

^TCODIFICATION:

^{OT} its evolution, obstacles and achievements; and its
value in South Africa/

by

^A
SUSAN ELIZABETH FARRAN.

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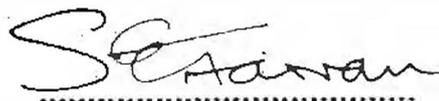
FORMAL DECLARATION

I hereby declare that this Thesis, submitted for the degree of Master of Laws in the Faculty of Law of the University of Natal, is my own unaided work and that all my sources of information have been acknowledged.

To my knowledge neither the substance of this Thesis, nor any part thereof, is being submitted for a degree in any University.

Dated at ..~~Pietermaritzburg~~..... on the 30 day of September.....1984

Signed


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I should like to express my gratitude for the unfailing criticism and advice given by my joint supervisors; Professor John Milton - who guided me through the labyrinths of South African legal history; and Professor Lawrence Baxter - who introduced me to the pleasures and pitfalls of Comparative Law.

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<u>MLR</u>	:	<u>Modern Law Review</u>
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Robinson v Canadian Pacific Railway Co 1892 AC 481.

Swanepoel v Crown Mines Ltd 1954 (4) SA 596 AD.

NOTES ON TERMINOLOGY

- Blacks This term is used to refer to any person or group of persons not of European descent. The term 'Black' is used in preference to: 'Bantu' which is a language classification for a particular sub-group of the Nguni people; 'Native' which was widely used by the colonists when referring to the indigenous African people; and 'Kaffir' which is generally regarded as perjorative nowadays.
- Civil law This term is used to refer to those systems of law which are Romanistic in structure, basic concepts, and general outlook, inasmuch as the national legal system has been subject to a pervasive Roman law influence as a result of the rediscovery and reception of Roman law during the Middle Ages.¹
- Civil law/
Civil Code These terms are used to indicate that area of law other than criminal, constitutional, administrative and commercial law, ie contract, delict, property, succession and the law of persons.²

- Common law This term is used to indicate the system of law found in England and the United States of America, and those countries whose legal system is based on, or derived from, the Anglo-American system, in order to distinguish such systems from civil law ones.³
- Common law This term is used in the context of South Africa to mean the Roman-Dutch law, as received from the Netherlands and modified by time and local conditions. Common law in this sense is juxtaposed to the term 'statute law' or 'legislation'.⁴
- Customary law This term is used to indicate the indigenous law of any people which exists apart from the laws imposed on, or adopted by, such people from other national systems. Customary law is largely unwritten traditional law.⁵
- Mixed legal systems This term is used to describe those systems of law which are neither common law systems nor civil law systems but a mixture of both. Such systems are also referred to as 'hybrid' because they contain both civil and common law elements and sometimes customary law elements as well. South Africa in particular has a mixed system of law.⁶

1. See Hahlo & Kahn 131-132 and 521-3. For a detailed discussion on classifying the different legal systems see generally David and Brierley 17-29; Zweigert & Kötz 57-67; Eörsi Comparative Civil (Private) Law (1979) 31-61.
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3. Hahlo & Kahn 132-133; David & Brierley 286 et seq; Zweigert & Kötz 189. As will be indicated during the course of this study when it comes to the issue of codification the distinction between the two systems often breaks down.
4. Hahlo & Kahn ibid.
5. David & Brierley 29, 404 et seq; M'Baye International Encyclopedia of Comparative Law vol 2 138.
6. Hahlo & Kahn 585; Eörsi idem 55.

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5. David & Brierley 29, 404 et seq; M'Baye International Encyclopedia of Comparative Law vol 2 138.
6. Hahlo & Kahn 585; Eörsi idem 55.

INTRODUCTION

1. General

The codification of law, dates back to 2000 BC or possibly even earlier, and continues to this day. Moreover codification is not limited to one type of legal system but occurs in civil law, common law, customary law, and mixed legal systems. Similarly although codification frequently has political overtones and may occur as an instrument, or result of political change, the use of codes is not restricted to any particular type of political framework. Thus codes are found in a wide variety of countries which have greatly differing political, social and economic backgrounds.

The chronological and geographical extent of codification makes it an interesting subject for a comparative and historical study. In order to speculate on the possible future of codification in South Africa it is first proposed to look at the historical development of codes and codification generally, and to examine the experiences that have occurred in other national systems, in order to achieve a broad perspective of this controversial legal topic, before studying its role in a particular legal system.

2. Projected ambit of study

The projected ambit of this study is to examine, by means of a comparative survey, the evolution and development of codification as a legal phenomenon, taking into consideration:

the historical and geographical extent of codification
some- of the problems and challenges confronting
codification

the reasons why codification has been successfully used
in some national legal systems and not in others;

and, in the light of these factors, to examine the possible future of
codification in the South African legal context.

3. Definition of Codification

At the outset of this study it is necessary to indicate what is to be meant
by the term codification.

It is extremely difficult to arrive at an entirely satisfactory defini-
tion, particularly in a study which ranges widely over a variety of
codes, compiled over an extensive period of time.¹ This difficulty is
attributable to the following factors.

First, the presence or absence of the title 'code', in reference to a
particular statute or collection of statutes, is no clear indication as to
whether that area of the law has in fact been codified. For example, the
Laws of Hammu-rabi have traditionally been described as a Code, although
statements by Hammu-rabi himself would indicated that he had not set out to
codify the law.² Similarly the South African Criminal Procedure Act, 51 of
1977, has been called a code despite the fact that it is an incomplete
statement of the law; and there is no indication on the part of the
legislature that codification was intended.³ On the other hand, it can
happen that there is the declared intention to codify the law but the
resulting statute is not called a code. This occurred with the Bills of
Exchange Act of 1882. This act was passed during a period of intensive law

reform in England which was partially inspired by the codification movement on the Continent. Lord Herschell, considering the Act in the case of Bank of England v Vagliano Bros,⁴ stated that 'The Bills of Exchange Act was intended to be a code of the law relating to negotiable instruments'.⁵ He went on to say that because of this the Act should be considered as the primary authoritative source of law on the matter.

The question of the intention of the legislator being used to determine whether an enactment is a code or not, is another factor which complicates the definition of codification. Although the intention to create a code of law may be a useful indicator for classifying a statute; the final product may fail to fulfill, or accurately reflect, that intention. Further, in judging whether a code has been produced, lawyers from different legal systems will apply different criteria. Thus a civil law lawyer may have considerable problems in accepting that a common law statute which is intended to codify the law is in fact a code. Similarly a common law lawyer may look at a civil law code - such as the French Civil Code - and wonder how a collection of such open-ended and generalised legal provisions can be regarded as a complete and authoritative statement of the law. The conflicting views of lawyers from the two systems are due to fundamental distinctions between the civil law and the common law; and to differences in attitude towards codes themselves.⁶ However conflicts of opinion are not confined to different legal systems. The passage of time, and the development of more sophisticated styles of legislative drafting, may mean that codes within the same legal system are quite different - compare for example those of France and Germany. Indeed legal changes may be such that statutes which were once regarded as codes are felt to be no longer worthy of the name.⁷

It might be thought that a code can be recognised and defined by the task it performs. However, a further factor arising out of the distinctions between different legal systems is the variety of functions expected of a code.⁸ Thus codification may be seen as a means of consolidating the existing law and compiling it in a more accessible form; or, it may be seen as a means of reforming the existing law and introducing a number of innovations. As the function of a code is likely to be influenced by considerations of the needs, resources, and dominant ideologies of a country at the time of codification, there can be little consensus as to what the function of a code should be.⁹ Consequently, although some may feel that a code should simplify, systematize and reform the law;¹⁰ others may be of the view that codification should primarily be a restatement of the law, and be clearly distinguished from law reform.¹¹ Yet others have suggested that codification should be used to modernise legal terminology and improve the basic administration of the law, rather than implement structural reform.¹² Not only may the function of codes vary from one situation or period to another; but the stated function, and actual function, may be different. For example, many thought that the French Code - The Code Napoleon - would radically reform the law in order to reflect recent, revolutionary, political changes.¹³ In fact the code was firmly based on traditional legal institutions and little new law was introduced.¹⁴ Moreover, when considering the question of function, it should be borne in mind that although the main function of a code may be the restatement of the law, not all restatements will necessarily be codes.¹⁵

It has been suggested that a code may be distinguished from other statutes because it is a complete, systematic, statement of the law, which

is exclusive in its dominion, and supplants all special diversities of locality, status, jurisdiction or privilege.¹⁶ Apart from the fact that not all codes express the law in a systematic fashion, these characteristics could equally well be applied to a variety of statutes - for example those that replace the existing customary law; or which combine a multiplicity of local laws within a single document.¹⁷ Nor is a code necessarily a complete statement of the law. Although there are codes that were intended to be comprehensive statements of the law - such as the Prussian Code of 1794;¹⁸ today, due largely to technical and procedural problems, partial codification is more common.¹⁹ Similarly while a code may be a comprehensive statement of a particular area of law - for example the civil law - this does not mean that the entire legal system is codified. Moreover experience has shown that even the most comprehensive code will inevitably have loopholes and inadequacies and prove to be less complete than envisaged.

It is apparent that none of the above factors distinguish a code from other forms of written law; although by themselves, or in combination, they may be useful indicators.

Perhaps the distinguishing features of a code can best be found in its relation to other statutes and sources of law within the same legal system; and in the way in which its provisions are applied to cases that come before the courts.

First, whereas a statute may be a comprehensive and exclusive statement of the law relating to a particular subject; in codifying the law there will be an attempt to achieve 'a rational formulation of the underlying principles of all the aspects of human activity regulated by the code'.²⁰ This is because the envisaged lifespan of a code is generally

longer than that of a statute, the latter being subject to frequent amendment and revision. Indeed, one of the reasons why codes are used is to overcome the problem of accumulated legislative enactments.

Secondly, the status of a code will generally be superior to that of an ordinary statute, in that the code will be referred to before other sources of law - including case decisions and subordinate legislation. Moreover, the order in which other extra-codal legal sources may be used is often stipulated by the code. Although the status of a code may not be exactly the same in different legal systems;²¹ it is generally true that those who draft the code will approach their material in a manner distinct from other statutes. Also the attitude of lawyers and laymen to codified law will be distinguishable from that expressed towards other enactments.

Thirdly, although a code - like any statute - is a product of the legislative branch of government, its success, and therefore continued use, is very dependent on the co-operation and contribution of the judiciary. Thus a system of law - or part thereof - can only really be said to be codified if the provisions of the code are regularly and consistently applied to cases that come before the courts.

There is little doubt that today 'codification appears to be much more diversified than a century ago'.²² Consequently it would be misleading to limit the meaning of the term to any specific type of code. However, in the light of the above considerations and for the purposes of this study, codification is understood to mean: a conscious attempt by the legislator to convey, by means of the minimum number of necessary provisions, within an authoritative document, a selected area of law. Such an enactment must be comprehensively structured - although not necessarily comprehensive in scope - so that whether the work consists of a single document or a series

of them, they are related to each other in a rational way. Further the motivation behind such an enactment must be to improve the current law on the subject - whether by reform or consolidation - either for a selected target - such as the practitioner, or generally. Codification is more than mere amending legislation aimed at blocking loopholes discovered in existing statutes. Therefore codification is not to be understood as a short-term repair job on a delapidated legal system, but a radical - without meaning revolutionary - overhauling of the existing law, so that it be better able to provide for current and future needs.

1. The difficulty at arriving at a satisfactory definition has been experienced and discussed by others. See for example Bayitch in Yiannopoulos 161, 162 et seq.
2. See Driver & Miles The Babylonian Laws vol 1 (1952) 45 particularly note 1; and Kocourek & Wigmore 387.
3. For reference to the Act as a code see Dugard Introduction to Criminal Procedure (1977) 57. Compare however the attitude of the redactors of the Criminal Procedure Ordinance 1 of 1903 as indicated by De Villiers (1931) 43 SALJ 318. See also the comments of Burchell & Hunt 42 note 359.
4. 1891 AC 107 at 144. This attitude towards the codification aspect of the Bills of Exchange Act also found support in other cases for example In re English Bank of the River Plate Ex parte Bank of Brazil (1893) 2 Chancery 438 at 442. Compare however Swanepoel v Crown Mines Ltd 1954 (4) SA 596 (A) at 603-4, where Fagan JA rejected the argument that the Prescription Act 18 of 1943 should be regarded as the primary source of law on the question, on the ground that the intention behind the act had not been to codify the law on the matter.
5. As will be indicated one of the expressions of the attitude which distinguishes a code from non-codified law, is that where there is the intention to codify, then on any point dealt with by the code the law must be ascertained from reference to the language of that code before any other source is consulted. See for example the dictum of Lord Watson in Robinson v Canadian Pacific Railway Co 1892 AC 481 at 487 referring to the Civil Code of Lower Canada of 1866. Other examples of such 'codes' were the Bankruptcy Act of 1883, Partnership Act of 1890 and Sale of Goods Act of 1893, discussed infra under codification in common law systems. Compare however David, who expresses the view that the re-organization and consolidation achieved by these statutes did not amount to codification in the French sense; David & Brierley 307.
6. The difference is clearly illustrated by David in the following extract:

'The codes of continental Europe, even if they lean heavily on tradition and in fact perpetuate it are considered as operating a sort of novation; they constitute an expose of the law sufficient in itself, and the point of departure for a new development of juridical rules. The codes of common law countries, on the contrary, do not abolish the prior law. Their essential function is to set out systematically principles which are thus confirmed and remain in force; the rules of law therefore are modified and modernized by codification only on occasion and only on special points. Law and code, one can say, are synonymous in the continental European conception. The code in common law countries is only an accident in the development of a law which was existing and continues to exist in a way independent from the new code':

(1963) 37 Tulane Law Review 187, 190. See also Lawson Many Laws (1977), 43; and David English Law & French Law (1980) 16 et seq.

7. This has happened with Justinian's Corpus Iuris Civilis which is regarded by some as a code but by others as falling far short of the definition. See the discussion infra on the 'early' codes.
8. As Akzin says:
 'The meaning in which these terms ("code" and "codification") are used determines the functions which the codes will fulfil on the legal scene, and it is the sympathy or antipathy with which the various factors involved view the proposed functions that will make them more or less receptive to codification':
 (1956) 5 American Journal of Comparative Law 44, 49.
9. Compare for example the 18th century Natural Law School view that a code should be a complete legislative statement of the whole body of law, in one self-sufficient form; with the view of Lord Westbury or Sir James Stephen, that the aim of code should be to publicize the law in an orderly and conveniently accessible fashion: Pound Jurisprudence vol 3 (1959) 724.
10. Tallon (1979) 14 Israel Law Review 1, 3-5.
11. See for example the view of the Society of Public Teachers of Law in England, discussed by Smith (1984) Statute Law Review 17, 19.
12. M'Baye International Encyclopedia of Comparative Law vol 2 (1975) 138, 153.
13. For example that the code would 're-make the law in the image of a new and better society' Friedrich in Schwartz 1, 2.
14. Zweigert & Kotz 68.
15. For example, North, commenting on the work of the English Law Commission states that 'Most codification projects tend to involve two elements - re-statement and reform; there is no doubt that, in England at least, both elements are present in all the current codification projects'. Although, as he points out 'the original intention to codify might have involved no more than restatement of existing principles': North (1982) 46 RABELSZ 490, 493. See also on the matter of restatement and reform in a code Smith op cit 20; and Lloyd (1949) 2 Current Legal Problems 155, 165.
16. Continental Legal History vol 1 (1968) 177.
17. For example as was done with the Droit Coutumier in France, Lobingier (1918-19) 32 Harvard Law Review 114, 121.
18. The Allgemeines Preussisches Landrecht.
19. See for example in Israel as discussed by Akzin op cit 44; and in England as discussed by North op cit 490.
20. Chloros (1973-74) 48 Tulane Law Review 814, 825 (my emphasis).

21. On the question of status of codes and written law generally in civil law and common law see the comments of Bayitch op cit 161, 165 et seq.
22. Tallon D (1980) 15 Society of Public Teachers of Law 33, 34.

HISTORY OF CODIFICATION

1. Introduction

The history of codification suggests that there are two main reasons why codification takes place; first to fulfil a need to 'tidy up' the law and make it more easily ascertainable, and secondly to unify the law of hitherto separate legal systems, following political unification of the countries, or areas of a country, where these separate systems exist.¹

The first reason is influenced more by practical than political considerations, although codification may still be undertaken within a certain ideological framework - for example, to make the law accessible to the layman and remove it from the realm of a powerful and elite judiciary; or to create certainty and stability in the law in order to avoid the arbitrary administration of justice.² The second reason indicates that codification may be undertaken to improve the administration of the law, and also to reflect changes in the government of a country, a new political dispensation or power structure.

While the first reason for codification is particularly relevant to those legal systems that have accumulated a mass of legal material which has grown to unmanageable proportions;³ political considerations - sometimes accompanied by a desire to express ideological beliefs through a code⁴ - appear to have been the motivating factor behind much codification.

Codification not only occurs as a result of political unification, or where internal changes and re-organization occur, but also where there are changes in the international status of a nation. Thus codes are often adopted or drafted when a country achieves independence, as a mark of the new country's sovereignty;⁵ or to indicate the independent legal existence

of a state.⁶

However codes are not only found in independent, sovereign countries. This is particularly true of the common law codes used in India and parts of Africa, where the imposition of codes on the indigenous inhabitants by the foreign powers governing them, reflected the political status quo and facilitated the administration of justice.⁷

Codes may also be adopted or introduced where political changes have been accompanied by far-reaching socio-economic changes, for example the 'westernisation' of Japan, China and Turkey;⁸ and more recently parts of Africa.⁹

The above reasons for the use of codes are not exhaustive. In each country there are a combination of factors which cause or encourage codification of the law. As will be seen, these influential factors vary over the course of time and from country to country. Indeed an examination of the history of codification - albeit brief - indicates the diversity of codes and codification movements that have existed in the past, and continue to exist in the present day.

