and judgments, especially as abstract-deductive systems thinking, starting from the French (Descartes, Pascal), took off in the second half of the 17th century. Century. Its absence in English and early American legal

¹¹ Lange, Hermann (1997): 142: *Römisches Recht im Mittelalter: Band I. Die Glossatoren*. C. H. Beck'sche Verlagsbuchhandlung, München.

¹² Stein, Peter (1966): 154: 108: *Regulae Iuris. From Juristic Rules to Legal Maxims*. Edinburgh: at University Press.

thought, which carried on their intellectual treasure, shaped differently the forms of abstraction of law in Anglo-American legal life, on the one hand, and in continental European legal life, on the other.

2. The role of legal maxims in pragmatic Anglo-American legal life

Although from 1300 onwards the English no longer adhered to Roman law, which became a common European law, the rules and maxims of Roman law that had been adopted by then became the inseparable basis of common law summaries. John Fortescue wrote a dialogue in 1469 in the form of “*De Laudibus Legum Angliae*”, in which he summarized the English common law of the time. He said to his pupil in his “Catalogue of the Law of England” that although it would take many years to learn the whole law, it could be done in a year at the level of the rules and maxims that underlie it: “The principles which the commentator (Aristotle) said were efficient causes are, moreover, certain universals which the scholars of the laws of England and the mathematicians alike call maxims”.¹³ According to Fortescue, already the chief justice Edward Coke in the beginning of the 16th century used the power of maxims in the sense of Aristotle’s first principles, axioms, which in his interpretation, as the ultimate foundations of law, no longer need proof and are necessarily, without exception, always applicable: “maxim, a sure foundation or ground of art is so certain and uncontrollable that it should not be questioned”.¹⁴ In parallel with Coke, Francis Bacon, who held the office of attorney general to Queen Elizabeth, his great rival, attempted to rationalize the entire body of English common law by attempting to give it the force of law in a collection of general maxims in 1597, emphasizing the basic principles of law, which, though not successfully, would lead subsequent authors, who then wrote more and more maxims, to present each part of the detailed common law as a bundle of general maxims. The Maxims of Equity by Richard Francis were published in 1727 and transferred to and published in the United States in 1823. According to several authors, however, the most comprehensive was Herbert Broom’s 1845 collection of maxims, which covered all of English law in five hundred maxims and listed dozens of maxims with examples of their meaning and relationships, separately for the organization of justice and jurisdiction, property law, inheritance law, contract law, constitutional law, criminal law, evidence, etc. Many of

¹³ McQuade, Stanly J. (1996) 77: Ancient Legal Maxims and Modern Human Rights. *Campbell Law Review*. (Vol. 18:75) 75–120.p.

¹⁴ quoted in Simpson 1981: 644

these were derived from Roman law and were either part of the rules or were extracted from them by glossators and commentators and created as *notabilia*, or, moreover, were modelled in English law and developed from detailed case rules into maxims that emphasized overarching legal ideas.¹⁵

In contrast to the restrained use of maxims in continental Europe, the English, and in their wake the Americans, gave a more prominent role to maxims, the overarching principles of law, and while Bartolus and later Baldus gave them primacy only in the initial stages of legal reasoning, against which they could be eclipsed by the exposition of more detailed rules for a particular situation, in Anglo-American legal life they were for a long time the undisputed and unchallengeable normative quantity.

In common law countries, however, this gradually came to an end from the middle of the 18th century. For even if legal dogmatics, as a tendentially narrow system of meaning, did not take centre stage in the regulation of individual areas of law as exclusively as it did in continental Europe – with the Germans in the lead – the English and especially the Americans also began to work on the law in systematic monographs, in contrast to the earlier open maxims of legal topics. The American *Joseph Story*, who later became a member of the Supreme Court, summarized the law in nine systematic monographs on specific topics of private law and procedural law in the first half of the 19th century, but a number of authors outside his own circle also summarized the law in such monographs. Against this background, the loose maxims, with their constantly overlapping effects and contradictions, lost their primary role in the specific case. The epigrammatic brevity that had earlier made them successful proved insufficient for the complex legal debates of life in modern industrial societies. By the beginning of the 20th century, maxims and their principled support at the level of legal principle had virtually faded into the background in jurisprudence, and the old legal maxims were used only as illustrations in legal arguments.

In this situation, constitutional jurisprudence based on fundamental constitutional rights, which became the focus of American law in the early 1960s, has brought about a turning point. To understand this, however, it is first necessary to take a closer look at the processes and tendencies toward the abstraction of law and morality on the European continent since 1700.

