

Ladies and Gentlemen, Dear Guests,

Let me start by thanking you for the opportunity to deliver a speech here at the European Commission which touches on issues of lawmaking. In my view, meeting lawyers dealing professionally with lawmaking, whether at national or European level, is extremely important because law and faith in justice are fundamental pillars on which democratic society and all democratic communities (including the European Union) stand. European unification and the creation of new – Community – law is a phenomenon of the latter half of the 20th century. A phenomenon which, without exaggeration, tore down the classic understanding of law.

By reason of my duties as the Minister Responsible for Legislation, I have a close affinity to the field of legislation and executive lawmaking, an area with broad social connotations. Legislation is important especially when it replaces the spontaneous creation and application of non-legislative rules, by which I mean conduct shaped by those who do not have the democratic legitimacy to set binding universal rules. Whenever I hear talk that legislation is a necessary evil to control society, I counter this with the argument that legislation and lawmaking in general is actually a prerequisite if society is to develop and, on the basis of majority decision-making, to set rules that are enforceable and applicable for all.

In the democratic rule of law, it appears to be accepted without argument that the legislature is the parliament. This argument is both true and a fiction. There is no doubt that the formal legislature is indeed parliament, which is the only body entitled to pass and enact legislation. If the formal legislature fails to manifest its will sufficiently, a legal norm cannot be regarded as binding legislation, and failure to comply with the requirement of the legislature's formal consent renders such a norm void and possibly null.

The material legislature is much more diverse and consists of several entities. The material legislature, contrary to the parliament, lends a piece of legislation its values and gives a legal norm its content. Parliament, as the formal legislature, is unable to think of all the conceptual considerations that led the promoter (mostly the government) to submit the bill. Without expert support, in the vast majority of cases interventions by the formal legislature can be regarded as unfortunate, and often destructive. The material legislature, as a group of experts, will never be endowed with formal legislative power, and this is as it should be, because not only does it not have a mandate from the people, but sometimes it is not even able to accept outside interference intended to improve the legislative proposals submitted. In a

democratic rule of law, the formal legislature should play a supervisory role and should have the concentrated wisdom to know that no legal norm will grasp life in its entirety.

The lawmaking process, in our era of newly acquired democracy, has taken on entirely new dimensions which have not yet been adequately resolved in practice, in theory or judicially. I am thinking in particular of the Czech Republic's accession to the European Union, which significantly transformed our national law and expanded the sources of law in force and applicable in the Czech Republic. Now, the creation of rules of conduct in the form of legal norms is not only the prerogative of the Czech legislature, and we need to adapt our legal thinking to the new structures arising from European law. At the level of executive power, I have observed gradual, deepening knowledge of European law, which is certainly immensely pleasing to me. A new dimension to the creation of laws is judicial lawmaking, which is becoming increasingly important, not only because finishing touches are being put to the law by the highest judicial authorities from the general system of courts, but in particular because the Constitutional Court is adding its own finishing touches to the law.

The European Communities were created as international organizations equipped with their own legal personality; from the outset, they were in a position to adopt legal norms to the extent that the Rome Treaties conferred powers on them. If legal norms are to be legitimate norms, then it should be stressed that the legitimacy of laws depends on their approval process. Criticism of democratic deficit used to be frequently argued in relation to Community law. Having taken a deeper look at the development of procedural rules applied in the adoption of European legal norms, I am compelled to point out that this reservation is no longer acceptable. Over time, the European Communities and the European Union have eliminated a significant chunk of the procedural rules suffering from the democratic deficit, and I am wholeheartedly convinced that Community law has adopted procedural mechanisms typical of democratic post-modern legal systems, as a result of which claims of a democratic deficit necessarily fall flat.

If, however, I were to talk about the practical implications of Community law in Czech law, a legal phenomenon which has had to be 'cracked' in the past and is now faced by the new Member States is the destruction or, rather, the overlapping of several legal systems, from which a somewhat randomly designed relationship is formed in terms of the effects that the legal norms arising from these systems have in national law. I am referring to the overlapping of national, Community and international law. The polycentrism of law means that, today, national law is not an isolated set of provisions adopted by the national legislature,

but that national law and, by extension, the national legislature are becoming components of the mutual relations brought about by pan-European developments.