2. The Archaic Codes¹⁰

One of the problems encountered in defining a code is arriving at a satisfactory method whereby a code may be differentiated from other forms of statute law. In the early history of codification however one of the distinguishing features of a code was that it was written law, as opposed to unwritten, customary law. Indeed one of the main purposes of a code was to establish a written, and therefore indisputable, record of the law, thereby facilitating the enforcement of a single legal system over a wide area previously governed by unwritten and separate local customs. Such a

code was that of Hammu-rabi, King of Babylon, which is the earliest code of law discovered, and is dated circa 2000BC.¹¹ Under Hammu-rabi the previously independent city-states of Babylonia were unified. In an attempt to amend the unwritten customary law of a large area, the Laws of Hammu-rabi were carved in diorite - compared with the usual clay tablets - and set up in the Temple of Marduk in Babylon,¹² thus publishing the new law in a permanent form.

Hammu-rabi regarded himself as a reformer of law and a legislator,¹³ and made no claim to have constructed a code of law. Indeed it has been suggested that

'The laws must not be regarded as a code or digest but as a series of amendments to the Common law of Babylon.'¹⁴

However although the laws do not represent an exhaustive exposition of the law, the collection and arrangement of specific laws within a united whole, with a distinct section for each law, does distinguish Hammu-rabi's Laws from earlier - albeit fragmented - collections of written law. It is not unusual therefore, to find the Laws of Hammu-rabi referred to as a code,¹⁵ and, if one adopts a broad interpretation of the subject, justifiably so.¹⁶

In a period when written law was relatively scarce, these early or archaic codes were often used to publicise important changes in the existing customary law. Such changes might be occasioned by political upheaval - as with Hammu-rabi - or to deal with social or economic demands. For example the Athenian Laws of Solon (c 800-900BC) were aimed at easing the burden of the debtor class, while the Roman Twelve Tables (c 450BC) sought ostensibly to break the patricians' stranglehold on the administration of justice.¹⁷ Similarly the later Leges Barbarorum were drafted to overcome the administrative and social problems of conflicting systems of law which arose in Europe after the fall of Rome.¹⁸

In some cases the early codes were compilations of pre-existing legislation or traditional customary law, collected and re-arranged in a code because of their public importance. Examples of these are the religious codes, such as the Biblical Codes of The Old Testament¹⁹ and the Hindu law code - the Laws of Manu (c 200BC).²⁰

Included among the archaic codes, although European in origin, are the Leges Barbarorum. Initially compiled by barbarian rulers for their Roman subjects after the collapse of the Roman Empire in the West in 476AD, these codes helped to preserve, in rudimentary form, many aspects of Roman law in parts of France, Spain and Italy.²¹ Such codes were not however limited to Roman law, and codes of customary law also date from this period, for example the code of Visigothic customary law, the Code of Euric (c 475AD), or the Codex de Tolosa,²² and the Laws of the Sali or Sea Franks, the Lex Salica, which was drawn up around 450AD²³ and which was followed by the Lex Ripuaria (c 596AD) of the River Franks.

These early codes did not present a complete statement of any one branch of law,²⁴ nor set out general principles of law,²⁵ but provided a set of rules whereby the immediate and most important social, economic and political problems could be resolved.²⁶ Some of these codes remained in force for a considerable length of time,²⁷ others laid the foundations for later codes.²⁸ Moreover their existence meant that codification, although in a comparatively primitive form, was not entirely unknown in Europe in the period prior to the re-discovery of Justinian's Corpus Iuris Civilis, and the renaissance in legal thinking and interest that this occasioned.

Roscoe Pound declared that

'codification in the modern sense begins in the maturity of the Roman law',

because before this attempts to codify the law were attempts to secularise it rather than to systematise it.²⁹ Hahlo and Kahn state that

'The Corpus Juris Justiniani, ... was a code in the modern sense in that it was intended to cover the whole of the law.'³⁰

However the learned authors go on to add that

'It (the Corpus Juris) differed from modern codes in that it did not attempt to state the law systematically in the form of abstract rules.'³¹

Justinian's great work thus hovers somewhat uncertainly between the archaic codes and the modern, or 'early' European codes.

The practical advantages of codifying the growing bulk of Roman law had been realised earlier during the expansion of the Roman Empire, as a means whereby newly conquered territories might be more easily controlled and assimilated. Attempts to codify the law had been made prior to Justinian,³² but the extent and scope of his Corpus Juris Civilis distinguish it from these earlier works, as did Justinian's intention that his code should replace all the existing law and be regarded as the 'authoritative binding statement of the whole body of Roman law'.³³

Although the Corpus Juris Civilis lacked the general legal principles that might be found in more modern codes, neither the enormity nor significance of the undertaking should be underestimated. Besides seeking to collect and compile all existing imperial legislation into a more accessible form, and to discard that which was obsolete or repetitive; Justinian also sought to include in his code the best juristic writing available - thus ensuring that much of this was preserved for later students. Furthermore Justinian's codification represents the first major

attempt to cope with the physical and technical problems involved in such a task. The organization of manpower, resources, and the arrangement of material in the Codes themselves, served as a model and inspiration for those who were to look to Justinian's work in later years; particularly the adherents of the Natural Law School who were to have such an influence on later European codes. Moreover the codification of Roman law meant that it could be easily incorporated into other legal systems, creating today what is known as the civil law tradition or family of laws.

3. Early 'European' Codes

Due to their incomplete nature the archaic, or early codes never totally replaced customary law,³⁴ which continued to govern the majority of people in Europe and elsewhere. Thus although Justinian's code can be distinguished from those that went before it, the true influence of the Corpus Iuris Civilis was not felt until the renaissance of legal enquiry in the eleventh century.

In the interim a number of codes of customary laws were drafted; for example the Saxon Code (c 750AD),³⁵ the Frisian Code (c 780AD),³⁶ and the Welsh Code - the Laws of (King) Howel Dda.³⁷ Frequently the aim of such codes was to preserve local customary law from being overwhelmed by the incursions of Roman and Canon law.³⁸ At the same time these codes facilitated the administration of justice in areas where a number of different tribes lived under one ruler.

Codification also occurred fairly early on in Scandinavia, where customary law was, and continues to be, the most important source of law.³⁹ The earliest codes occurred in Denmark, where several provincial codes were passed between 1150 and 1250, including the Jydske Law of 1241. When

the country achieved legal unity in 1683, these were replaced by a single code of Christian V.⁴⁰ In Norway, where legal unification of the country occurred during the latter half of the thirteenth century under King Magnus Lagaboter (1263-1280), codified law became the most important source of written law for a while.⁴¹ In Sweden, although there were several provincial codes promulgated during the thirteenth century - for example the 1350 National Code of Laws (for country areas) - internal political strife during the fifteenth and sixteenth centuries prevented much judicial development. It was not until the seventeenth century, under the influence of ideas from Germany, France and the Netherlands, together with the gradual infiltration of Roman law into the universities, that a national Swedish Code came into effect in 1734.⁴²

The Scandinavian codes made no attempt to be complete statements of the law,⁴³ nor did they display the sophisticated or scientific codification of the later civil law codes.⁴⁴

Meanwhile in Europe, the study of Roman law was spreading; and recourse to its provisions as a lex omnium generalis when customary law was proved inadequate, was becoming more frequent. Under the influence of this new academic interest in law the forerunners of the modern codes appeared.

The first of these was the Penal Code of Charles V, the Constitutio Carolina Criminalis of 1532.⁴⁵ Based on an earlier code, the 'Bambergen-sis',⁴⁶ the CCC was primarily a code of criminal procedure, but was much influenced by the ideas engendered by the reception of Roman law and Italian legal science. Indeed it has been described as

'the first true code, in criminal law and procedure, by which the dualism of the native and the foreign law was reconciled.'⁴⁷

Reconciliation of legal dualism was one of the factors that made the idea of codified law popular, particularly in France, where customary law -

droit coutumier - held sway in the north, and Roman law - droit écrit - was enforced in the south. Consequently a number of attempts to bring about legal unification by means of codification were made.⁴⁸ However little could be achieved until the country had a sufficiently strong, central, government to enforce a single, unified system of national law.

In Bavaria two comprehensive codes appeared during the reign of Prince Maximilian III, a criminal code in 1751, and a code of civil procedure in 1753. A further code, the Codex Maximilianeus Bavaricus Civilis appeared in 1756 but unlike the other two, was intended as a subsidiary source of law.⁴⁹

In Prussia, Frederick the Great's Code of 1794 - the Allgemeines Landrecht für die Preussischen Staaten⁵⁰ was among the earliest codes reflecting the ideas of the Enlightenment and the theory of natural law.⁵¹ Under the influence of Justinian's code and the systematic exposition of law found in the Roman authorities, the Natural Law School of the seventeenth and eighteenth centuries saw codification as a practical means of expressing the ideal, theoretical law, which had been developed during the past six hundred years in the universities. A code provided a means whereby the ideal law might become the living and applied law.⁵²

'Codification was the technique which eventually enabled the ambition of the Natural Law School to be realised. It consolidated the evolution of Romanist scholarship over the centuries and systematically expounded the law as suited to eighteenth century society.'⁵³

In terms of this philosophy the task of the enlightened legislator was to reform the law in order to reject past errors, and to give authority to those rules which fully conformed to reason and upheld the natural rights of man.⁵⁴ Frederick the Great, inspired by writers such as Voltaire and Montesquieu, hoped to achieve a popular code, based on pure reason, which

would be 'simple, lucid and brief in its provisions'.⁵⁵

Although these aims were never fully realised,⁵⁶ there is no doubt that Frederick the Great intended to create a full and complete code, and even went so far as to appoint a commission which was to be consulted by judges on matters where the code was silent or inadequate, in order to prevent them referring to previous sources of law.⁵⁷ Experience soon showed that no code could achieve this degree of completeness, and although the Prussian code remained in force until 1900, later legislators were to adopt a far more realistic view of the need to provide for flexibility and the development of the law within the framework of a code.

In Austria codification had been instigated by the Empress Maria Theresa as early as 1713 when she appointed a commission to draft a code. A first draft, completed in 1767, was rejected but part of a second draft was promulgated in 1787, and a complete code, the Allgemeines bürgerliches Gesetzbuch came into effect in 1811. Much less bulky than the Prussian code, the Austrian code was also inspired by the idealism and rationalism of the Enlightenment, and by the French Codes that had appeared in the intervening period. However in Austria itself, the adverse political climate meant that the immediate effect of the code was limited,⁵⁸ although it did subsequently influence the law in some other European countries, notably Serbia, Croatia, Slavonia, Transylvania and Hungary.

4. Modern Codes

i. Civil Law Countries

The 'code of codes'⁵⁹ which introduced the era of modern codification was the Code Napoleon or French Civil Code.⁶⁰

It has been said that two conditions are essential for successful

codification; first an enlightened sovereign, unhampered by the past and willing to establish new principles of justice, liberty, and dignity of the individual; and secondly, ruling in a country which is powerful enough to exercise an inescapable influence over others.⁶¹

In France these conditions did not exist until the era of Napoleon Bonaparte, although a number of attempts to codify the law were made earlier under the influence and inspiration of the 1789 Revolution. The first of these was a resolution of the Constituent Assembly on October 5 1790, to appoint a Commission to draft a code.⁶² In 1793 the National Convention took the matter further and appointed a committee which, in compliance with their instructions, produced a draft code within a month.⁶³ Although rejected, this code was inspired by the philosophy and ideals of the Revolution, and sought to remove the administration of justice from the hands of the despised and elite judiciary of the old regime; and to make the laws simple, democratic and accessible to every citizen. Codification was seen as a solution to the existing legal chaos of old laws and customs;⁶⁴ and a way of remaking the law to reflect the new and better society which would emerge from the Revolution.⁶⁵ Moreover because of the Revolution a number of former obstacles to codification had been removed - for example there was a greater awareness of the need for national unity; and feudal law had been abolished. Three further drafts followed,⁶⁶ but it was not until the Consulate was established in 1799, with Napoleon as first consul, that codification really made progress.

Napoleon supported the ideas expressed in Rousseau's Contrat Social⁶⁷ particularly the latter's belief that the legislator had the power to shape society. Nevertheless ideology and philosophy had to be tempered by practical considerations, such as the need to overhaul, unify, and reform the

laws of France. To this end Napoleon appointed a new commission in August 1800.⁶⁸

Although Napoleon hoped to achieve certainty and uniformity by codifying the law, he did not subscribe to the view that a code could be a complete and permanent statement of the law;⁶⁹ nor did he believe it possible to do away with the judiciary entirely. Consequently the ensuing draft code was largely based on existing law - purged of anachronisms and obsolete laws - and contained little in the way of new or 'revolutionary' law.⁷⁰ It also contained material from commentators on French law - notably Domat and Pothier; collections of various statutes - particularly the Grandes Ordonnances of D'Agnesseau; collections of customary law - as found in the Livres de Coutumes; rules of canon law on certain matters; and selected decisions of the parlements.⁷¹ Judges were given a reasonable amount of discretion to apply the rational principles behind the code, and to develop the law by analogy.⁷² Moreover where the code made no provision or was silent on a legal question recourse to previous law was permitted.

While in theory belief in the rational man - inspired by the Natural Law school; and the idea of equal rights - adopted by the Revolution; indicated that all those interested in making the law should be allowed to participate in a democratic fashion; Napoleon soon discovered that in practice such ideas hindered the progress of codification. No doubt it was due to his political dynamism and personal enthusiasm for codification that Napoleon was able to successfully manoeuvre the draft code through the necessary cumbersome legislative machinery in a remarkably short time.⁷³

As a result the Code Civile des Francais came into effect in March 1804, to be followed by four other codes in quick succession.⁷⁴

Despite its shortcomings,⁷⁵ the French Civil code marked a distinct

break with previous codes. First while previous codes had included a mixture of civil, criminal, canon, and procedural law within a single code, the French civil code was exclusively concerned with private, substantive law. Similarly the codes that followed specialised in a particular field of law.⁷⁶ Secondly, while public law had previously been largely ignored, it could now be developed alongside private law within the structure of a code.⁷⁷ Thirdly, codification was no longer seen as a subsidiary source of law, to be consulted along with other sources of law, but as a primary and fundamental source of law abrogating all others.⁷⁸ Fourthly, as a product of the revolutionary movement which had brought about the demise of the socially unacceptable institutions of the ancien regime, the code reflected the new relationship between legislators and those governed by the law.⁷⁹ Finally, by overcoming the fragmentation of the law and the multiplicity of customs that existed previously, codification ultimately led to the emphasis of nationalism and the legislative sovereignty of the country, which in turn enhanced the status and popularity of the codes.⁸⁰

One of the most far reaching repercussions of the Napoleonic codification movement was the introduction of codes into much of the rest of Europe as a result of French aggrandizement. Either the French codes themselves were superimposed on other national legal systems, as the result of military conquest;⁸¹ or they were adopted;⁸² or they served as models for new national codes, within Europe and beyond.⁸³

Contrary to what one might expect the defeat of Napoleon in 1814 did not lead to a total rejection of French law introduced in this way, nor of codes based on the French model.⁸⁴ For example, in the Netherlands, attempts to draft a code of Dutch law, had been thwarted by the accession of Louis Napoleon to the throne of Holland in 1806, and the subsequent intro-

duction of a code formulated along the lines of the Code Napoleon - the Code of Holland - in 1809. This code had been repealed in 1811 and the Code Napoleon itself implemented in the Netherlands. Despite the fact that the country gained independence from France in 1813, a truly Dutch code was not introduced until 1838 when, after twenty-five years labour, the Nederlandsche Wetboken was brought into effect.⁸⁵

The reason for adherence to the French code or facsimiles of it were various. In countries such as Italy and the Netherlands disunity and diversity of legal systems were as great a problem as they had been in France, and the merits of using codification to achieve unification were soon realised. The French code, characterised as it was by precision, clarity, simplicity, and the systematic arrangement of legal rules, provided a readily accessible model. Elsewhere, because of their historical and political background, the French codes provided a formula for newly independent countries wanting to revolutionise their laws - such as happened in the Latin-American countries of Bolivia, Uruguay and Argentina.⁸⁶

Such was the impact of the French code that in some countries it was utilized or copied regardless of the indigenous legal system. For example in the Dominican Republic, where the code was adopted in 1825, the original French version was used despite the fact that the language of the colony was Spanish.⁸⁷ In Louisiana where the bulk of the laws in force at the time of codification were Spanish, the draft code, presented to the legislature in 1808, was based not on Spanish law but on the new French law and the French Civil Code, and when promulgated later the same year declared itself to be a 'Digest of the Civil Laws now in force' regardless of Louisiana's legal background.⁸⁸ The influence of the French codes was not

limited to the period immediately after their promulgation in France, but continued throughout the nineteenth century and into the twentieth.⁸⁹ For example Japan, seeking rapid westernization of its legal system due to the growth of modern capitalism, initially turned to the French code as a model, although it subsequently modified early drafts in the light of codification in Germany.⁹⁰

In 1868 Huc wrote

'the Napoleonic Code governs two-thirds of the civilized world; one may surmise that one day it will be adopted by all nations.'⁹¹

The French code has remained influential, although its achievement and excellence were partially eclipsed in 1896, when the German Reichstag adopted the German Civil Code (BGB)⁹² which came into effect in 1900.

Germany was one of the few countries which reacted strongly against the imposition of French law once Napoleon's power began to wane, although demand for codification of the law persisted. Some areas of the law had been partially codified,⁹³ but there was no unified civil law; nor was there sufficient legislative machinery or political consensus to implement such a code.⁹⁴ It was not until there was political unity in 1871, with the establishment of the German Empire, that effective changes in the law could be implemented. Moreover, although the need for a civil code had been voiced as early as 1814,⁹⁵ an additional hindrance was the ensuing academic debate on the merits of codification.