¹⁵ e.g., Edward Coke also developed two such maxims, using the concise Latin style of the Roman maxims for better effect, see Simpson 1981: 636

3. The parallel development of systematic legal dogmatics and human rights

I. In France, which became the centre of European intellectual life at the beginning of the 17th century, the medieval forms of case thinking were replaced by deductive thinking based on abstract principles, which in the following decades became known as “geometrical thinking” because it was applied for the first time. *René Descartes*, drawing on the earlier French works on logic, formulated with great influence the requirements of systems thinking, which proceeds deductively from abstract first principles, and the advantages of logical analysis based on common features rather than the details of many cases. Descriptions that search for common features based on necessarily true principles and deduce from them in a tight logical sequence of steps can yield real truths, and this allows us to arrive at certain truths beyond first certain principles. The basis of all this is the abstraction of details, and the theses thus obtained are reduced to certain first principles (axioms), and the middle-level theorems thus proved then provide a secure basis from which to derive order from the chaotic multiplicity of details by syllogistic logic in other areas as well.

This process of abstraction in law was continued from the 1660s onward by *Samuel Pufendorf*, who no longer emphasized more comprehensive concepts and principles merely in the form of short, mental maxims, but rather placed the individual concepts in a relationship free of contradiction, thus bringing the traditional material of Roman law into an abstract system. Following in the footsteps of the mathematician-theologian *Christian Wolff*, from the 1730s he placed the dogmatic concepts and dogmatic principles of private law and legal procedure in an even narrower logical order, which then culminated in the development of a system of individual legal dogmatic categories from the beginning of the 19th century in the conscious activity of Savigny, Puchta, and Anselm Feuerbach.¹⁶

As a result of these developments, in some countries of continental Europe in the 19th century the regulation of certain areas of law was laid down in codes of law, which contained a large number of dogmatically structured rules in private law, in criminal law, then in procedural law, and in newly emerging areas of law such as labour law. Here, in light of modern developments, law was anchored at the level of the abstractness of Roman

¹⁶ see extensively Hattenhauer 2000; in English Pokol Béla (2008) 117–152: Középkori és újkori jogtudomány. Az európai jogi gondolkodás fejlődése. Dialóg Campus Kiadó. Budapest.

legal rule (*regulae*), breaking with the ad hoc concreteness of Roman law, precisely because of the incentives that no longer permitted jurisprudence based on purely ad hoc norms, even in the era of complex administration of the late Roman Empire. But in modern times, dogmatically structured law has reached a higher level of abstraction that has given judges too much discretion in deciding individual cases, leading to legal uncertainty. Thus, in the course of the 19th century, although it was the most forbidding thesis of the Enlightenment, judge-made law developed as a new level of case-based legal stratum, from which the open statutory rules were constantly concretized and without which they could not function predictably. Abstract law, embodied in the text of the codes and in the conceptual level of legal dogmatics, could therefore provide an adequate legal service in continental Europe only in conjunction with the concretizing judicial level.

From 1800 onward, the dogmatics of legal concepts and the contradiction-free conceptual apparatus of a streamlined conceptual system prevailed throughout continental Europe, and the earlier legal maxims and legal principles were discarded as unsystematic and contradictory legal foundations. Parallel to this process of development, however, another process set in from the early 17th century onward, giving rise, first, to the idea of a secular natural law within law and, second, to the idea of human rights, which was brought into focus by moral philosophers and other intellectuals, mainly outside law. The starting point was the Dutchman *Hugo Grotius* with his work of 1625, in the wake of which the idea of a secular natural law that could be explored by reason began to spread, replacing the earlier Christian natural law. Within law, this also contributed to the emergence of the systematic legal dogmatics mentioned above; outside law, the creation of abstract catalogues of human rights by moral philosophers increasingly placed human rights at the centre of the ideological-political struggle. As we have seen above, abstract legal principles and maxims actually overlap in concrete application in most cases, but non-legal laymen have been enthusiastic supporters of the reasoned legal ideas contained in them since the beginning of modern times. Similarly, abstract human rights are only ever capable of providing a single point of reference and can only ever be appropriate in concrete cases through a series of interrelated limitations. However, in the ideological-political struggles that were dissatisfied with feudal conditions, they became inflammatory slogans and were emphasized as truly compelling first principles and absolute truths.