Over its evolution, Community law has lost its heart, comprising the idea of economic cooperation and ease of trade between the countries in the European continent. European law is expanding its reach in an evolutionary way even into areas that were previously the sole preserve of national law. It is through European law that EU Member States today enter into international commitments; the dualistic theory of the relationship between national and international law has been overcome even in the Czech Republic following the adoption of a 'euro-amendment' to the Czech Constitution in 2001; it is through European law that a conduit into the Czech legal system has been opened for the separate EU codification of human rights and fundamental freedoms, which, after the ratification of the Lisbon Treaty in particular, will form part of primary law and will substantially modify the European Union's basic orientation of values and inject the EU with a new dynamic charge. These days – and in the future this will be more so – citizens do not find their rights and obligations solely in the precepts of the domestic legislature, but also in the regulations enacted by European legislators and the international community. Even rights and obligations not, in the strict sense, of a domestic nature may be invoked before the national courts, which is a phenomenon completely unknown in the 20th century. Judicial and application methods are still looking for ways to deal with this situation in a process which, in my view, will last for at least two decades of this century.

While it was typical for the 20th century to search for a relationship between positive and natural law, which was undoubtedly influenced by the Second World War, the 21st century will be characterized by the search for a relationship between natural and positive law on the one hand and the legal regulation on the other. The huge expansion of the law in terms of quantity is connected in part with the problem of loopholes which emerged in the past and which will emerge on a much larger scale in the future, especially if we consider how voluminous Community law is. I am firmly convinced that those gaps must be plugged on the basis of natural law and an assessment of the purpose of legal regulation in the strict sense. If, then, the practices of application are set the task of finding a solution to this problem, the content of the term 'rule of law' will have to be redefined, but not in the sense that it will have to be narrowed – on the contrary, it needs to be expanded to embrace the attribute of the meaning of legal regulation; here, the purpose of legal regulation will be assessed in relation to the basic principles of natural law and the principle of the applicability of legal norms.

Even today, we can successfully question the meaning of legal regulation and compliance with the principle of the rule of law insofar as, in the efforts to grapple with societal life in all its diversity, legal norms are adopted that are so full of holes that it is impossible to apply them. Personally, I view porous and consequently non-applicable legal regulation as a strong incentive to consider extending the interpretation of the concept of the rule of law, which is a product of the democratic development of states in the second half of the 20th century. The loopholes in legal regulation are a manifestation not of the absence of intellect, but often of the expressive possibilities of language per se; legal language, due to its confines, is not able to encompass some of the relations it regulates in all shades and contexts.

I would like to close with the prediction that law in the 21st century will be characterized not by a defence of the idea of natural law and the purpose of the rule of law, or by the creation of ideological conditions for law as a vehicle of power politics, but rather by the search for law's place in society or, in other words, by the search for a relationship between law and those addressed by legal norms. A key point of the relationship between law and society will be the quest to find a balance between the guarantee and preservation of the individual's sphere of human rights and his fundamental rights and freedoms, on the one hand, and on the other those interests generally socially inevitable and worthy of protection; in the future, and in some respects already today, the state will use the law as a means of protection against terrorism and the dangers associated with organized crime. It must be noted that the proportionality in these relations should be of eminent interest to the academic community, which should define the limits of state intrusion in the human rights of the individual.

When taking stock of the current state of lawmaking, it is very difficult to answer the question of where to look for the causes of this situation. History shows us that lawmaking and its trends are strongly influenced by the overall social development and political priorities in the given time and place.

The legal world today reflects political ideas and views that are ideologically so clear-cut that handling them is a political, not a legal issue. Politics is the force driving changes in the law. In its efforts to bring about changes in the legal system, any democratic government in modern Europe is limited by the state of post-industrial society.

Ladies and Gentlemen, thank you for your attention. I wish you all the best and lots of success in your demanding legislative work!