This debate arose out of the philosophy and ideas of the Historical School which had developed as a reaction to the Natural Law School. The main proponent of the Historical School was Carl Friedrich Von Savigny, who strongly opposed codification of the law on the grounds that a code would obstruct national legal development if it occurred before the country was

politically, socially and economically mature.⁹⁶ Moreover, he argued, there was no suitable German model on which to base a code - that of the 1794 Prussian Code was inadequate; nor was there sufficient skilled manpower for such an undertaking. Further he felt that codification would either impede the natural growth of the law, or force it into unnatural directions contrary to its historical growth. He also feared that a code made by one generation would impose its own intellectual and moral notions on succeeding generations, by which time these notions would be anachronistic. Defects in past codes convinced Von Savigny that codification could not be done well enough to be successful.⁹⁷

Anton Thibaut, on the other hand, as a reaction against the recent French invasion and military occupation by revolutionary and Napoleonic forces, argued in favour of the immediate codification of German law. Codification, he urged, would provide a foundation for the national unity of the country.⁹⁸ Such a code would be based on general legal principles adapted to Germanic customary law. All foreign law would be excluded, including Roman law.⁹⁹ This conflicted with Von Savigny's belief that the essential principles of German law could not be established unless the legal system was studied in its full historical context.¹⁰⁰

One of the most important results of the Historical School was the development of Pandektenrecht and its influence on the BGB. Pandektenrecht - or the legal philosophy of the Pandects - was based on the intensive historical investigation, and logical analysis of, the diffuse mass of Roman and German legal materials that made up the bulk of German law.¹⁰¹ From this arose the idea that legal rules and legal solutions could be found by the use of logical, scientific, methods. By following this technique the Pandectists were able to create clear and clearly dis-

tinguished legal concepts,¹⁰² and a system of abstract, legal principles.

By the time Germany achieved political unification in 1870 the intensity of the debate between the two schools of thought had largely abated,¹⁰³ and work on codification could proceed.

A commission to prepare a code was appointed in 1874 and produced the first of a series of drafts in 1880. Unlike the French Civil Code, which had been completed in the space of a few years, the BGB took over twenty-two years to complete (1874-1896).¹⁰⁴ The German Code has been described as

'the most monumental formulation of the law in comprehensive abstract terms ever projected by the mind of man.'¹⁰⁵

Its technical sophistication stimulated its reception or imitation elsewhere. For example the Swiss Code (1907) itself closely modelled on the German one, was subsequently adopted by Turkey in 1926. Similarly Japan, although strongly persuaded to adopt a French-style code,¹⁰⁶ eventually opted for one more closely attuned to the more modern and scientific German code.

As with the French Civil Code the German code was not without its critics. Directed primarily at the professional lawyer rather than the layman, the language and expression of the code are at times complex and laboured.¹⁰⁷ In an attempt to be comprehensive while maintaining its methodical construction of the law, a certain amount of simplicity and clarity were inevitably lost.¹⁰⁸ Nevertheless, the code achieved its immediate aim of providing a single, unified, system of law for the whole country. Moreover the scientific approach to the study of law and the high degree of systematization of Roman Law principles within the code has made the BGB a widely admired and much studied piece of legislation.

(ii) Common Law Systems

It has been said that

'Although the codes spread all over Europe and to the remotest parts of Asia, they never crossed the narrow "legal straits of Dover"'.¹⁰⁹

While it is true that the Code Napoleon or the BGB were never adopted or incorporated into the laws of England - as they had been on the Continent and elsewhere¹¹⁰ - attempts to codify the law had been made; and the ideas behind codification in Europe did cross the Channel, although they fell on somewhat less fertile ground.

England had never suffered from the same problems of a multiplicity of legal systems within one country, as had been experienced in France, Germany and elsewhere. Already possessing legal unity, England had little need of codification to bring this about. However, development of the law, left as it was to the judges, meant that a vast and unsystematic mass of case decisions and disorganized statute law had accumulated.

The need to bring some kind of order to this chaos by means of a code was first advocated by Francis Bacon in the late sixteenth and early seventeenth centuries.¹¹¹ His project to reduce the current volume of statutes was introduced in Parliament in 1593, whereupon the matter was left to the lawyers in the House of Commons. Unwilling to fetter the discretion and power of the judges, the lawyers - unsurprisingly - did nothing. In 1616 a further proposition for the amendment of the law, the compilation of digests, and the appointment of a commission to keep such digests up to date, was suggested.¹¹² Again nothing came of this.¹¹³ However the idea persisted, and in 1650 Cromwell appointed a Parliamentary Committee to compile a Digest of the Law.¹¹⁴ From 1652 until 1656 a commission under the chairmanship of Sir Mathew Hale sat to prepare a draft to simplify the law.¹¹⁵

Nothing lasting was achieved, and enthusiasm for codification died down.

Although there was widespread horror and revulsion at the events in France, the philosophical ideas and ideological theories of the Revolution infiltrated the common law world, largely thanks to the activity and writings of Jeremy Bentham. As a result interest in codification was revived during the nineteenth century.

Contemptuous of judges and the role of case law, Bentham supported the idea of legislative rather than casuistic development of the law. Essentially a utilitarian, he proposed that legal clarification and certainty would be achieved by reducing the 'shapeless mass' of the common law to a system of consistent rules and principles, thereby eliminating the ambiguities inherent in the existing legal structure.¹¹⁶

Bentham's advocacy of codification was strongly opposed, especially by the legal profession which monopolised legal education through its control of the Inns of Court, and formed a powerful lobby in Parliament.¹¹⁷ Orientated towards the pragmatic development of the law and extremely unwilling to adopt a priori legal principles, the opposition of practitioners did much to thwart proposals to codify the law, or to introduce structural reforms.

Nevertheless, attempts in this regard were made during the course of the nineteenth century,¹¹⁸ and a number of piecemeal reforms achieved during the 1860's.¹¹⁹ These culminated in a series of important consolidation bills, which, although not called codes, incorporated many characteristics of codes.¹²⁰

A more realistic approach to the question of codification in common law systems was that taken by John Austin. While sharing Bentham's enthusiasm for a code as a means of expressing the existing law in a complete

and coherent form, he realised the complexity and immensity of the task involved. He was also aware that unless the code was drafted in a form acceptable to contemporary society then it would be a worthless exercise.¹²¹

Both Bentham and Austin believed that it would be possible to make the law certain and accessible, by setting it out clearly and simply, and restricting the judges' function to the straightforward interpretation of legal rules.¹²² Neither ever completed a draft code, although Austin went further in expressing his ideas on paper than Bentham.¹²³

One of the major problems confronting those who sought to alter the law by codification was the lack of any suitable legislative machinery to initiate or implement such reform. The Lord Chancellor's office was not permitted to undertake any systematic law reform and no Ministry of Justice with the requisite power existed.¹²⁴ As early as 1859 Chancellor Westbury, fully aware of the difficulties involved in finding a member or Minister to champion the cause of legal reform and steer it through Parliament, urged the establishment of a Ministry of Public Justice.¹²⁵ Nothing was done to attempt to remedy this basic technical problem until the beginning of this century,¹²⁶ meanwhile hostility to codification continued.

However, this hostility did not extend to codes drawn up for the administration of justice in British colonies, and it was here that the skills and ideas of many who supported codification found expression.

The area where the bulk of common law codification in this respect occurred, was India, where a multiplicity of local legal systems and customs made the administration of justice extremely difficult - especially for English civil servants. In contrast to the reluctance of the government to promote codification in England, no such reticence seems to

have been felt about imposing codes on the population of India. It was believed that here codification would achieve legal unification and certainty, which, besides improving and facilitating the administration of justice, would also encourage and assist national development. Moreover codification of the English common law would make its reception in India much easier as its provisions could be simplified, modernised, and adapted to local conditions by means of a code.¹²⁷

The first step towards the preparation of a system of codified law for India was the passing of the Charter Act, in 1833, which provided for the appointment of a commission to undertake the work. Originally consisting of three members, a further post - similar to that of a Minister of Justice - was created soon after. The first incumbent was Lord Macaulay.¹²⁸

Macaulay, himself strongly influenced by Bentham's ideas, had considerable influence on the work of the commission - an influence that was to extend beyond the Anglo-Indian codes.¹²⁹ Others who shared his enthusiasm for codification and also served on the commission were Sir Henry Maine and Sir James Stephen,¹³⁰ both of whom were to contribute to legal development, not only by their work on codification in India; but also by their support for the implementation of law reform through the use of codes in England.¹³¹

The first commission, which sat from 1833 to 1840, planned to draft three codes; one of Muslim law, one of Hindu law, and one of territorial law, which would be applicable when an issue fell outside the provisions of the first two codes.¹³² Although this commission put forward many suggestions and drafted a penal code, these were not acted upon for some time.¹³³ A second commission, however, appointed in 1853, was more fruitful and produced several codes, the first being a Code of Civil Procedure in 1859.

This was followed by a Criminal Code in 1860,¹³⁴ and a Code of Criminal Procedure in 1861. A number of statutes which also codified the law but were not called codes, were also passed,¹³⁵ and a code for the law of delict was drafted by Sir Frederick Pollock, but never enacted.¹³⁶

In formulating the codes, there was no attempt on the part of the commission to conceal the influence of the civil law codes, either directly - as in the case of the Criminal Code which closely followed the French Penal Code; or indirectly - for example in the case of the Contract Act by Field's code in Louisiana.¹³⁷ Consequently the Anglo-Indian Codes were not simply consolidations of the English common law but also introduced a number of reforms. Moreover those areas of law that were codified were much more easily assimilated elsewhere than law which had to be sought in a mass of cases and legal texts.¹³⁸

The need for greater certainty and uniformity in the administration of justice by civil servants, who had little or no legal training and often even less knowledge of local laws and customs, also made itself felt in South Africa, in the colonies of Natal and the Cape.

In Natal, which had been formally annexed as a separate district of the Cape of Good Hope in May 1844,¹³⁹ it had long been apparent that the administration of the territory, particularly the influx control of Blacks was inefficient, inconsistent, and unsatisfactory.¹⁴⁰ Pressure on land and the immigration of Blacks from Zululand had led to outbreaks of violence and fostered discontent and unrest on both sides.

Although one of the conditions at annexation was that all inhabitants would be treated equally before the law,¹⁴¹ it was soon evident that reform was needed in order to secure stability and encourage development of the district. Thus in 1852 a commission was appointed:

'to inquire into the past and present state of the Kafirs in the District of Natal and to report upon their future government, and to suggest such arrangements as will secure the peace and welfare of the district for the information of His Honour the Lieutenant Governor'.¹⁴²

The Report of the Commission indicates that the main problem to be resolved was the lack of uniformity in the administration of law by local magistrates. It was believed that this situation was due to

'the non-existence of a full and complete digest of the rules and principles of Kafir laws'.¹⁴³

It was felt that conspicuous inconsistency in the application of the law undermined respect for local magistrates, and that what was needed was a system of clear, and firmly enforced law.

The introduction of a code had been suggested by a royal proclamation in 1843, but upon studying the matter the commission felt that rather than adopt a common law code, the existing customary laws should be modified to form the basis of a code, as these were generally just, although poorly administered.¹⁴⁴

The recommendations of the commission were submitted to Lieutenant-Governor Pine, but practical difficulties in ascertaining the exact content of customary law, together with opposition from the Secretary for Native Affairs - Sir Theophilus Shepstone - delayed the drafting of a code.¹⁴⁵ Although the matter was raised a number of times in the Legislative Council,¹⁴⁶ nothing was done until 1875, when a Native Administration Law was passed requiring the Lieutenant-Governor to appoint a Board, the function of which - amongst other things¹⁴⁷ - was to be the codification of customary law. This Board was also to make subsequent proposals to implement any necessary alterations and amendments to the code once it came into force.

The resulting code, which was completed in 1878, was, however,

strongly criticised.¹⁴⁸ In an attempt to improve the matter a new Board was appointed in 1887.¹⁴⁹ This Board prepared a new Code of Native Law which was completed in April, and approved with alterations and amendments by the Governor in Council in May 1890.¹⁵⁰ Legal effect was given to the code in the following year¹⁵¹. Although an improvement on the earlier code, the 1891 Code was still not entirely satisfactory. First it was an incomplete statement of the law,¹⁵² secondly no provision was made concerning reference to the residual area of non-codified customary law. Moreover, in seeking to codify the existing, customary law of the territory, rather than impose a code which was largely founded on English common law - as in India - the commission encountered the same type of problems as those met in Europe in the period of the early codes:¹⁵³ namely the problem of ascertaining what the law actually was.¹⁵⁴

The shortcomings of the Natal code were largely due to a failure to fully appreciate the difficulties inherent in the codification of customary law.¹⁵⁵ However, the Penal Code introduced into the Transkei - which like the Anglo-Indian Codes was founded on English common law - was more successful.

The territory of the Transkei lay east of the Cape Colony, between the Great Kei River and the borders of Natal, and between the Indian Ocean and the mountains of Basutoland.¹⁵⁶ The area was inhabited by a number of different tribes,¹⁵⁷ many of whom were traditionally enemies, and sporadic outbreaks of unrest and violence were fairly frequent.¹⁵⁸ Despite the close proximity of the territory to the Cape Colony, and several requests by various tribes for protection, the British government in the Cape was extremely reluctant to incur the expense and responsibility of administering the area. However, fear of instability in the Transkei

sparkling off unrest within the Cape amongst related tribes;¹⁵⁹ combined with pressure from parliamentary lobbyists in London;¹⁶⁰ and the very obvious need for a more efficient legal and administrative system in the area, ultimately compelled the Cape government to act.

As a result of the War of the Axe in 1846 - the Seventh Frontier War - the area between the Keiskamma and Kei Rivers was brought under British rule and a separate province called British Kaffraria established.¹⁶¹ In 1860 Kaffraria became a crown colony and in 1865 it was incorporated into the Cape.¹⁶² In terms of the proclamation establishing British Kaffraria, native law was to be retained. In practice, the gradual introduction of a European-staffed, judicial and administrative system, charged with the duty to administer the law 'according to equity and good conscience',¹⁶³ inevitably led to a great deal of confusion, particularly amongst those in charge of administering the law.¹⁶⁴ Consequently - as had happened in Natal - codification was undertaken primarily to benefit local magistrates and judicial officers, in order to give certainty and uniformity to the unsatisfactory system which prevailed.

The first suggestions for a code for the area had been made in 1835 by Sir Benjamin D'Urban, who had suggested the drafting of a simple code of criminal law based on colonial law. There had however been insufficient time to undertake the scheme.¹⁶⁵ Further recommendations supporting a codified system of law were made in 1873 and in 1877.¹⁶⁶ Finally a commission was appointed in 1880 to:

'suggest such a code of Civil and Criminal Law as may appear suited to the future condition of the (Transkei) territories'.¹⁶⁷

One of the first problems which confronted the commission was the absence of a complete, customary, system of law on which to base a code.¹⁶⁸ Consequently the commission was compelled to look elsewhere; and it turned to

Lord Macaulay's Indian Penal Code of 1837 and Sir J Fitzjames Stephen's draft Criminal Code of 1879 (as amended).¹⁶⁹ The commission also referred to the reports of various Indian Law Commissions and Stephen's draft of the Indictable Offences Bill of 1878.¹⁷⁰ The Roman-Dutch law of the Cape was considered as an alternative to the English common law, but was found to be neither sufficiently certain, nor entirely satisfactory. It had the disadvantage of not being in a readily accessible codified form and was therefore difficult to find, frequently being written in a foreign language and scattered through a great number of statutes and texts.¹⁷¹ Also the cruel punishments of the Roman-Dutch criminal law, and the absence of minimum and maximum limits to punishments, made it unfavourable.

The strong influence of the Indian codes was not only reflected in the substance of the code but also in the style. Initially it had been intended to codify the existing, customary, criminal law by bringing it within the framework of colonial law definitions but avoiding any innovations in the substantive law.¹⁷² However the style finally adopted was that of the Indian Code, with the definition of the criminal act stated first, followed by case illustrations, designed to assist those administering the law, and to prevent legal innovation by the courts.

In order to achieve the aims envisaged i.e. certainty and clarity, it was recommended that the code be drawn up in clear, untechnical statements, suited to the native comprehension and translated into the local language.¹⁷³ It was also suggested that an efficient 'follow-up' system be established whereby omissions or defects encountered by those administering the code could be reported and rectified.

The work of the commission was favourably received,¹⁷⁴ and a draft code completed in 1882.¹⁷⁵ This was presented to the Cape Legislative As-

sembly in 1882 and eventually became law in 1886.¹⁷⁶

Although originally instructed to suggest a code of civil law, as well as a criminal code, the commission expressed the view that this would be a very difficult undertaking and suggested that it would be better to wait until such a code was passed for the Cape Colony.¹⁷⁷ Consequently in the Transkei the commission avoided many of the problems that had arisen in Natal in trying to codify the law on matters such as marriage and personal status. Also, by basing the code on common law the commission did not have to contend with the difficulties inherent in codifying customary law - difficulties which would have been further complicated by the number of different tribes in the territory. Moreover, from a study of the Report of the Transkei Commission it appears that those engaged on the task were not only better legally qualified for the task than those who sat on the Natal Commission, but also more positive in their approach to the problems involved. Codification in the Transkei was therefore a greater success than in Natal.¹⁷⁸

Although the English common law codes were largely reserved for her colonies, the spirit of rationalism and enthusiasm for law reform, engendered on the Continent, spread across the Atlantic to America, where, despite its predominantly common law system, codification was more enthusiastically received.¹⁷⁹

Prior to the nineteenth-century codification movement, some of the new colonies had already reduced their laws to 'codes', for example Massachusetts in 1634 and Pennsylvania in 1682. However these were probably no more than written statutes and in some cases simply a collection of legal texts bearing the appellation 'code'.¹⁸⁰

At state level therefore, codification of the law served a similar

function to that of the early codes in Europe and elsewhere; to make the law more certain and more readily ascertainable.