The abstract rationalism of the French Enlightenment produced judgments and social blueprints derived from abstract principles in everyday intellectual struggles, and when the French Revolution was carried out on the basis of

this intellectual movement and those considered enemies were relentlessly condemned on the basis of abstract principles and human rights, the abstract rationalism of the revolutionaries largely led to the mutual annihilation of the revolutionaries. (And then, eerily, the same thing was repeated with the Russian Bolshevik revolutionaries, who operated on the same principles and with the same style of thinking!) The terrible experience of judgments based on abstract principles led some of the contemporary English thinkers of the French Revolution to prefer pragmatic reasoning and always partial changes in the status quo to abstract rationalism and its erasure of all traditions.¹⁷

The French revolutionaries left their convictions along these lines in the Declaration of the Rights of Man of 1789, and while the terrible experiences of their revolution long left them ineffective in continental Europe, they were adopted as constitutional amendments in the newly constitutionalized and independent United States. These were essentially political liberties – freedom of speech, freedom of assembly, etc. – and some of the European constitutions drafted in the later political struggles of 1848 or even later also included them. However, at that time it was an exercise of the functions of the legislature rather than a right at the jurisdictional level. This did not change in the United States, where the Federal Supreme Court decided in 1803 to bind the laws of the Federation and its member states to the Constitution and to prohibit them for unconstitutionality if they exceeded the division of powers between the Federation and the member states established in the Constitution. This was the birth of constitutional adjudication in modern history, but at first it was only a jurisdiction limited to settling disputes between federal and state authorities. This began to change when, in the early 20th century, the Federal Supreme Court began to strike down laws for unconstitutionality, even beyond jurisdictional disputes based on fundamental constitutional rights and principles. In this way, constitutional adjudication became largely a form of fundamental rights adjudication and began to function as a competitor to the democratic will and legislation of Congress.

This change in character and the political opportunities it created led some of the major capital groups in the United States to attempt to gain dominance over competing social groups and other capital groups, not through mass elections and majorities in the legislature, but by gaining majorities in the judiciary and relying on constitutional judicial processes based on fundamental constitutional

¹⁷ see Sunstein 2007: 353–408 for an analysis of Edmund Burke’s thought on this point Sunstein, Cass R. (2007): *Burkean Minimalism*. Michigan Law Review. November, 2006. (Vol. 105) 353–408. p.

rights. This political strategy was developed beginning in the 1910s by large groups of commercial and banking capital, which, in contrast to the conservative American majority, sought to achieve general social domination and bring about social and political change in their favour by appropriating and exploiting the grievances of various minorities and marginalizing rival groups of productive capital and their social base in the governance of society. The largest banking groups founded the American Civil Liberties Union (ACLU) in the 1920s and, with its help, first championed the constitutional rights of the black minority by addressing their grievances-financially supporting its apex body, the NAACP-and then, beginning in the mid-1950s, created a majority for this technique of social control in the Supreme Court by successively launching the various human rights foundations and the fundamental rights movement. Later, as the demands of feminists, homosexual/lesbian minorities, and then immigrant minorities, the homeless, animal rights activists, the disabled, etc., were taken up, the once massive American conservative majority morphed into a collection of many small, opposing minorities, and politics became based on the protection of minorities and the attainment and maintenance of overall social supremacy by them.

“The American Fund for Public Service was founded in 1922 and for a short time supported important citizens’ rights efforts. Roger Baldwin, the director of the ACLU, also became the director of the new fund, and the original board was largely composed of the members of the ACLU’s national committee (...) the Fund supported a wide range of leftist causes in the 1920s and 1930s, and the Fund was the primary source of funding for ACLU-led court battles in the 1920s (...) The stock market crash of 1929 devastated the Fund, however, and as a result its support for litigation declined dramatically in the 1930s” (Epp 1998: 58).

Thus, alongside (or even above) the legislature, the constitutional adjudication has become the principal normative shaper, now not only controlling the legislature but also allowing direct constitutional challenges so that individual plaintiffs can choose whether to sue under the more detailed rules of common law or prefer to bring a constitutional challenge and ground their complaint in constitutional arguments. Thousands of U.S. law firms have adopted this litigation approach since the 1960s, developing techniques to litigate directly on the basis of fundamental rights, and fundamental rights movements have also taken advantage of this opportunity by establishing legal departments. “Cause lawyers” are the legal departments of a minority movement that

fight the movement's political goals in the courtroom by using fundamental constitutional rights to set precedents.¹⁸

Beginning in the second half of the 1960s, these developments led to new currents of legal theory that rehabilitated legal maxims and principles in American legal life, alongside or in place of legal dogmatic categories, and made them a central part of the law alongside the necessarily looser arguments of the fundamental rights argument.

4. The rehabilitation of legal principles and maxims: Dworkin's appearance

In the United States, the aforementioned turmoil over fundamental rights has led to a proliferation of constitutional cases based on loose and political value-based decisions derived from abstract legal principles, rather than the formerly more dogmatic and systematic jurisprudence based on statutes and precedents, and the re-emergence of discredited maxims and legal principles. The judges of the supreme courts are unable to develop clear legal concepts that cover entire areas of law without contradiction when deciding a case on the basis of loose fundamental rights. However, the large background of the banking circles in the intellectual sphere and in the media – in the neo-Gamscian sense: their organic intelligence – has provided them with broad intellectual and artistic support and its dissemination in public opinion. The whole was presented as a struggle for the “rights of man” against the laws of selfish politicians. This development rehabilitated thinking in terms of legal maxims and legal principles to a large extent in American intellectual life, and it was then Ronald Dworkin who, in the second half of the 1960s, as a theoretical summary of the process that had already taken place, took up the cause of legal principles as a higher level of law as opposed to rules.

Dworkin thus turned against the legal view of the English professor H.L.A. Hart from Oxford, who in 1960 had formulated a largely consensual view of modern law as a set of rules.¹⁹ Dworkin, on the other hand, pointed out that this meant a narrowing of the law, since the unwritten principles of customary law overshadowed the rule-based statutory provisions and these overshadowed the contradictory rule-based provisions in court decisions. It is clear from Dworkin's study that he raised this issue without any knowledge of the six hundred years of development and change in the field, using the example of an

¹⁸ see Scheingold 1998: 115–150 Sarat, Austin/S. Scheingold (ed.): *Cause Lawyering. Political Commitments and Professional Responsibilities*. New York. Oxford University Press. 1998 118–150 p.

¹⁹ cf. Hart, H. L. A. (1995): *A jog fogalma. Osiris*. (Ford. Takács Péter) Budapest.

1897 U.S. Supreme Court decision in which an inheritance matter—the decedent had murdered the testator in order to quickly obtain the inheritance—was decided by the court on the basis of a broad legal maxim, depriving the murderer of the inheritance, which was thus different from a judgment that would have considered only the norms of rule inheritance law. Based on this example, Dworkin’s overarching thesis was that law contains not only the body of law at the level of rules, but also the body of law at the level of principles, and that in the event of a conflict, the body of law at the level of principles is the superior body of law that takes precedence over the rules.²⁰ This is precisely what the English have professed since Chief Justice Coke and then the Americans—in contrast to the more modest role of principle in the laws of continental Europe—and it was relegated to the background before Dworkin. but it was still possible to find such legal reasoning and judgment in a U.S. Supreme Court decision, as Dworkin exceptionally did in 1897.²¹ However, they were relegated to the background in order to create a more rigorous law, and these legal principles and maxims could only be considered as an aid to argumentation alongside legal dogmatic concepts. Dworkin changed this neglected role as his main theoretical thesis.

A similar attempt to rehabilitate legal maxims in Germany was made by *Theodor Viehweg* in 1952 with the highlighting of legal topics and legal maxims in contrast to a legal dogmatics perceived as too rigid, but after careful discussion it affected only German and from there the rest of continental legal thought, that in the first stage of legal development there is room only for current maxims, and that in the second stage the norms thus developed must be incorporated into legal doctrine by concentrating on the conceptual system of the legal field in question. Thus, in this conception, the maxims of law remain subordinate to the dogmatics of law and to the rules-based norms of law – just as Bartolus decided this question six hundred years ago. Of course, legal maxims are also passed on to a greater or lesser extent to a narrower circle of younger generations of jurists in continental Europe, but they are seen more as a means of maintaining the prestige of the “profession” than as a means of fighting the rules in legal policy. For example, the German *Detlef Liebs*, mentioned above, published 1640 legal sayings in Latin together with a German translation in his 1983 book, some of which are still sometimes used by educated German jurists today.²²

²⁰ Dworkin, Ronald (1977): 65–89: Is Law the System of Rules? In: uő (szerk.): *The Philosophy of Law*. London. Oxford University Press. 65–89.p.