However independence, the occurrences of the French Revolution, and the emergence of the French codes, introduced other factors which were to be important in the development of the codification movement in America. First a growing sense of independence, and resentment at English influence, gave rise to a feeling of hostility towards the common law which began to be viewed as a foreign law. Secondly, in a country where there was emphasis on the freedom and equality of all classes of people - in theory anyway - there was a distrust of lawyers not dissimilar to that expressed during the Revolution in France. Thirdly, the sheer bulk of law reports - largely of English origin - and the fact that full sets of these were in short supply, made the pursuit of the law arduous and frustrating. Fourthly, there was a certain amount of distrust of the judiciary, which was seen as elite and as being a law unto themselves. Fifthly, the influence of the Napoleonic codes, reflecting as they did the glory of the Revolution and the rise of the common man, as well as the ideas of the Enlightenment and the theory of a social contract, appealed to the American philosophy of life. Finally there was the influence of Bentham, whose hopes of making the law cognoscible to the layman was given a better reception in America than in England.¹⁸¹ Although Bentham's personal offer to codify the laws of the United States was politely, but firmly rejected;¹⁸² his support of, and conviction in, the advantages of codification, inspired others who took up the cause during the nineteenth century in America.¹⁸³

The first of these was Joseph Story, who in 1821, advocated the codification of those areas of the law which had reached a sufficient degree of maturity and stability, in order to overcome the bulk and fragmented nature

of the law. Story suggested that the lead in codification should be taken by a state such as New York or Massachusetts, which would set an example to be emulated by other states. Although Massachusetts showed interest in codification,¹⁸⁴ it was New York that led the way, due largely to the activity of David Dudley Field.

In 1846 Field urged the New York Constitutional Convention to adopt a general code, and in the following year a commission to investigate the possibilities of codification was set up. In 1848 Field himself drafted a Code of Civil Procedure, and this was followed by four other codes in the period up to 1865.¹⁸⁵ Between 1876 and 1880 the Code of Civil Procedure was promulgated in New York,¹⁸⁶ and in 1881 the Code of Criminal Procedure was given legal effect. In 1879, the New York legislature had tentatively adopted Field's Civil Code but as a result of opposition from the legal profession, particularly the New York Bar, had subsequently vetoed this.¹⁸⁷

Despite the fairly unenthusiastic reception of Field's codes in New York itself, they were eagerly adopted by other American states either wholly or partially.¹⁸⁸ However while unification of the law had been one of the considerations influencing codification in Europe; in America it has been suggested that the desire to maintain the federal nature of the country inhibited national codification.¹⁸⁹ Consequently to this day the autonomy of federal law has been maintained in a number of legal areas - particularly in private law. In others the demands of the twentieth century emphasised the need for uniformity - particularly in commercial and, to a lesser degree, criminal law.

As a result of new legal needs, during the 1890's the American Bar Association set up a National Conference of Commissioners on Uniform State Laws, with the aim of codifying various aspects of commercial law. Under

the auspices of this conference a committee was appointed in 1895 to draw up a code for the law of negotiable instruments. Submitted in 1896 this code was subsequently adopted in fifty-one states.¹⁹⁰ Similarly codification of the law of sale was completed in 1906.¹⁹¹ As had happened in England during the 1890's, in America a number of consolidating statutes were also passed, with the intention of reforming and consolidating the law in order to foster trade and industrial development.¹⁹² It was these statutes that ultimately formed the basis of the American Uniform Commercial Code of 1962.

Besides the activities of the legal profession, the influence of prestigious national law schools such as Yale and Harvard, with their emphasis on national rather than federal law encouraged a broader perspective of the American legal system,¹⁹³ and thereby made codification more acceptable.

The establishment of the American Law Institute in 1923 also provided a forum for legislative reform and comment. Under the auspices of the Institute many areas of the common law were reduced into forms very similar to codes, namely Restatements. Through these the Institute hoped to reduce the pre-existing mass of the law, and to express it in a systematic and authoritative form. As with codification the aim was to promote uniformity of law by excluding local peculiarities, and placing the law on firm foundations.¹⁹⁴ Besides the work on the Restatements, the American Law Institute also produced a number of Model Codes - by itself, and in combination with the Conference of Commissioners on Uniform Laws.¹⁹⁵

This later stage of codification activity in America indicates that codification need not occur as the result of revolution and political change, but may be part of a general desire to tidy up the law and reduce it to more manageable proportions.

Certainly this is true of the present movement towards codification in England,¹⁹⁶ where a Law Reform Commission was established in 1965.¹⁹⁷ The mandate of the Commission in terms of the Act, was to:

'take and keep under review all the law with which they are respectively concerned, with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.'¹⁹⁸

Codification is thus seen as a mixture of reform and restatement. The work of the Commission has received much comment, some of it highly critical and pessimistic, some more positive and optimistic.¹⁹⁹ To date a number of drafts, reports, and working papers have been produced but no complete codes. It is therefore too early to judge whether the commission will achieve that part of its mandate which relates to codification of the law. However, the continuing interest in codification in common law countries is illustrated by the ongoing work of such organizations as the American Law Institute and the English Law Commission.²⁰⁰

It has been suggested that the distinction between common law and civil law systems is superficial, because before the era of codification 'there was virtually a common law of Europe'²⁰¹ In many respects the historical development of codification has again blurred the distinction between the two systems. In both there has been increased legislative activity in every branch of the law, either to codify customary law, amend it, or supplement it. In common law countries traditional hostility by the judiciary towards statute law has tended to abate; while in civil law countries it is increasingly apparent that the judge has a vital role to play in interpreting and applying the provisions of codified law.²⁰²

There are two areas where this blurring of the distinctions between

the two systems, by codification, is most apparent. The first is where civil law countries undertake the re-codification of their laws, as has happened in many parts of Europe during the present century.²⁰³ Re-codification is not simply a means of reforming the law once more, but also a consolidation of the body of additional statute law that has developed to supplement the original code. Re-codification also has to take cognisance of the development of the law by the judiciary and summarise the case law to date. It is therefore a process which shares many of the difficulties confronting codification in common law systems.

The second is where civil law codes are used together with the common law in mixed legal systems, and it is to these that I now turn.

(iii) Mixed Legal Systems

The overwhelming majority of countries that have mixed legal systems were initially civil law jurisdictions. However not all countries with mixed systems have codified law; and those that do, seldom have a fully codified system. Some of those countries that have codes, codified their law prior to the introduction of common law - for example the Philippines and Puerto Rico,²⁰⁴ others turned to codes afterwards - such as Louisiana and Quebec.

There have been two main reasons for codification in such systems; either to try and preserve the existence of the civil law in the face of increased use of common law²⁰⁵; or as a reaction against the imposition of common law once independence from the political dominance of the common law country is achieved.²⁰⁶ Thus the motivation behind codification in 'mixed' legal systems is not necessarily any different from that of single legal systems. On the other hand because these legal systems invariably reflect the characteristics and cultural backgrounds of a population of two

or more predominant groups, a greater number of ideological and practical considerations may have to be taken into account than in a single system.

The earliest code in a mixed legal system was that of the Territory of New Orleans - now Louisiana - which became law in 1808.²⁰⁷ Agitation for codification began when it appeared that the continued existence of the civil law in the country was being threatened by the increasing use of common law by lawyers trained in the common law tradition.²⁰⁸ The matter was further aggravated by the fact that there were few civil law treatises available and those that were, were in French, not English. In 1805 the Legislative Council passed a resolution authorizing a legislative committee to draft civil and criminal codes.²⁰⁹ A further resolution was passed the following year appointing James Brown and Moreau Lisset to compile and prepare a civil code.²¹⁰ In the interim however the common law had encroached further, having been introduced into all areas of criminal law except those pertaining to slaves, and provision for trial by jury had been made.²¹¹

In 1808 an act was passed promulgating a digest of the civil law - the Louisiana Civil Code - thus giving formal recognition to, and ensuring the establishment of, civil law in the territory.²¹² However, codification in itself did not ensure the perpetuation of the civil law. The status of the code as a legal source had to be determined, and also the law to be applied where the code was silent.²¹³ In many instances common law was used where loopholes occurred. However the matter was complicated by a decision in 1817 that held that where the code had not repealed the prior law then Spanish law applied - except where incompatible with the code.²¹⁴ This necessitated further research into the content of these Spanish laws, and in 1820 a collection of these was published by the Louisiana legislature

under the title Las Siete Partidas.²¹⁵ Had this not been published it seems likely that the common law would have gained the upper hand, as it was, the position of civil law was strengthened and it remained dominant except in the areas of criminal and procedural law.

A similar situation arose in Canada, where French law was introduced into the province in 1663.²¹⁶ The basis of this law was the Coutume de Paris, itself a compilation of customary law made in 1510. Also in force were local ordinances and those passed by the Parliament of Paris where applicable to local conditions. The capitulation treaty of 1760 which brought Canada under British rule, neither repealed the existing legal system nor upheld it. Consequently considerable confusion as to which laws were of force and effect prevailed until 1774, when the Quebec Act was passed.²¹⁷ This act firmly established a dual legal system by re-introducing French law, except in criminal matters.²¹⁸ However, as in Louisiana, there was widespread ignorance and doubt as to what the laws of Canada were prior to 1760, which resulted in uncertainty and administrative inconsistency with English judges virtually ignoring all French-Canadian law. When Canada was divided into two provinces in 1791, French law prevailed in Lower Canada but was repealed in Upper Canada, a situation that did not change even at Union in 1840.

Added to the general ignorance concerning the content of Canadian law, was the fact that a number of statutes had been passed in the period since capitulation - particularly in the field of commercial law - which were of common law rather than civil law origin. The resulting chaos ultimately led to codification, and in 1857 an act was passed instigating the codification of the law of Lower Canada.²¹⁹ In 1859 a Commission was appointed to work on a code of civil and commercial law. Between 1860 and 1865 a

number of reports were produced, and in 1866 the Code came into effect.²²⁰

The Code did not purport to abrogate all the existing law, but only where provision on a matter was made by the code.²²¹ Where the code is silent the decisions of the courts are taken into account. Thus in Canada a system of codified law exists alongside a system of case law. Although in theory stare decisis is frowned upon, in practice considerable weight is given to judgements of the Supreme Court. Consequently a great amount of judge-made law has grown up around the code, supplementing it and adapting its provisions.²²² However it seems that the presence of the code prevents strict adherence to precedent despite the fact that most of the members of the Supreme Court are trained in common law. As a result there are the advantages of wide judicial discretion combined with a comprehensive codified statement of general principles.²²³

A country with a mixed legal system which has most recently undertaken the codification of its law is that of the Seychelles. Although prior to independence the Seychelles was a British colony, the French Civil Code was promulgated in the Islands by the original French settlers in 1808.²²⁴ When the area was ceded to the British in 1814, French law remained in force but gradually became less important as English common law statutes were introduced to provide for the day-to-day legal needs of changed social and economic conditions.²²⁵ However, while the basic legal principles remained those of the eighteenth-century French codes, recourse to common law statutes by lawyers trained in England led to a number of cases where these principles were ignored.²²⁶ Although there were no obvious injustices arising out of the co-existence of the two systems it was felt that the law was insufficiently certain to provide a suitable framework for the foreign investment necessary for the development of the Seychelles.

Also the civil code lacked simplicity, and, more importantly, it was not widely accessible in its original form, nor was an official English language version available. Thus not only was it difficult for the layman to know what his legal rights and remedies were, but the legal profession also had problems in ascertaining the law.

Nevertheless, it was felt impossible to replace the whole system with French law because while the Seychelles French law was still that of the Napoleonic Codes, the law of France had changed considerably. Nor was it felt feasible to abolish French law in favour of a wholesale adoption of English common law, the historical background and development of which were quite alien to the Islands. It was therefore decided to maintain a mixed legal system but to revise and reform the Civil Code.²²⁷

In 1972 the governments of the United Kingdom and the Seychelles started on the work of revision and in 1973 an English version of a new code was drafted. It was decided that the new code should reflect the civil law tradition in style and expression, but incorporate a substantial amount of common law in its provisions, in order to reflect a true picture of the legal situation.²²⁸

The final draft of a revised code was published in 1975,²²⁹ and came into effect on 1 January 1976, six months before the Seychelles became an independent Republic.²³⁰ The new Code provided that the French Civil Code would cease to have effect,²³¹ thus marking a distinct break with the past. However, although the 1976 code was in English, it was very much in the French code tradition, and has been instrumental in preserving the principles of the civil law while providing an up-to-date legal system geared to the future needs of the country. As Chloros says, it is a 'Code which attempts to look to the future without renouncing its past'.²³²

The Civil Code of the Seychelles has been described as 'an experiment in Franco/British codification'.²³³ Certainly it reflects an interesting attempt to utilise the best aspects of civil and common law, and suggests that harmony between the two systems may be achieved or promoted through the use of codes.

The foregoing historical survey of codification is by no means a complete history of the use of codes. For instance, no mention has been made of the use of codes in China, where codified law has existed since the code of the T'ang Dynasty drafted between 600 and 700AD; nor of socialist countries where codes have been used to support new social and economic policies, for example in Russia in 1921-28, and again in 1958-68. Similarly new codes were used to reflect changes in political structure in China during the 1920's and 30's; and in Cuba during the 1970's.

The history of codification is so extensive that it is impossible in the course of this study, to do more than touch on the subject. However, the above information together with that given in Appendix A, should give some indication of the background and development of codification, and it is against this that the obstacles, achievements and value of codification should be assessed.

1. Lawson Many Laws (1977) 43, 44. Examples where codification has followed unification are Italy and Germany.
2. Bayitch describes this type of codification motivation as 'legal-technical' or 'static', compared to 'dynamic' codification, which is directed at achieving definite political or socio-economic goals: in Yiannopoulos 161, 173.
3. This has been the motivation behind much of the movement towards codification in common law systems, for example the United States Uniform Commercial Code and the current work on codification being undertaken by the English Law Commission, but is not limited to modern codification work, see for example the Code of Justinian.
4. This is reflected in the new or revised codes that have emerged after political change, for example in China, Russia, Mexico and Italy - see Appendix A.
5. See for example the Seychelles, Chloros; and those countries cited by Bayitch in Yiannopoulos 161, 176. See also Israel's movement towards codification discussed by Akzin (1956) 5 American Journal of Comparative Law 44.
6. For example in Greece the city states had their own legal codes such as those of Draco and Solon - see Appendix A - indeed local codes remained a feature of Greece until the Civil Code of 1946 became law. See Zepos (1961) 3 Inter-American Law Review 285, 291. See also Louisiana, Quebec and the various codes of the separate states of America discussed infra.
7. For example the Indian Criminal Code of 1793 the Transkei Penal Code of 1886 and the Natal Code of Bantu Law of 1878. The use of the French Civil Code was similarly employed by Napoleon in his empire.
8. Bayitch op cit 177. See also Noda Yosiyuki Introduction to Japanese Law (1976).
9. See for example the situation in Ethiopia - David (1963) 37 Tulane Law Review 187; and Nigeria - Williams (1966) 29 MLR 258.
10. This term is taken from Seagle, The History of the Law (1941) 102, and for this study will be used to cover those codes up to and including the Code of Justinian, although Seagle himself includes all codes up to the Code Napoleon in this category. The division into different historical periods should not be regarded as anything more than a guideline.

11. Kocourek & Wigmore 387-88. It is possible that there were city state codes before this date, as fragments of laws of Bilalama, King of Eshnunna (c 2268-2259BC); and the laws of Lipit-Istar, King of Isin (c 2217-2207BC) have been discovered, but there is insufficient evidence to indicate whether these were sufficiently comprehensive or systematic to be regarded as codes of laws Driver & Miles The Babylonian Laws vol 1 (1952) 5-17.
12. Kocourek & Wigmore 387. Besides the fact that the temple was a public venue, there was a close association between law and religion as many laws were believed to be divinely inspired, see Maine Ancient Law (1916) 1-18.
13. Driver & Miles op cit 45.
14. Idem 41. Compare however the view of Seagle op cit 104 & 109.
15. See Driver & Miles op cit 45 note 1.
16. Seagle suggests that the 'archaic' codes should be judged on their own terms as 'unsystematic digests', which, although not codes in the modern sense were regarded equally highly in their own day op cit 103.
17. Seagle op cit 113. Whether the Greek codes had much influence on the Twelve Tables is uncertain. See for example the comments of Thomas Textbook of Roman Law (1976) 34. For an assessment of the Twelve Tables as a code see Maine op cit 12-18.
18. Based on the theory of the personality of laws the Barbarian Codes sought to provide a self-contained form of law for those Romans subject to Barbarian rule.
19. The Pentateuch or Covenant Code (c 900-850BC) found in Exodus xxi 2-xxii 33; and the Deuteronomic Code (c 700-600BC) found in Deuteronomy xii-xvi.
20. Kocourek & Wigmore 469.
21. For a discussion of the survival of Roman law and its subsequent influence on latter codification movements in Europe see Sauveplanne 13. The most important of these codes were the Edictum Theoderici of Theoderic, King of the Ostrogoths (453-66AD) in North Italy; the Lex Romana Burgundionum (c 501AD) of King Gondebad in South East France; and the Lex Romana Visigothorum or Breviarium Alaricianum (506AD) of King Alaric II, in Spain and South France. See Continental Legal History vol 1 35 et seq.
22. Tucker (1965) 25 Louisiana Law Review 698, 704.
23. The Lex Salica was drawn up sometime prior to the death of Clovis, King of the Franks in 511AD and although possibly originally in the Frankish language was translated into Latin during his reign. The code is a combination of customary law, ecclesiastical law and Roman Law. See Wessels History 37-39.