²¹ but actually fifty years before him Benjamin Cardozo, who introduced the role of legal principles in law in his book based on that very judgment, see Cardozo, Benjamin N. (1921): *The Nature of Juridical Process*. New Haven: Yale Univ. Press.

²² Liebs, Detlef (1983): *Lateinische Rechtsregeln und Rechtssprichwörter*. (Dritte, überarbeitete Auflage.) Verlag C. H. Beck. München.

It should be noted, however, that the strong push for fundamental rights in Europe in recent decades has given legal maxims enormous support from power relations beyond law, just as the rise of fundamental rights in America and the shift in social governance from congressional legislation to Supreme Court constitutional decisions has come about through a constellation of socio-political power relations since the 1960s. As a result of the general shift in political power, the idea of human rights and natural law was strongly supported by those in power here and became an important part of the definition of law, first in the United States and then, under pressure from the dominant political forces here, in European countries. After World War II, constitutionalisation under the control of the victorious American powers in Germany, Italy, and Austria introduced the institution of constitutional adjudication and incorporated the catalogue of human rights into the Constitution, bringing it to the level of concrete application of law. It is true that this “constitutionalisation” of law did not really achieve the same effect as it did here in the U.S. because of the infiltration of German, Austrian and Italian legal culture, but this process continued after the collapse of the Soviet power bloc by the U.S. in the 1990s. Here, too, constitutional courts with broad powers have been established, and here, too, there is no longer the resistant legal thinking in defence of rule law and legal dogmatics that would sufficiently ennoble the constitutionalisation of law. Moreover, since the 1990s, organizations have been established and strengthened at the pan-European level that use human rights as a central tool for monitoring the internal legal and political systems of individual countries. The Council of Europe and the Strasbourg Court of Human Rights, for example, can be mentioned here, through which the domestic law of individual states is reviewed and overruled. Although some critics in 2001 called the U.S.-led military strikes and occupations in Serbia “human rights imperialism” in the name of defending human rights, this is also the method of global control that we are now highlighting.

As a result, a legal dogmatic background can be observed in a number of legal areas, and certain provisions of private law, criminal law and procedural law can be reviewed in the light of human rights and natural law principles transformed into fundamental constitutional rights. The problem with these human rights and legal principles, however, is that while they represent overarching civilizational values, they are irreconcilably opposed to each other at a concrete level in the adjudication of a concrete case. It is worth quoting the Scotsman Neil MacCormick at length on this problem:

“Why don’t we just let the principles and values do their work, without the seemingly useless interposition of rules? (...) Why should we resign ourselves

to these detailed and complex rules and legal provisions, behind which we must always fall back on the underlying principles and values to solve our perennial problems of interpretation (...) Recourse to crude values and principles would thus have two defects (...) The establishment or concretization of a principle for a particular class of cases is neither a derivation from the principle nor a discovery of implicit meaning; it is the establishment of a more concrete and categorical requirement in the spirit of the principle, guided both by a sense of what is practically feasible (or enforceable) and by a recognition of the danger of conflict with other principles or values that have themselves been concretized by other determinations. Neither the delineation between duty and goal nor the achievement of balance or reconciliation of potentially conflicting values or principles is possible without some determination”²³

In other words, the rules of modern legal systems, dogmatically structured and characterized by the imposition of limits and compromises between the principles that govern them, are also bearers of fundamental values and legal principles, but it is precisely in the context of resolving their contradictions that they have acquired such content. Thus, by creating the possibility of directly invoking fundamental rights and legal principles – and these rules can be used not only to interpret them, insofar as they leave gaps and can be interpreted in a certain direction, but they can also be used to abrogate the rules based on them – we are, in effect, reintroducing the eliminated contradictions into the normative support of the judge. The judge will then give preference to one of the relevant fundamental rights and legal principles and be forced to relegate other fundamental rights and legal principles to the background or even leave them untouched in the background. At that point, the losing party’s lawyer – if he does his job well and is prepared with all the fundamental rights material available for the case – will appeal and ask the Supreme Court to rule differently, relying on the fundamental rights and legal principles that have been left in the background. In other words, the law becomes unforgivably open and undecidable in individual cases.