24. These archaic codes fell short of the expectation expressed, by for example Seagle, that a code should be a statement of at least one particular branch of law that purports to be complete and systematic in form: Seagle op cit 103. See also Hahlo & Kahn 66.
25. For example the Visigothic code which is a penal code is far more concerned with the punishment of various crimes than in establishing general principles of liability.
26. For example the Lex Salica is largely concerned with criminal law, although it also makes legal provision for various aspects of succession, contract, possession of land, sale and lease: Wessels History 37-39.
27. For example the Lex Romana Visigothorum remained in force in Southern France until the 12th century or so: Tucker op cit 704.
28. For example the Lex Salica and the Lex Ripuaria formed the basis of a code of imperial law drawn up by the Emperor Charles the Great, King of the Franks, in 772AD: Wessels History 32.
29. 'Codes in the modern sense come after a full legal development and simplify the form of developed law, systematize and harmonize its elements, and formulate its principles. They are lawyers' codes': Pound Jurisprudence vol 3 (1959) 680. This idea is similar to that of Sir Henry Maine, who suggested that codification represented a third stage in the development of law, whereby customary law was codified to resolve social conflicts: Boheneimer Jurisprudence (1974) 75-76. Although a fully mature legal system is not always a pre-requisite for the use of codes, Maine's theory of legal developments is true of most systems where codification has occurred.
30. Hahlo & Kahn 66.
31. Ibid. See also Hahlo (1967) 30 MLR 241, 244. David rejects the classification of the works of Justinian and Theodosius as codes and regards them as collections: David & Brierley 101. See also Lloyd's comment that 'by its emphasis on particular points rather than general principles, and also its extreme bulk, (Justinian's Code) does not by any means conform to modern notions of codification': (1949) 2 Current Legal Problems 155, 159.
32. Two early, private, but authoritative collections had been made by Gregory - the Codex Gregorianus c 300AD, and Hermogenianus - the Codex Hermogenianus c 323AD - 295. In the Eastern Empire Theodosius II ordered a code which was completed in 428AD and later introduced into the Western Empire by Valentinian III in 439AD: Tucker op cit 702-703.

33. Ibid. 'In terms of Roman Law as a whole, therefore, Justinian may properly be regarded as both the first and last codifier' Thomas op cit 55. It is possible that Justinian was inspired by the example of the Barbarian Codes. See Lee Elements of Roman Law (1956) 26. Certainly as Emperor in the East he may have been aware of the much earlier eastern codes and also had the attempts of Gregory, Hermogenian and Theodosius to refer to.
34. Seagle op cit 280.
This was true even of the Corpus Juris Civilis of Justinian which, written as it was in Latin was probably only used in practice by the courts in Constantinople and the larger provincial towns in the Eastern Empire. See Lee op cit (1956) 31.
35. Originally a penal code containing pure Saxon law, later chapters reveal the influence of Frankish laws and were probably added subsequently. See Continental Legal History vol 1 52-53.
36. The Frisian Code was probably an unofficial one, and includes general principles of law, pagan and Christian laws: idem 53-54
37. Kocourek & Wigmore 519. For a full discussion of the early codes of the Lombards and Franks see Continental Legal History vol 1 23-70. There are also a number of collections of laws which have occasionally been referred to as codes, but which do not appear to have been intended to be any more than written, as opposed to unwritten, law and have therefore not been included in this study, for example The Dooms of Aethelbirht (601AD) and the Leges Henrici of Henry I (1118).
38. See Continental Legal History vol 1 23-24.
39. Lievestad (1938) 54 LQR 95. Generally on Scandinavia see Continental Legal History vol 1 part VII.
40. Gomard (1961) 5 Scandinavian Studies in Law 29, 35. This code has never been formally repealed although today much of it has fallen into disuse or been modified by new legislation and interpretation.
41. Lievestad op cit 96. Once Norway and Sweden had united in 1319, and then Denmark (1380), Danish law became increasingly influential and the separate, national codes were replaced with new codes, for example the (New) Norwegian Code of Christian V in 1687.
42. Stromholm (ed) An Introduction to Swedish Law vol 1 (1981) 31-32. This code is still in force and is updated by adding new books or amending old ones by a system of successive partial reform.
43. The codes dealt with specified areas of life and the laws affecting those areas, not with the whole body of law, and therefore lacked the systematic exposition of the law found in later codes ibid. See also the comments of Lievestad op cit 98.
44. Hahlo & Kahn 67.

45. Pound suggests that the CCC is the first legislation which can be called a code in the modern sense, because 'in comparison with earlier imperial legislation it was characterized by greater exactness of definition. It eliminated many abuses, and did away with obsolete rules of proof': op cit 689.
46. "The Bambergensis" a criminal code prepared for Bishop Georg of Bamberg by Johann von Schwazenberg in 1507, was in turn based on two other codes - also influenced by the Mos Italicus theory of criminal law - the Criminal code of Maximilian I for Tyrol (1499) and that of Radolfzell (1506). See Continental Legal History vol 1 402-403.
47. Ibid
48. For example in 1560 the States General voted in favour of codification under Dumoulin's encouragement, and an attempt at compilation of royal ordinances was made by Brisson in 1580 during Henry III reign. Codification was recommended by the States General in 1576 and 1614 and although nothing was done then, partial codification was achieved by Colbert in 1665-1681 during the reign of Louis XIV; and by D'Agnesseau in 1731-1747 during the reign of Louis XV. See Pound op cit 689; Seagle op cit 281; and Lobingier (1918-19) 32 Harvard Law Review 114, 115.
49. Continental Legal History vol 1 435.
50. The first draft of this code - probably the work of Samuel van Cocceji, a celebrated teacher of natural law as well as Minister of Justice - appeared in 1749. However the Seven Years' War (1756-63) interrupted the work and the final draft was the work of Karl Goltlieb Svarez: Seagle op cit 282.
51. For a discussion of the ideological and philosophical background to the Prussian Code see Friedrich in Schwartz 11-14.
52. A belief in natural reason meant that it was possible for rational men to draw up a complete and perfect code based on the systematization found in natural law. Because the resulting code would be formulated on purely rational grounds it would be of universal and perpetual application. See Donald (1973) 47 Australian Law Journal 164; Friedrich op cit 2; David & Brierley 43-46.
53. David & Brierley 60. See also David French Law - Its Structure Sources & Methodology (1972) vi.
54. David & Brierley 59.
55. Seagle op cit 282-283. Seagle describes the Allgemeine Landrecht as the first of modern codes because it aimed to be complete, supplanting the law of the pandects and yielding only to the provisions of provincial statutes. For a detailed description of the Code see Continental legal History vol 1 436-437.

56. Not only did the code fail to reflect the ideas of the Enlightenment in many respects but it was also very detailed, casuistic and bulky, containing over sixteen thousand provisions: Seagle ibid. See also Hahlo & Kahn 67.
57. Seagle op cit 282-283.
58. Pound op cit 691; Zweigert & Kotz 78; Continental Legal History vol 1 435. Metternich's attempts to restore absolute monarchy in Austria were hardly conducive to the view of law and the legislator taken by the Enlightenment: Zweigert & Kotz ibid. David also suggests that Austria was insufficiently politically powerful in the rest of Europe to influence the development of law there: David & Brierley 61.
59. Seagle The History of Law 283.
60. Initially published in 1804 as the Code Civil des Francais, the code was renamed the Code Napoleon in 1807 and then reverted to being called by its original name in 1814 and 1830, and in 1870 was called the Code Civil: Continental Legal History vol 1 285.
61. David & Brierley 61. While the need for enlightened leadership seems indisputable, the second requirement is perhaps only valid where codification occurs alongside territorial expansion, as did the Code Napoleon.
62. Seagle op cit 282. See also Lobingier (1918-19) 32 Harvard Law Review 114, 116. Nothing in the way of a civil code appears to have been achieved under the Constituent Assembly or the Legislative Assembly which followed it, although a Rural Code was passed in 1791: Continental Legal History vol 1 277.
63. The committee consisted of Cambaceres, Treilhard, Berlier, Merlin de Douai and Thibaudeau. The draft was largely the work of Cambaceres who acted as chairman: Continental Legal History ibid. This first draft was rejected as being insufficiently revolutionary: Pound op cit 692.
64. Voltaire's remark that a traveller changed his law as often as he changed horses is often cited to illustrate the diversity of French laws prior to codification. See for example Sauveplanne 5-6.
65. See Friedrich op cit 2.
66. In September 1794; in June 1796 and in December 1799. All of these were the work of Cambaceres: Seagle op cit 284.
67. For a discussion of Rousseau's influence on Napoleon see Friedrich op cit 7-10.
68. The commission consisted of Tronchet as Chairman, Portalis, Bigot de Preameneu and Malleville. None of these were revolutionaries and in fact all belonged to the legal profusion of the Ancien Regime. See Lobingier op cit 117-118.

69. Compare for example the view of Frederick II of Prussia discussed supra.
70. Lobingier op cit 119.
71. Idem 119-121. See also Hahlo & Kahn 68; Lawson A Common Lawyer looks at the Civil Law (1955) 35-40.
72. The 'law-making' function of the judiciary was however curtailed on matters dealt with by the codes.
73. The first draft was rejected by the legislature, which consisted of a Council of State, a Tribunate, a Legislative Body and a Senate. In order to get the second draft accepted Napoleon had first to re-arrange the legislature. See Pound op cit 693; Seagle op cit 285; and Continental Legal History vol 1 281-283.
For a discussion of Napoleon's own contribution to the work of codification see an anonymous article in (1983) 57 Australian Law Journal 64; Limpens in Schwartz 105; Lobingier op cit 123; and Zweigert & Kotz 76-77.
74. The Code of Civil Procedure of 1806; the Code of Commerce of 1807; the Code of Criminal Procedure of 1808; and the Code of Penal Law of 1810.
75. For example that the code is too simple; illogical; and has too many important omissions: Lobingier op cit 128-130.
76. The scope and arrangement of the French codes were distinct from previous codes. See Lobingier op cit 119.
77. David & Brierley 59-60. This particularly applied to criminal law. It should be noted, however, that the Napoleonic codifications failed to deal with constitutional and administrative law.
78. See for example Article 7 of the law of 30 Ventose, year XII which promulgated the Civil Code and which declared:
'From the day when these laws go into effect, the Roman laws, the Ordinances, the local or general Customs, the Statutes and the Regulations shall cease to have the force of either general or special laws, on the matters dealt with in the afore-said laws composing the Civil Code':
Continental Legal History vol 1 284.
79. The idea of equality before the law reflected in the French code, was very different from the 'paternalistic authoritarianism' of the Prussian Code. Also the downfall of the ancien regime and the new role of the bourgeoisie in the law-making process meant that the legislating function of government was no longer set in a feudal society. See Zweigert & Kotz 78, 85; Eorsi Comparative Civil (Private) Law (1979) 156-157, 491 et seq.

80. The development of legal nationalism frustrated the hopes of the universalists who had seen codification as a means of expressing a common law of Europe - a ius commune - which, based on the principles of natural and just laws, would develop unfettered by national boundaries or local customs and practice: David & Brierley 62-64. However, it seems that it was not so much the codes themselves but their subsequent commentators who, by their emphasis on legal positivism, were responsible for this trend.
81. For example in Belgium, Luxembourg, Poland, parts of Italy and Egypt.
82. As happened in Westphalia; Hanover; the grand duchies of Baden, Frankfurt and Nassau; and parts of Switzerland.
83. As in Greece, Spain, the Netherlands, Quebec, many parts of South America and as far away as Japan and Turkey. For details on the territorial expansion of the codes see Limpens op cit 93; Lawson (1949) 61 Juridical Review 16, 30; David English Law and French Law (1980) 16; Seagle op cit 289; Continental Legal History vol 1 302-305.
84. Some states temporarily repudiated the French system, eg Italy, but after the restoration of national law turned once more to the French codes as models for their own codes. Other countries continued to preserve French legislation, eg Switzerland: Continental Legal History 304-305. See also Limpens op cit 96 et seq.
85. Bisschop (1901) 3 Journal of Comparative Legislation 109.
86. Bayitch op cit 174. Similarly codes have been adopted by African countries achieving independence more recently, such as Algeria, the Ivory Coast, Nicaragua and Ethiopia. See 'National Reports' International Encyclopedia of Comparative Law vol 1 (1973). For a detailed discussion of codification in Ethiopia see David (1963) 37 Tulane Law Review 187.
87. Limpens op cit 99. The codes was not translated into Spanish until 1884.
88. Brown (1957-58) 1-2 The American Journal of Legal History 35, 46-48, 53.
89. As late as 1946 the French Penal Code was introduced into French Africa and Malagasy; and the new Egyptian Code of 1948 retains much of the character of the earlier Egyptian codes (1878-1881) which were almost identical to the Code Napoleon: Limpens op cit 102.
90. The rapid growth of capitalism and the demand for a legal system which would mark a total break with the past were occasioned by the re-establishment of foreign relations in 1853. The initial interest in the French Code was largely due to the influence of Boissonade and his colleagues who were in charge of teaching French law in Japan from 1872. The final code of 1898 was a mixture of French and German influences. See Limpens op cit 101; Hahlo (1967) 30 MLR 244; and Noda Yusiyuki Introduction to Japanese Law (1976) 41 et seq.

91. Huc Le code civil italien et le code Napoleon vol 1, 2 (1868) cited by Limpens ibid.
92. Das Burgerliche Gesetzbuch.
93. For example after the establishment of the German Tariff Union in 1834 a uniform Bills of Exchange Act was passed in 1848, followed by a Commercial Code in 1861: Hubner (1977) TSAR 22, 23.
94. For example, the Commercial Code had to be promulgated by a separate act in each state. The strength of provincial laws was such that there were over thirty different legal systems in existence in 1873 when the Federal legislature was at last given the power to legislate for the whole country: Seagle ibid. See also Zweigert & Kotz 134-136.
95. In 1814 Anton F J Thibaut, Professor of Roman Law at Heidelberg published a pamphlet entitled 'Über die Nothwendigkeit eines allgemeinen burgerlichen Gesetzbuch fur Deutschland' Zweigert & Kotz ibid.
96. Continental Legal History vol 1 183 et seq. For an assessment of the influence of Savigny see Dawson The Oracles of the Law (1968) 451.
97. Pound op cit 728. Austin was to take up many of Savigny's objections and repudiate them. See Lectures on Jurisprudence (1899) 332 et seq.
98. Zweigert & Kotz. As indicated supra note 94 political reality at the time did not provide propitious circumstances for codification.
99. Continental Legal History vol 1 183.
100. This meant that both the Germanic and Roman sources should be studied. However the Historical school increasingly concentrated on ancient Roman law and ultimately lost touch with current legal demands. For criticism of their views and methods see Zweigert & Kotz 140-141.
101. Yntema (1960) 2 Inter-American Law Review 207, 211; Zweigert & Kotz 141-142. By studying the historical origins of German law and largely ignoring the provincial differences that had occurred in more recent times, the Pandectists at least brought about integration on a theoretical level: Zweigert & Kotz ibid.
102. ibid.
103. Savigny himself had died in 1861 and although the Historical School and the Pandectists continued to flourish after his death their failure to take cognisance of social and economic reality invited growing criticism. Moreover, practising lawyers had little time for abstract theories and wanted a system of law which would overcome the disadvantages and difficulties of Germany's legal chaos.
104. Between 1880 and 1887 this draft was revised and then published for further debate. A second commission was appointed in 1890 to draw up

a new draft which was completed in 1896 but only enacted in 1900: Pound op cit 698-699. See also Seagle op cit 291-92; Huber op cit 24.

105. Yntema op cit 211.
106. See note 90 supra.
107. One of Savigny's arguments against codification was that the German language was quite unsuitable for such an exercise: Seagle op cit 292. The bulk of commentaries and works interpreting the code add weight to his view. See also the criticisms of Zweigert & Kotz 143; Gilmore (1947-48) 57 Yale Law Journal 1341, 1356; Hahlo & Kahn 69 et seq.
108. Many of these problems, which have been seized upon by the anti-codification camp, have been shown to be less serious than initially imagined due to the skillful use and application of the general clauses of the BGB, (Generalklausen). See David & Brierley 110-112. See also infra on the question of flexibility vs rigidity of codified law.
109. Seagle op cit 295.
110. See supra notes 23, 24, 25.
111. In 1614 Attorney-General Bacon proposed codification in the form of a statute code, a new abridged edition of the Year Book reports, and an institutional part; consisting of a book of principles, a treatise on maxims and a law dictionary: See International Encyclopedia of Social Sciences vol 1-2 494; Pound op cit 705; Donald (1973) 47 Australian Law Journal 160, 164.
112. Kerr (1980) 96 LQR 515, 518.
113. This lack of success may have been partly attributable to Bacon's own fall from political power in 1621 when he was impeached and subsequently disgraced.
114. Donald op cit 162. See also Pound Jurisprudence vol 3 705.
115. Kerr op cit 518. One of the reasons why codification received less support than in France, for example, was that although the judges were powerful, the dual system of courts of law and courts of equity, which existed until 1873, probably reduced the chance of arbitrary administration of justice. There was therefore less demand for reform.
116. Gregory (1899-1900) 13 Harvard Law Review 344, 350; Bentham J The Limits of Jurisprudence Defined (1945); Bentham (ed) Hart Of Laws in General (1970).
117. The university teaching of law remained disorganised and weak until the late nineteenth century; particularly when compared with the impetus given to codification and the systematization of the law from the universities on the Continent. See McWhinney International Ency-

yclopedia of the Social Sciences vol 9 & 10 216.

118. For example in 1829 codification was advocated by Henry Brougham - later Lord Chancellor; in 1833 a Royal Commission to consolidate statute laws was established - with no result; in 1853 Lord Chancellor Cranworth requested a further commission; and in 1859 Lord Chancellor Westbury proposed the compilation of a digest of case and statute law: Kerr op cit 518-519.
119. For example the 1861 Malicious Damage Act, and Offences Against the Person Act ibid.
120. The most important of these were: Bills of Exchange Act 1882; Bankruptcy Act, 1883; Factors Act and the Arbitration Act, 1889; Partnership Act, 1890; Sale of Goods Act, 1893; Merchant Shipping Act, 1894; Perjury Act, 1911; Forgery Act, 1913 and the Larceny Act, 1916:
Seagle op cit 296; Diamond (1968) 31 MLR 361. For a history of the drafting of the Bills of Exchange Act and an indication of the type of problems involved see Chalmers (1903) 19 LQR 10.
121. Donald op cit 164-165.
122. Pound op cit 725.
123. See Austin Lectures on Jurisprudence (1899)
124. Kerr op cit 516.
125. The problem of Parliamentary time and enthusiasm is still a very pertinent consideration when considering codification and is discussed infra under Difficulties confronting Codification.
126. In 1934 Chancellor Sankey set up a Law Revision Committee which was revived in 1952 as the Law Reform Committee by Lord Simonds, and again in 1959 by Lord Butler as the Criminal Law Revision Committee. However it could only deal with specific topics referred to it by the Lord Chancellor or Home Secretary, had no independent initiative, and was staffed entirely voluntarily: Kerr op cit 521.
127. David & Brierley 466-467.
128. Ibid.
129. Macaulay's work was particularly influential when a code of criminal law was being drafted for the territories of the Transkei in South Africa.
130. Findlay (1904-1907) 2-6 Natal Law Quarterly 2, 5.
131. For example Sir James Stephen was very active in his attempts to achieve codification of the English law of evidence and criminal law: Seagle op cit 296; Gregory (1897-1900) 13 Harvard Law Review 344, 351. For Sir Henry Maine's views on Codification see Ancient Law (1916) 1-18.

132. That the Commission was setting themselves a very difficult task is perhaps illustrated by the fact that a modern code of Hindu Civil law did not come into existence until 1955-56, although there had been such a code - The Laws of Manu-c 200BC.
133. The Commissions for codification of the religious laws met with a certain amount of resistance and this idea was subsequently abandoned. David & Brierley 467. There was also the problem that any proposed legislation had to go through the British parliament where it encountered further opposition.
134. In fact two previous Criminal codes had been passed in order to reform the uncivilised system of criminal law. These were the (Cornwallis) Criminal Code of 1793 and the (Elphinstone) Criminal Code of 1827: David & Brierley 467 note 90.
135. These statutes were: Succession Act, 1865; Evidence Act, Contract Act, Specific Relief Act, 1872; Negotiable Instruments Act, 1881; Transfer of Property Act, and Trusts Act, 1882. See David & Brierley 468. It should be noted that these were promulgated for India and were intended to codify the Common law of Indian not England. See Diamond (1968) 31 MLR 361, 362; David & Brierley 469.
136. Diamond ibid.
137. David & Brierley 469. See also Pound op cit 708.
138. The Anglo-Indian codes have been used as models in eastern Africa and the Sudan: David & Brierley 469. Also in Ceylon where some of the codes were adopted with very few changes: Nadaraja The Legal System of Ceylon in its Historical Setting (1972) 232 et seq.
139. Formal annexation was declared on 31 May 1844 although the announcement was not published in South Africa until August 1845 and the new Lt. Governor - Martin West - did not assume office until December 1845. Natal had been inhabited by white settlers since 1823, but despite petitioning the English crown to extend its protection of the territory - for example in 1832 to William IV - Britain had shown little inclination to do so. From 1837 onwards an increasing number of Dutch farmers and trekkers settled in the area and in 1839 the Trekker Republic of Natalia was established. The Trekker government remained in power until 1842 when British troops from the Cape under Col. Cloete occupied Natal. See Brookes & Webb (1965) 48.
140. It has been suggested that one of the very reasons for the delayed publication of annexation was the 'absence of any fixed policy or effective means of control over refugees from Zululand entering the colony': ibid.
141. The others were that there would be no slavery, and that no unauthorised aggression on Blacks beyond the borders of the colony would be permitted: idem 40.
142. Government Notice 68 1852. These instructions were given by Stephen Gordon, Acting Secretary to the Government. This was in fact a

- subordinate task of the Commission, which was primarily appointed to take a census of the Black population in Natal.
143. 1852-3 Commission Proceedings and Report of the Commission appointed to inquire into Past and Present State of the Kafirs in the District of Natal, 5. Hereinafter cited as Natal Report. The members of the commission are indicated in the Report. The most important of those, who sat on the initial commission were: W Harding (President of the Commission and a Crown Prosecutor); J Bird (the acting Surveyor-General); T Shepstone (Diplomatic Agent of the colony); J N Boshoff (Registrar of the District Court); F Scheepers (Field Commandant of the Mooi River Division); and Solomon Maritz (Field Commandant of the Klip River Division). The Commission's interpreter was the legendary Henry Fynn, and the Secretary, E Tatham.
 144. Natal Report 30 & 36. Support for the codification of the Black customary law also came from the colonists who distrusted and disliked Sir Theophilus Shepstone - the Diplomatic Agent in charge of 'Native Affairs'. See Welsh The Roots of Segregation (1845-1910) (1971) 159.
 145. Shepstone himself believed that codification would outweigh the present advantages of unwritten customary law. Welsh op cit 160-164.
 146. Enquiries concerning a code were reported in 1859, 1860, 1862, 1863, 1864, 1868, 1869 and 1872: idem 161.
 147. The law also made provision for the establishment of a court of appeal for decisions of the Native High Court, and the creation of special courts for certain offences.
 148. See for example the comments of Welsh and remarks cited therein op cit 166.
 149. Law 44 of 1887 amended the 1875 Native Administration Law and appointed a Board with power to 'propose the alteration, amendment or appeal of any of the provisions of Native Law known and administered in the Colony of Natal' (Long title to the act).
 150. The full title of this was the 'Code of Natal Native Law, framed by the Board appointed by the Governor under the provisions of Section 4 of Law No 44 1887 and passed by the Board on 10 April 1890'.
 151. Law 19 of 1891 legalised the Code of Native Law drafted in terms of Law 44 of 1887.
 152. For an indication of the reception of the code and a discussion of its weaknesses see Welsh op cit 168 et seq; Cassim N (1981) 25 Journal of African Law 131.
 153. For example the Livres de Coutumes in France
 154. Although a number of chiefs and headmen had been consulted on the content of customary law, this tended to vary from one locality to another. Moreover the lack of Black representation on the Legislative Council during the passing of the code's provisions meant that inaccuracies were perpetrated and incorporated. See Welsh op cit 167.

155. The problems of codifying customary law will be discussed later in this study as will the subsequent history of the Natal Code.
156. The Rev H Dugmore writing in 1846-47 described the territory of the Transkei as an area which extended from the Great Fish River eastwards to the mountains of the Amatoli; and to Fooboo's mountains and the sources of the Keiskamma, Buffalo, Kei and Bashee Rivers in the north: Maclean A Compendium of Kafir Laws & Customs (1906) 2.
157. In 1846-47 it was estimated that the population was approximately 300,000 with nine or more tribes: Maclean op cit 7. By 1883 - when the Report of the Commission was tabled - this had increased to approximately half a million. The main tribes were the Xhosa, Tembu, Bomvana, Pondomisa, Baca, Xesibe and Fingoes (or Mfengu). Report of the Commission on Native Laws and Customs (1883) 94, hereinafter cited as Report Transkei, paragraph 7.
158. Burman 'Cape Policies towards African Law in the Cape Tribal Territories 1872-83' 352. This unrest was not only inter-tribal - due to quarrels, disputes and raids; but was further aggravated by the presence of whites competing for land; and attempts by white magistrates and missionaries to interfere with tribal customs. See Scholtz 500 Years A History of South Africa (1969) 122, 167.
159. Burman op cit 350.
160. There were a number of humanitarians in Britain who felt that the area should be brought under direct British rule, rather than annexed to the Cape, which would mean abandoning the future welfare of the Blacks to the Cape Legislature. See Burman op cit 350; Scholtz op cit 171.
161. This was not the first time that the area had come under British influence. After the 1835 Kafir War, Blacks living between the Keiskamma and the Great Kei Rivers were declared British subjects. However in 1836 the British withdrew from the territory and in the same year the Lt. Governor of the Cape granted the inhabitants their independence together with the right to adopt, or adhere to their own laws, or any other laws which they might see fit to substitute. See Report Transkei paragraph 11.
162. Act No 3 1865 (C). Other parts of the territory were incorporated as follows: 1778 Griqualand East; 1779 Griqualand West, Fingoland and the district of Idutywa; 1884 Port St Johns; 1885 British Bechuanaland, Tembuland, Bomvanaland and Galekaland; 1886 Mount Ayliff District; and 1894 Pondoland: Hahlo & Kahn Union 57; Scholtz op cit 172.
163. Report Transkei paragraph 19.
164. Local magistrates tended to depend on the advice and information of local chiefs which meant that there was very little consistency in the interpretation of law. Also customary law varied from area to area and among the different tribes.

165. See note 160 supra.
166. Burman op cit 388. The latter recommendation came from the Commission on Colonial Defence, which recommended a code of Black law rather than colonial law as had been D'Urban's idea.
167. Report Transkei paragraph 2. The Commission was subsequently reappointed in 1881 and 1882.
168. Initially the Report of the Commission indicates that there was the general belief that the Blacks had a well-established, uniformly recognised and administered, system of law. Maclean suggests that the Blacks did not entirely lack administrative, constitutional and legal institutions, but the efficiency of these was undermined by the lack of fixed rules and principles, due to fluctuations from generation to generation, and the influence of intrigue, political instability, and favouritism: Maclean op cit 33-36.
169. The role of Macaulay and Stephen in Indian and their work on the Anglo-Indian codes is discussed supra. See also International Encyclopedia of Social Science vol 9 & 10 499; Walker Oxford Companion to Law (1980); Burman op cit 391 et seq.
170. Burchell & Hunt 37-40. Kitchin maintains that the Code was also based on the common law; parts of the old Dutch placaaten; Cape statute law; and decided cases of the Cape Colony: (1913) 30 SALJ 10, 11.
171. Report Transkei paragraph 37. Besides the natural propensity of the members of the commission to turn to the common law in which most of them were trained; there was a certain amount of urgency in their work. The outbreak of revolt in the territory in 1880 emphasised the need to implement an efficient system of legal administration as soon as possible: Burman op cit 380-396. However, it was recommended that the order and arrangement of crimes be that 'found in the best commentaries on the Roman-Dutch law' Report Transkei paragraph 54.
172. Idem paragraph 32.
173. Idem paragraph 143. The hope was also expressed that a code would enable those subject to the laws to know them, by the dissemination of the law through missionaries, educated Blacks and others. See Paragraph 35.
174. See for example an anonymous article in the 1885 (2) Cape Law Journal 143.
175. The members responsible for this were: J D Barry, President of the Commission and Judge President of the Eastern Districts Court; Rev J Stewart, JP for Alice and later MP for Victoria East; W E Stanford, Magistrate and Native Administrator, and later Chief Magistrate; T Upington, a Lawyer, MP, and later Judge of the Cape Supreme Court and Attorney General; W Bisset Berry, a physician, Cape politician and who later became Speaker of the House of Assembly; E S Rolland, (M.A.); and Richard Solomon, a Barrister. A dissenting minority

report was presented by J Ayliff (M.P.).

176. Act 24 of 1886: The 'Native Territories' Penal Code. Effective from January 1887 the Code applied throughout the whole of the territories known as Transkei, Griqualand East, Tembuland and the port and territory of St John's River. See s 1 of the Act.
For a discussion of the provisions of the code see (1885) 2 Cape Law Journal 143 (Anon).
It is interesting to note that the 'Native Territories' Penal Code remained of force and effect until replaced in 1983 by a new Transkeian Penal Code, Act No 9 of 1983.
177. Report Transkei paragraph 66. The Commission did however make recommendations on certain civil law institutions such as marriage, inheritance and succession. See paragraphs 62-109.
178. An indication of the code's success is the fact that although it was only intended to apply in the Transkei it appears that its influence extended beyond the borders of the territory, and that it was referred to with approval by a number of courts in South Africa, including the Appellate division, until the late 1960's. See Burchell & Hunt 39 and cases cited thereunder.
179. Apart from Louisiana which had a mixed system of civil law and common law most of the American colonies had legal systems based on the English common law as far as was applicable to local circumstances. In some of the southern states and California, Spanish law was also influential. See Sauveplanne 11.
180. Such collections, as for example the Civil Code of Georgia (1860), may have been made to overcome the scarcity of textbooks: Pound op cit 715. See also Harrison The Life of the Law (1964) 104, 105.
181. These six factors are suggested by Hezel in his discussion on Bentham's influence in the United States (1972) 22 Buffalo Law Review 253, 255.
182. In 1811 Bentham wrote to President James Madison volunteering to codify the laws of the United States: Honnold The Life of the Law (1964) 100-102. For the influence of Bentham see Gregory (1899-1900) 13 Harvard Law Review 344; compare however Gilmour The Ages of American Law (1977) 69.
183. Those who were inspired by Bentham included David Dudley Field, Edward Livingston, William Sampson, Thomas Grimke and Robert Rantoul Jr. For a discussion of the contributions and theories of these last three see Hezel op cit 256-267.
184. In 1836 the Massachusetts legislature appointed a commission, chaired by Story, to consider codifying the common law of the state. The report of the Commission advocated codification of only those areas of law which had not already been modified by statute. However enthusiasm for the scheme appears to have waned once sufficiently comprehensive textbooks became available - notably those of Story himself. See Donald (1973) 47 The Australian Law Journal 160, 162; Pound

- op cit 713.
185. These were codes of Criminal procedure, a penal code, a civil code and a political (constitutional) code: Pound op cit 709-711.
 186. The code that was finally adopted, although founded on Field's draft was in fact the work of a man called Throop: ibid.
 187. Seagle op cit 297. Johnson suggests that the two main reasons for the short-lived success of Field's codes were (1) the fact that the law was still in a formative stage in the new country, and (2) the attitude of the legal profession and its inclination towards an historical rather than scientific approach: (1951) 29 Canadian Bar Review 411. For a discussion of the contents and style of Field's civil code see Donald op cit 167-168.
 188. Thirty states adopted his Code of Civil Procedure; sixteen his Penal Code and Code of Criminal procedure: ibid. California, Montana, North and South Dakota, adopted all five of the codes: Pound op cit 712. See also Diamond (1968) 31 MLR 361, 362-363.
 189. Johnson op cit 415. This has also been a problem in Australia where it has proved almost impossible to get unanimity on any legal reform from the independent states. See Leach (1963) 12 American Journal of Comparative Law 206, 219.
 190. Gilmour op cit 69; Pound op cit 720.
 191. The Uniform Sales Act. For a full list of the codes undertaken by the Conference see Friedman A History of American Law (1973) 581.
 192. For example: Warehouse Receipts Act, 1906; Stock Transfer Act, Bills of Lading Act, 1909; Partnership Act, 1914; and Conditional Sales Act, 1918: Donald op cit 169.
 193. McWhinney International Encyclopedia of Comparative Law vol 2 (1975) 216.
 194. Whether the Restatements should be regarded as codes or not remains a moot point. They have been described as 'codification under another name' and 'a covert attempt (at) codification' - Judge Goodrich cited by Johnson op cit 413 et seq. Alternatively De Grooth declared that they were 'utterly deficient as a starting point for codification in the genuine (civil law) sense of the word' (my parentheses) cited Donald op cit 170. Compare Donald's own view ibid.
 195. Such as the Internal Revenue Code 1954, a Model Penal Code 1962 and a Federal Securities Code project.
 196. This is also the case in Australia, where a number of law revision agencies have been established; New Zealand, and Canada. See Donald op cit 171.
 197. The Law Commission Act 1965. A separate law commission was simultaneously established for Scotland.

198. S 3(1) of the Act.
199. See for example:
 Hahlo (1960) 77 SALJ 432; Hahlo (1967) 30 MLR 241; Diamond (1968) 31 MLR 361; Hahlo (1975) 38 MLR 23; Kerr (1980) 96 LQR 515; Cretney (1981) 44 MLR 1; North (1982) 46 RABELSZ 490.
200. The achievements of the Law Commission and the difficulties it faces are considered later in this study.
201. Smith in Yiannopoulos 3, 6.
202. See Sauveplanne 21-28.
203. See for example France - Tallon (1979) 14 Israel Law Review 1; Germany - Huber (1977) TSAR 22; The Netherlands - Dainow (1957) 17 Louisiana Law Review 273.
204. Bayitch in Yiannopoulos 161, 177.
205. As happened in Louisiana and Quebec; and as was suggested in South Africa by Wessels (1920) 37 SALJ 265.
206. This happened in a number of newly independent countries in Africa during the 1950's. See Limpens op cit 92; National Reports Encyclopedia of International and Comparative Law vol 1; and Appendix A.
207. Louisiana, originally occupied by French settlers, was occupied by Spain in 1769 when Spanish law came into force. In 1800 Spain agreed to hand the province back to France but during the delay in formalities France sold the area to the United States. Transfer took place in December 1803.
208. This was despite the fact that federally-appointed members of the territorial supreme court were meant to apply civil law to the cases that came before the court. See Brown (1957-58) 1-2 American Journal of Legal History 35, 36.
209. Brown op cit 41. A key figure in the history of codification in Louisiana was Edward Livingstone who participated in the drafting of the Civil Code and drafted codes on evidence and criminal law although these were never adopted by the legislature. See Friedman op cit 153-4.
210. Idem 53.
211. May 1805.
212. In fact the civil law incorporated into the code was French, not Spanish, as had been the original intention. See Brown op cit 56 et seq.
213. The matter was complicated by the fact that the code only repealed certain laws which were in conflict with its provisions, and left

others untouched.