The American *Frederick Schauer* challenges the separation of rules and legal principles/norms into different levels from a different perspective. He argues that if the legislature chooses to regulate in an area at the level of more abstract norms, and avoids establishing more precise rules for narrower groups of cases within the area, and gives judges only abstract guidelines for judging the cases before them, then judicial practice will spontaneously begin to fill in the principles/norms with more precise rules for a narrower group of cases. If, on the other hand, the legislature avoids any abstract normative

²³ MacCormick, Neil (1990) 547–548: Reconstruction after Deconstruction: A Response to CLS. *Oxford Journal of Legal Studies*. (Vol. 10) 539–558.p.

support in a given area and decides all issues by more precise rules for each narrow group of cases, then judicial practice will begin to extract the more abstract normative support from the detailed rules in the many cases that arise, and after a while an abstract standard/principle level will be added to the body of rules to judge the cases. In other words: In the complexity of modern circumstances, judges take into account both the concrete set of rules and legal principles in their adjudication, and if the legislature creates only one, judges will develop the other themselves in their adjudication practice.

“I would like to point out that the choice between rules and norms, between specific and vague guidelines, does not make nearly as much difference as is commonly thought. And this is not because there is no difference between rules and norms, but because there is a difference, but also because the adaptive behaviour of rule interpreters and rule enforcers pushes rules toward norms and norms toward rules”²⁴

The false duality between rules and legal principles and the superimposition of rules and legal principles, broadly posited by Ronald Dworkin, merely provided a theoretical foundation for what the American “fundamental rights revolution” had already accomplished in the United States in the 1960s. While rules were indeed compromised forms of conflicting fundamental rights and legal principles, Dworkin viewed the level of rules and the level of legal principles as two independent sets of norms, and if one was dissatisfied with the norm at the level of rules, one could override it with “nobler” legal principles. In this theoretical form, the American fundamental rights revolution became exportable and, in particular, influenced legal thinking in the Central European countries of the former Soviet bloc from the 1990s onward. However, as we have seen, this is a theoretical fallacy. Rather, its effect is that social groups dissatisfied with parts of the existing law may take a stand against certain legislation on the basis of this legal ideology and seek to create a different set of legal norms based on “nobler” legal principles and fundamental rights.

Moreover, with the centrality of constitutional adjudication and the emergence of fundamental rights as a central component of law, the “fundamentalisation” of a number of parts of law has also begun. Since the Enlightenment, the catalogue of fundamental rights was limited to political freedoms, followed by economic and social rights in the late 1800s and cultural and informational rights in the 1970s, and so it has continued

²⁴ Schauer, Frederick (2003):305: The Convergence of Rules and Standards. *New Zealand Law Review*. 2003. 303–328.p.

ever since. For each part of the right can also take the form of a fundamental right, e.g., the important issue of environmental protection requires the development of thousands upon thousands of environmental regulations, and the development of these regulations among the many different interests and the many value considerations that occur in a political democracy gives rise to thousands of political debates and compromises. But an alternative to this democratic path is to define all environmental law as a basic constitutional right to a “healthy environment”, and when this is achieved, all that is needed is to push the Constitutional Court with a few members in the direction of relying on the specialized cadre of organic intellectuals from the intellectual and media spheres to specify the details of the basic right in specific areas of environmental issues through tests and standards appropriate to the dominant group. The end result will still be a normative set of hundreds of tests and yardsticks against the backdrop of a comprehensive fundamental right, but this will have been shaped not by hundreds of provisions of parliamentary laws but by fundamental rights jurisprudence. This alternative to democracy in the legislative and social spheres is in the interest of those social groups and their capitalist leadership circles that have greater control over the intellectual-media sphere but do not rely on the control of millions of citizens in elections and thus on their votes.

Ultimately, the “fundamental rights revolution” within the legal system of any country can be understood as a technique of legal change aimed at introducing a new body of law promoted by a group of moral philosophers and the media elite, as opposed to legislation and professional jurisprudence developed in light of legal dogmatic categories. In hundreds and thousands of decisions of the Constitutional Court on fundamental rights, norms and tests on abstract fundamental rights have been developed over time and concretized by focusing on one or another fundamental right and legal principle for a particular group of cases. In a few decades, a concrete body of law will be created in the same way as before, except that the regulating principles will be fundamental rights and their tests and standards, rather than legal dogmatic categories. But if a social group is dissatisfied with this, it will resort to the fundamental rights and constitutional principles, and in its abstraction will begin to overturn these tests and yardsticks and create a new concrete regulation more favourable to it. That is, abstract and contradictory fundamental rights and legal principles in themselves are incapable of providing a lasting legal service, and if we use them not only to interpret the rules that contain their compromises, but also to overturn them, we only begin another revolution through law.