214. Cottin v Cottin 5 Mart O.S (La.) 93 (1817) cited Brown op cit 73.
215. The full title of the publication, which was largely the work of L Moreau Lislet and Henry Carleton, was The Laws of Las Siete Partidas which are still in force in the State of Louisiana.
216. Canada was under French rule from 1534 to 1759, but no French law was officially introduced until 1663 when Louis XIV on Colbert's advice appointed a governor to administer the area. See Castel The Civil Law System of the Province of Quebec (1962) 8-12.
217. The situation was similar to that of Louisiana. English criminal law and certain aspects of civil law were introduced and the lawyers were largely English trained, but the population was French. See the comments of Castel op cit 20 et seq.
218. Complete freedom of testation was also retained, but trial by jury abolished.
219. The initiative for this came from the Attorney-General of Lower Canada, the Hon. G E Cartier. It was hoped that a code would make the law accessible to judges, lawyers and notaries.
220. The original commission also produced a Code of Civil Procedure in 1867, which was subsequently replaced by a new, revised code in 1897. A number of modifications were introduced between 1866 and 1962 and in 1954 a jurist was appointed to revise the code, however no new code has yet been produced although a Civil Code of Quebec dealing with Family Law came into effect in 1981.
221. Article 2613.
222. For a detailed discussion of this development see Castel op cit 215 et seq.
223. Castel suggests that judges under this 'mixed' system have the best of both worlds as they retain the judicial authority associated with judicial precedent while not being bound by it: op cit 232.
224. The French Commercial Code and the Code of Civil Procedure were also introduced into the Seychelles: Chloros (1973-74) 48 Tulane Law Review 813.
225. Chloros points out that the need to provide a suitable legal framework for change and modernisation is particularly acute in the Seychelles, which has a number of social technical and political problems which require quick and sometimes drastic solutions if the islands are to develop. See Chloros op cit 816-817.
226. Chloros gives a number of interesting cases where this has happened: idem 818-819.
227. The code was to be revised and reformed in the light of both systems:

idem 823-824.

228. By the 1970's English law was to a considerable extent the law of the Seychelles. So, for example, the powers of the court were those of the common law rather than the civil law.
229. A printed version of the 1973 draft was available in 1974. Further discussion and consultation took place before the final draft was completed. See Chloros 2-5.
230. The full name of the code was the Civil Code of Seychelles Ordinance 1975. The Seychelles gained independence on 29 June 1976.
231. Seychelles Ordinance (1975) s 4.
232. Chloros 3.
233. Ibid.

2. DIFFICULTIES CONFRONTING CODIFICATION

1. Introduction

The history of codification outlined in the preceeding chapter illustrates the extensive use of codes over many years and in a great number of different countries. However the success and popularity of codified law has varied considerably, and this is partly due to the difficulties confronting codification in particular legal systems.

It appears that there are three main problem areas. First the sheer technical problems involved in undertaking the work of codification; including finding sufficient manpower to do the work of research and drafting; reaching consensus on the scope or extent of the envisaged code, and on drafting techniques and legal expression; and negotiating completed the draft code through the legislative process. Secondly, there is the problem of professional opposition - particularly where codified law is being introduced for the first time. This may mean that opposition from the bench has to be overcome - both before and after codification comes into effect; practising lawyers have to be re-trained to work within the confines of a code; the actual role of judges in applying the code has to be defined; and the authority of pre-codal and post-codal court decisions regulated. Thirdly, the problem of keeping the code up to date has to be considered. A code codifies the present law for future use, so it is essential that consideration is given to how the code will function when social and economic changes create new needs, and make unforeseen demands on its legal provisions.

Often the difficulties indicated above are closely related; for example the style of drafting chosen for a code may be strongly influenced by the fact that the judges who are to apply the code are accustomed to

working with facts and not abstract rules. In other cases some difficulties will greatly outweigh others. For example where the judiciary is very weak, or virtually non-existent, then judicial opposition will be minimal. Alternatively there may be a weak judiciary but very powerful religious or ideological factors which have to be taken into account.

Although the type and combination of difficulties will never be identical in any one situation to those in another, an examination of the problems encountered elsewhere, and the way in which they have been handled, can be of assistance and value to countries embarking on codification. One country's success may provide another with a possible example to follow, and similarly the failures of others may highlight the pitfalls to avoid. Thus a comparative approach to the difficulties confronting codification can be extremely valuable, not because it provides infallible solutions but because it indicates alternatives. Moreover, in countries where codification is still being attempted or considered, fear of the difficulties may seem to outweigh the potential advantages of codified law. In such cases a comparative approach is essential in order to place the issues in perspective. It is therefore proposed to consider some of the difficulties mentioned above and to present a few of the approaches and remedies that have been employed in attempting to overcome these.

2. Technical Challenges

The technical challenges that have to be faced when codifying the law will largely depend on the type of code envisaged. If the code is to be a comprehensive and exclusive statement of the civil law, as, for example, the Code Napoleon or the BGB, then the extent of the undertaking is much greater than, for example, the partial codification of a specific area of

law, such as a Code of Negotiable Instruments. Therefore the rejection of one form of code because of seemingly insurmountable technical difficulties does not mean that none of the many different forms of codification are suitable. While codification along civil law lines may not always be feasible in common law countries, largely because of the impossibility of entirely excluding recourse to case law;¹ codification in the form of restatements or consolidation acts may be possible. Similarly the complexity of the work involved may depend on whether there is any existing codified law. For example, in France, the codification of the law would have been far more onerous had there not been codes of customary law and similar sources already in existence.²

In assessing the difficulties involved in the light of the type of code desired, one of the primary considerations will be the cost involved. This includes considering the availability of persons sufficiently skilled to undertake the work;³ the length of time they are likely to be engaged on the project;⁴ and, if they are to be paid for their efforts, whether the country can afford this and if so, for how long.

Wherever codification has been undertaken, whether it has been predominantly the work of a single person,⁵ or the work of a commission, it has invariably taken a great deal of time and effort.⁶ Today this fact is generally accepted and a number of countries have established permanent institutions to undertake the work of law reform, including the preparation of draft codes and the amendment of existing codes.⁷ Elsewhere government departments have been created or utilised to undertake partial or specific codification.⁸ Some countries, however, have decided that the difficulties occasioned by limited resources and manpower are sufficient to prevent codification of the national law, and have either imported experts from

elsewhere to do the work for them,⁹ or have decided on the wholesale adoption of foreign codes.¹⁰

Even where there is sufficient time and available resources to undertake codification, such codes still have to be given the force of law. To overcome this difficulty there has to be:

'a real political power ready and able to undertake the task of codification on (and) the acceptance of such a government's initiative by social groups and forces'.¹¹

With the earlier codes this political power was that of a single, strong, ruler, for example Hammu-rabi, Justinian, Frederick the Great, and Napoleon. In western-style democracies however, such political power is more difficult to find; and the legislative enactment of codes is consequently more complicated and takes longer.¹² This is due to a number of factors. First the issue of law reform is not a popular cause, and does not arouse the interest of members of parliament sufficiently to gain their support.¹³ Also the length of time that it takes to complete a code means that even where parliamentary support is gained for certain bills, there is a strong possibility that those members may not be sitting when successive bills are introduced. One of the results of parliamentary apathy for law reform is that it is often side-lined to departmental officials once it reaches the legislative stage, a procedure which may delay promulgation further.¹⁴

Secondly, whether codification is undertaken in a piecemeal fashion, by means of a series of separate bills, or in one single code, the actual progress of legislation through the democratic legislative process tends to be very slow, because of the debates and hearings that ensue. Besides the delays occasioned by this, it also means that a great number of people who have no specialised knowledge on the matter, may defeat or amend the work

of experts who have given the subject a great deal of time and consideration. The problem is illustrated by the remarks of Lord Lindley. Commenting on the passage of the Partnership Act through the English Parliament he said:

'The Parliament of this country is very ill-adapted to the work of codification. It is a matter of amazement that Englishmen should be content to have the laws by which they are governed in such an inaccessible shape as they are, but, no doubt, one explanation of this state of things is the hopelessness of passing through Parliament, without mutilation, any carefully considered exposition of any great branch of law.'

Moreover, while every piece of legislation will reflect political sentiments to a greater or lesser extent, ideally a code, which is to apply to people of many different political convictions, should be apolitical.¹⁶ Thus while parliamentary debate may moderate the extremes of the governing party where there is a strong opposition, this cannot happen where there is no, or a very weak, opposition. On the other hand, if legal reform is for the benefit of the majority - for example where it is part of a wider social programme - delaying tactics by the opposition may thwart the advantages that could flow from codification.¹⁷

As a result of these problems, piecemeal or creeping codification has been resorted to, whereby the law is codified - or re-codified - by means of a series of separate bills which are later consolidated.¹⁸ Although the total parliamentary time involved may be more than that which would have been devoted to a complete single code, the advantage is that debate can be spread out over a number of different sittings and there is a greater chance of achieving some measure of success in each sitting. However this type of codification may lack co-ordinating principles, uniformity of language and concepts, and, if spread over a great length of time, there is a greater danger of anomalies in the final code.¹⁹ It may also happen that

whereas the separate single bills are passed through Parliament, it appears impossible to achieve a final consolidating bill.²⁰

A further problem of piecemeal codification is the inconvenience and confusion it is likely to occasion, due to the simultaneous existence of codified and non-codified law. While most legal systems have to take cognisance of statute law and non-statute law, it is usually clear which source is to be referred to, and when. For example in common law systems where a statute is silent on a matter then the common law, i.e. unwritten law, applies. In civil law systems which already have codes, the law existing prior to the code is only referred to where express provision is made in the code, otherwise other remedies apply. Where however, the law is partially codified and partially not, there may be no clear indication as to which source of law takes preference. This can cause confusion amongst public and practitioners alike, particularly if one set of rules of interpretation apply while the law is only partially codified, but another set are introduced once the code is complete.²¹ While a certain amount of inconvenience and initial uncertainty may be justified after the code has proved successful, prior to this such factors are more likely to be used as arguments against codification.²²

Whatever type of code or method of codification is chosen the first step is to delimit the area of law to be codified.²³

For example, if a criminal law code is proposed, it must be decided whether it is to be primarily concerned with the formulation of general principles of criminal liability, or with the definition of specific crimes. Is it to create a detailed framework of reference which will cover every conceivable eventuality, or is it to state the law in very broad terms? Because no one area of law exists in a vacuum, delimitation is also

necessary to decide which overlapping areas of law from other branches should be excluded, and which included. For example, should a Criminal Code include legal provisions governing drug abuse and bigamy or should these be covered in a pharmaceutical act and a code on family law respectively? In view of the work involved in researching and drafting a code, and the practical difficulties of giving legislative effect to such a draft, delimitation is also necessary to keep the bulk of the code to manageable proportions. Also in order to avoid time-consuming and complicated cross-references or, alternatively, the repetition of provisions and definitions, it may prove necessary to concentrate on basic principles and create a fairly open ended code which can be applied to numerous situations as they arise.

There are a number of practical advantages to be derived from limiting a code to a statement of general principles. First there is no need to wait until a code containing all the relevant substantive offences has been completed. As new statutory offences are continually being created such a code may, in any case, be very difficult to achieve. Secondly, such a code alleviates the pressure to codify specific offences, which can therefore be consolidated and revised over a greater period of time while simultaneously being brought into line with the general principles. Thirdly, the codification of general principles largely avoids the problem of legal uncertainty during the period of transition from uncodified to codified law, by providing a common framework of legal principles, for offences under both systems.

Alternatively, it might be found preferable to undertake codification of the law by means of a number of separate statutes and then extract general principles from these.²⁴ There is also the method of including a

separate general part together with more specific provisions in one complete code as was done in Germany with the BGB.²⁵ However, it should be borne in mind that consensus on the formulation of general principles may in itself be very difficult to achieve. Also, in common law systems where the legal profession may be averse to abstract and a priori rules, it may be necessary, or preferable, to state the law in terms similar to those already in use if the code is to succeed. Once the extent of the code has been decided upon, and the content of the law ascertained, there is still the problem of drafting its provisions.

Ideally a code should be clear and simple in its expression and avoid ambiguity, longwindedness and obscurity.²⁶ Unfortunately the pursuit of such an ideal may necessitate abandoning traditional styles of legislative drafting,²⁷ thereby provoking antagonism both from those involved in the existing drafting process, and from those who must apply the code and are accustomed to the law being obscured by mysterious and - to the layman - often impenetrable legal jargon.²⁸ This is particularly a problem in common law countries where the pragmatic approach of the practitioner has resulted in the legislator producing very complex statutes in an attempt to legislate for every conceivable situation, and to avoid being misunderstood.²⁹ Alternatively, too great a simplicity and generality of style can also create problems because it provides the judge with insufficient guidance and in turn creates its own problems of ambiguity and uncertainty. There should therefore be 'neither a generalisation too vague nor a particularity too minute'.³⁰

Besides the fact that the area of law to be codified may influence the choice of drafting style,³¹ other factors may also have to be taken into account. For instance, whether the code is intended for the benefit

of the legal profession,³² or for the layman.³³ If for the former, then it may be necessary to consider the qualifications and skills of such persons.³⁴ Also relevant will be the degree of discretion permitted to the judge under the provisions of the code. If the judge has wide discretionary powers then it may not be necessary to draft a detailed and fully comprehensive code. If, on the other hand, the judge is to be strictly bound to the stated provisions of the code then more detail will be necessary.³⁵ Similarly, if no general principles are included in the code then greater precision - even if it means longer sentences and cross-references - may be necessary to achieve completeness and certainty. Further, where there is the chance of ambiguity or uncertainty about the legal meaning of a word or expression, it may prove essential to include a definition section.³⁶ The question of what is meant by a word or phrase can particularly be a problem where a country recognises more than one official language;³⁷ or, where a customary law concept is being translated into legal language for inclusion in a code.³⁸

Official recognition of two or more languages gives rise to the following technical problems. First a term in one language may not have an exact, equivalent meaning in another, or have the same shade of meaning. This is because different languages reflect different cultures, social values and modes of thinking. If a code is intended to apply to all the people of a particular national system equally, regardless of their language group, then it must be understood to mean the same thing by each group. In the past, codes have usually been drafted in one language and then translated. Today there is a growing awareness that translation is rarely a satisfactory method of expressing the law because direct translation fails to take into account nuances of language, or the need to pre-

serve the logical expression of a legal provision in each language.³⁹ Thus while a translation may be a faithful replica of the original, it may not communicate the meaning of the code's legal concepts. It may therefore be necessary to consider parallel drafting of the code in a style suited to each language or culture group to be governed by the code.⁴⁰

Secondly, in drafting a code under such circumstances the authority to be given to each language version of the code must be considered, and indicated in the code itself or in the rules relating to the interpretation of the code. This does not necessarily mean that one version will be superior to another. For example, in Switzerland where the Civil Code appears in German, French and Italian, all versions are of equal value. In Canada, where there is a French and English version of the Code, Article 2615 provides that if there is a difference between the two texts then the version to be chosen is that 'consistent with the provisions of the existing laws on which the article is founded'. If however the law has changed then the text which best expresses the intention of the legislator must be chosen.⁴¹

Thirdly, even where there are a number of official languages, it may be felt preferable to select only one language for codification, despite the fact that the code will apply to everyone. This was the solution chosen in the Seychelles, where both English and French are recognised as official languages, but English is the language of administration, the law, and Parliament.⁴² In order to avoid the potential problems of two texts the code was promulgated in only one original, authoritative text.⁴³

Fourthly, it may happen that codification is being undertaken by people who are not well acquainted with one of the official languages. This happened in Ethiopia, where foreigners working on the codification

commission had great difficulty in drafting an Amharic version of the code.⁴⁴ The original version was drafted in French, which is a much more precise language than Amharic, a language which has few words with exact meanings.⁴⁵ Consequently in translating the code it was necessary to create new forms of expression in order to make the legal concepts comprehensible.

This does not mean that codification in bi-lingual or multi-lingual systems is impossible, only that the additional technical difficulties must be taken into account, particularly when initially considering the resources available, and once drafting starts.

Further unique problems can occur where codification of customary law is undertaken.⁴⁶

Customary law does not readily lend itself to codification because the forces that dominate it - such as fear of the supernatural and the power of group opinion - mean that obedience to the law is based on notions entirely alien to modern western thinking.⁴⁷ Moreover, while western legal thinking is directed to the individual's rights and duties, in customary law the group predominates - a group which may include both the living and the dead.⁴⁸ Also much customary law is non-specialised - particularly in the areas of crimes and delicts⁴⁹ - which can make it difficult to state legal provisions clearly within the confines of a code.⁵⁰ Even where codification is undertaken, jurists and citizens may have to be re-educated, and a new administrative system established to enforce the code throughout the country it is intended for.⁵¹

However, although some decry the codification of customary law because it brings rigidity to a formerly highly flexible system,⁵² codification may be justified for a number of reasons. For instance where a

country wishes to develop and modernise in a short space of time; or finds itself in need of a more sophisticated legal system before it has time to develop one empirically. Also, as in other countries, codification may help to bring about unification, and develop a greater sense of nationalism, which in turn may promote social and economic growth.⁵³ Codification may also serve to preserve traditional customs and mores, while simultaneously introducing modern institutions to cope with changed demands. Moreover, where people are used to a dual tradition of law, for example religious and customary law,⁵⁴ the introduction of codification may occur without great difficulty.⁵⁵

In drafting codes for such systems a number of factors have to be borne in mind. First there is the difficulty of understanding the existing legal principles sufficiently well to be able to express them accurately and clearly within the structure of a code. Secondly, the code's provisions must be expressed simply enough for lawyers, or civil servants, who may have little or no knowledge and experience of codified law, to be able to apply its provisions. This is particularly so where a code of law which is based on a system other than the national customary law is being introduced.⁵⁶ Finally account must be taken of the political, economic, and social structure and aspirations of the country, so that the code may provide a suitable legal framework in which these can be pursued.⁵⁷ Failure to appreciate these factors, or an attempt to impose conflicting ideas and structures, can lead to a situation where, although there are codes of law, in practice these are rarely referred to.

However, despite the difficulties involved, a great number of countries, previously governed by customary law,⁵⁸ have opted for codification, whether of their own laws or those of a foreign legal system,⁵⁹ indicating

a persisting faith in the advantages of codification over non-codified law.

3. The Role of the Judiciary

One of the greatest difficulties which must be resolved in codified systems of law is the role to be allocated to the judiciary. This is particularly so in common law systems where the authority of the bench has traditionally been seen as being superior to, and independent from, the legislature. However, the problem also arises in civil law systems even where codification has purportedly been undertaken to restrict the powers of the judiciary,⁶⁰ or in some cases to completely replace them.⁶¹ Moreover the issue is not simply limited to what to do about the judiciary once the code comes into effect, but is a persistent problem from the moment codification is suggested, to long after it is completed.

First the judiciary, and the legal profession generally, may oppose the very idea of codification. In common law countries, as has been indicated in the previous chapter, such opposition has at times completely stultified attempts to codify the law.⁶² The reasons for this initial hostility to codification are varied, and may include such considerations as the historical role of the judge; the social status of the judge in the community and within the legal hierarchy of the country; the relationship between judges and other members of the legal profession - including whether in fact judges are lawyers or not; and the relationship between judges and other officials in the law-making machinery - including legislators and draftsmen.

Attempts to counteract judicial opposition in this respect - i.e. to the whole idea of codification and legislative interference in legal development,⁶³ has meant that for a long time the legislature has been com-

pelled to try and make statutory law 'judge proof', by restricting judicial discretion to the application of clearly defined rules.⁶⁴ Consequently, until this characteristic of legislative drafting changes, it is difficult to dispel the view of the judiciary that codification is yet another form of legislative encroachment, and therefore should be resisted.⁶⁵

A further difficulty in codifying the law in a common law system is the reluctance of lawyers to accept legal rules which do not originate from judicial decisions.⁶⁶ In civil law systems, a rule of law is one which is of sufficiently general and abstract a nature to be applicable to an unlimited number of cases. Thus it acts as a foundation for both judge and lawyer in solving individual cases. It is not a legal principle extracted by a judge from the facts of a particular case - as is done in common law systems - but exists apart from the case, ready to be applied as and when required. The existence of such legal rules establishes a body of substantive law by which people may know their legal rights and duties before they come to court, thereby satisfying a need for predictability and legal certainty.⁶⁷

The existence of a core of legal rules is essential for codification, otherwise it has no foundations to build on. Most legal rules in civil law systems emanate from the legislator - possibly with the advice of academics and lawyers sitting on advisory committees and commissions - although in practice, some may also be created in the course of judicial interpretation. In most common law countries however, the attitude prevails that a legal rule can only be fully recognised once it is established through the facts of a case.

This approach undermines not only the certainty required of a code, but also raises doubts as to the existence of a particular legal rule until

a case in point brings the matter to the attention of the court. Until the legal profession - particularly judges - can be persuaded to accept written law as the 'starting point for the elaboration and formulation of a new law'⁶⁸ codification - at least along civil law lines - will continue to meet with hostility and opposition in common law systems.

There are indications that this hostility may be abating as statute law becomes an increasingly important source of law; and the judiciary begins to realise that a judge-made system cannot progress without legislative intervention to help it keep pace with changed demands.⁶⁹ However, even where there is greater acceptance of the law-making role of the legislator, opposition to codification of the law may persist. This may be due to the fear that codification will mean that the legal profession must re-learn the law and that this will lead to greater chaos and uncertainty than if the law had never been codified. Such an argument may be raised even where codification is intended to be no more than a restatement or consolidation of the existing legal system with which lawyers are thoroughly acquainted.⁷⁰ In most instances this view is irrational. Judges and lawyers alike have long been accustomed to applying written law and interpreting statutes, the number of which have grown considerably over recent years. Once the law is codified they may have to look for it in a different place, but would, by and large, be using skills already acquired.⁷¹ Moreover, codification should make the law more accessible to practising lawyers,⁷² and to the judge, facilitating the decision-making of the latter by providing him with a ready formulated statement of legal principles, thereby obviating the need to cite numerous cases to substantiate his reasoning.⁷³

The judiciary may also oppose codification because it is seen as

posing a threat to the continued existence of the judiciary in its current form. Although experience in those countries with codes has shown that a code cannot survive without judges,⁷⁴ it is true that the judicial function may change from what it was once codification takes place. However, experience has also shown that in practice such alterations are unlikely to be as radical as those projected by some of the earlier codifiers, who hoped to do away with judges altogether.⁷⁵ With codified law, as with all forms of written law, the need to close loopholes arises, and this is invariably the task of the judge until the legislator intervenes with an amendment or revised code. The scope for judicial extension and manipulation of the legal provisions in a code will normally be determined by the manner in which the code is drafted; and the nature of the powers reserved for judges as stipulated in the code.⁷⁶ For instance, where offences are broadly defined, there is often greater scope for a judge to reason by analogy or by arguing to the contrary.⁷⁷ Similarly, if the code contains general principles, either expressly or implicitly, which may be applied beyond the substantive offences contained in the code - as for example those found in the BGB; - judicial application of the law may be less restricted than where specific offences are set out in great detail.⁷⁸

The failure of codes to provide for every eventuality has shown that it is better to allow the judiciary sufficient discretion to be able to adapt the law to changed demands; than to restrict their powers of interpretation so severely to the written letter of the code, that its provisions cease to be relevant to current legal needs.⁷⁹ Indeed Portalis declared that it was the duty of the judiciary to attend to

'those changing and petty details with which the legislature ought not to be pre-occupied and all those matters that it would be futile and even dangerous to attempt to foresee and to define in advance It is for them to fill in the gaps that we may leave. The codes of nations shape up with the passage of time;

properly speaking they are not drawn up by the legislature.⁸⁰

How the judiciary is to go about this task may be clearly set out in the code; or may develop as circumstances demand; or be prescribed by a combination of factors.⁸¹ Similarly the method used may depend on the nature of the problem before the judge. In Switzerland, for example, judicial power varies, depending on whether the judge is dealing with a problem of interpretation arising out of the code - intra legem; or whether the matter is one where the code is silent - praeter legem.⁸² It may happen therefore, that judicial activity is greater as a result of codification than previously, even if the judge's function is essentially to give an authoritative interpretation of the code.⁸³

Although the role of the judiciary will be maintained - perhaps in modified form - it is apparent that if codification is to succeed, not only must judges become accustomed to, and accept, changes in their function; but that they must also be prepared to regard the code as the 'exclusive source of law' in that particular field.⁸⁴ They must accept that the code has been formulated taking into account all the legal developments up to the moment of codification. Therefore judges have to be prevented from referring to earlier law - especially case law in common law systems;⁸⁵ and 'accustom themselves to beginning with the code and staying with it'.⁸⁶

This does not mean that all prior law will be cast into oblivion once the law is codified. One of the issues that has to be resolved in codifying the law is the role of case law as a supplementary source of law. This applies both to cases decided before codification, and which therefore form the background to the code; and cases that follow codification - for example those that interpret its provisions. For the law to develop it may be essential for judges to feel free to dissent from previous decisions

interpreting the code, provided they adhere to the basic provisions of the code.⁸⁷ The strong influence of the rule of precedent in some legal systems can create formidable problems to this type of judicial freedom,⁸⁸ and also make it more difficult to accustom judges to begin with the code, rather than a case. However, it can be argued that the role of precedent is simply a means of locating the law rather than creating it, and therefore is not adherence to case decisions as such, but proof of the legal rule contained therein. If this is so, once the law is codified the work of locating the law is considerably simplified - as the code contains all the important law to date - and the need to resort to precedent should fall away.

However, even in civil law countries, where - due to historical and political reasons⁸⁹ - decisions of the courts are viewed as being no more than the explanation or demonstration of the law by the judiciary, rather than confirmation of its validity; it has nevertheless been found necessary to legislate on the status of judicial decisions. If the courts are left free to refer to case-decisions rather than to the code each time, the status of the code as a primary source of law is placed in jeopardy. A number of solutions have been used. In some cases judges are urged to treat the code in the same way as any other statute: starting with an examination of the language of the act to ascertain its meaning, rather than looking at the law prior to the act.⁹⁰ If it is clear that the legislator intended to change the law then the court ought not to defeat that intention by reference to previous case law. Elsewhere the matter has been provided for by repealing all former law - implicitly or explicitly - except where reference to such is positively sanctioned by the code.⁹¹ Similarly provisions may also be made to deal with post-codal decisions,

which, if not controlled, can create as great a body of alternative law as that which preceded the code.⁹² So for example in France, while Article 4 of the Civil Code prevents a judge from refusing to deal with a problem, Article 5 stipulates that any judicial decision is only binding on the case in which it is given.⁹³ Besides regulating the role of case-law, regular incorporation of legal developments of the courts, into the code, can also restrain the influence of post-codal judicial decisions.⁹⁴ However, as it is inevitable that until amending legislation is passed, judges confronted by a problem will be drawn to consult other case-decisions, greatest control will exist where more than one method is used.⁹⁵

As has been indicated in the discussion of the technical problems confronting codification, persuading the judiciary to apply the provisions of codified law may be particularly difficult where there is partial codification. In such cases the judge has the initial discretion to decide whether a case falls under the provisions of a code, or into an area of law as yet uncoded. Once the judge decides on the former, he is bound to look to the code for the law; however, if he decides on the latter, then he adjudicates according to his traditional methods. Even if the judge can resist the natural inclination to choose the system he is best acquainted with, there is the added problem that prior case-decisions must be consulted to see whether the issue does in fact fall under a code or not.⁹⁶ Although the establishment of precedent in this way can be ameliorated somewhat by insistence on the justification for choosing uncoded law being recorded each time,⁹⁷ it nevertheless undermines the authority of codified law and gives rise to a degree of uncertainty that persists until the law is fully codified.

The codification of the law, the initial success of a code, and its

continued survival are all dependent on the support and ~~co~~operation of the judiciary.⁹⁸ However, where case-law and judicial opinion has traditionally been regarded as superior to enacted law, codification may well necessitate changes in the role, and law-making status of the judiciary. Neither can be regarded as the final source of law if each are considered to have equal authority. In order to ensure its continued existence and efficacy it appears essential that the redactor provides a framework for the future working relationship of judiciary and code, as experience indicates that codified law is far more threatened by judicial activity than the judiciary is threatened by codification.

4. Modernisation and Reform

In many respects the ability of a code to cope with new and changed demands is depends upon the way in which it is drafted, and the role allocated to the judiciary when applying its provisions to actual cases. As has been indicated, a code may be brought up to date by using a teleological, rather than literal, method of interpretation - as was done with the French code;⁹⁹ also by expressing the law in broad general statements, thereby allowing new content to be poured into old formulas.¹⁰⁰

Where the code restricts or curtails development of the law through the courts, but permits reference to juristic writing, commentaries of academics may also play a role in modernising and reforming the law.¹⁰¹ This is particularly so in civil law countries where legal scholars are generally held in higher esteem than in common law countries - due partly to the nature of the legal training of judges in each system, and to the fact that judges in civil law systems tend to remain anonymous and are therefore less easily referred to. Also the establishment of institutions

such as the Centre of Comparative Law in France, the International and Comparative Law Section of the American Bar Association, and the British Institute of International and Comparative Law, has done much to foster and encourage the exchange of experiences and ideas concerning law reform amongst legal scholars, who can, in turn, advise legislators.

The extent of academic participation in, and contribution to, legal reform varies from one system to another depending on the extent and status of academic institutions; whether freedom of expression - including criticism of any government policy underlying legislation - is permitted or restricted; and whether publishing houses are autonomous or government controlled. Also significant is the way in which academics themselves view their role within the legal system and in relation to law reform. For example in the Latin countries there is a tendency for jurists to concentrate on the study of legal principles which form the basis of the law; rather than to examine judicial interpretation of these, or to consider the practical application of the code.¹⁰² In Germany both the law as applied by the courts, and legal theory are studied and commented on, but the two are kept separate; with the result that annotated codes which analyse judicial decisions (Kommentar) are produced, as well as manuals and monographs which focus on the entire legal system and the function of legal rules (Lehrbuch).

However it can happen that the publication of legal commentaries and works, far from contributing towards legal reform and modernisation of a code, in fact threatens the continued existence of that code by providing their own solutions to meet new needs, with the result that the commentary is referred to rather than the code.¹⁰³ The situation may also arise where the reports and publications of institutions, set up to work towards legal

reform and codification, ultimately undermine the need to codify the law by providing adequate remedies in themselves.¹⁰⁴ This may particularly be the case where well-structured and comprehensive encyclopedias of law are produced as has happened in America;¹⁰⁵ and very recently in South Africa, where the publication of The Law of South Africa and the establishment of a modernisation programme by means of annual supplements, may well be considered to obviate the need to codify the law.¹⁰⁶

As has been shown to be the case even where the law is not codified, there comes a time when judicial interpretation and academic comment is insufficient, or unable, to bring about further modernisation or reform.¹⁰⁷ At this point the legislator must intervene.¹⁰⁸ The ensuing legislative activity may take a number of forms, depending on the original nature of the code and the legislative facilities available for drafting and implementing the required reforms and changes. Whether modernisation is effected by means of amendments to existing provisions; additional separate statutes; the drafting of completely new codes, or the revision of old ones, the work involved will be made much easier if the original code has been closely and constantly monitored since its inception.¹⁰⁹ Such monitoring may be done either through the establishment of Code Commissions;¹¹⁰ or by academic or quasi-academic institutions undertaking the work;¹¹¹ or by instructing those in the judicial field to submit regular reports indicating new legal needs as they arise.

Unless such bodies have their own legislative powers - which is rare¹¹² - their recommendations will have to be submitted to a separate, usually superior, legislative body, where once again the difficulties posed by the legislative process are encountered.¹¹³

It is at this stage that the method of reform adopted, and the origi-

nal structure of the code may determine the success or otherwise of attempts to modernise the code. For example in Sweden, where the provisions of the code are arranged in a series of 'beams' or books, revision has been relatively trouble-free as either entirely new 'beams' have been added, or old ones revised and brought up to date individually.¹¹⁴ In France on the other hand, attempts to revise the whole of the original Code of Commerce (1808), which had become quite inadequate to cope with new needs, was abandoned in 1958, thirteen years after the government embarked on the project. As a result, although the original code still exists, virtually all commercial law is to be found in separate statutes that have superceded the code and never been incorporated into it.¹¹⁵ However, reform of the Civil Procedure Code in the same country has been more successful. Here a number of statutes which were passed after the original code came into effect, have been combined into a new code.¹¹⁶ In the case of the Civil Code yet another technique has been adopted. A Commission to make a new code was appointed in 1945, but by 1958 it was obvious that the difficulties encountered in reaching consensus on the general principles of the code, would delay the project indefinitely. It was therefore decided to keep the old code but renovate it from within, by deleting certain provisions and inserting new ones into the original structure by means of subsections.¹¹⁷ Those provisions which remained unchanged were re-enacted. Although this process has made some sections of the code rather unwieldy, coherence of expression and unity of style have been maintained by entrusting the work to a single person rather than a Commission or number of committees.¹¹⁸

One of the major difficulties which seems to arise when revising codified law is that there is very little sense of urgency, compared with

the initial clamour for a code. Consequently, a makeshift system can persist almost indefinitely while revision committees or commissions continue to discuss and examine ways to revise or re-draft the code. For example, in France, revision to the Civil Code was first suggested in 1837, although a commission to undertake the work was not appointed until 1904 - one hundred years after the Code first came into effect. Even then it took the cataclysmic changes of two world wars to persuade the government that the need for a new modern code was imperative.¹¹⁹ However, the political and economic crisis resulting from the war, meant that not only was political support for the ideological foundation of the code, and its realisation in practice, absent - unlike the situation when the Code Napoleon first appeared; but the legal foundations of the code - particularly those of property and contract - had been severely shaken by the growth of socialism and the nationalisation of many enterprises. The result was the decision not to draft a new code but to revise the old one in the manner described above. As a result, modernisation of the code did not in fact start until 1964.¹²⁰

A further problem confronting the revision of a code is that of achieving a satisfactory balance between the traditional qualities of the code, with which people have become acquainted and which have survived the passage of time; and the degree of modernisation required to reflect changes and cater for new demands. In democratic systems it may also be necessary to take into account the expression of popular sentiment on certain issues, and the views of legal scholarship.¹²¹ The question of tradition versus modernisation also affects the choice of language used for revising the code. While many words and expressions may have become archaic and obscure over the course of time, too great a use of current popular language can

result in similar problems once colloquialisms become dated. Moreover popular language and current idioms may lack the precision necessary for expressing legal ideas, and therefore make the law less accessible rather than more so.

Many of the difficulties confronting the modernisation and reform of codified law can be reduced if the redactors of the original code approach their task with sufficient humility to accept that a code cannot provide for every conceivable situation. If this is appreciated at the outset, then not only can the need for reform and modernisation be taken into account in the actual drafting of the code; and in outlining the powers to be allocated to judges; but machinery for constant observation of the functioning of the code, and for legislative amendment, can be established from the start. An awareness of potential difficulties and the ways in which these have been solved elsewhere is more likely to result in successful codification than might otherwise be the case.

1. See for example the comments of Sir MacKenzie Chalmers who compared a code with a building and the common law to the atmosphere which surrounds that building and which penetrates every clink and crevice where the bricks and mortar are not: (1903) 19 LQR 10.
2. These were the French Livres de Coutumes; the work of jurists such as Domat and Pothier; canon law and various enactments.
3. For example, lack of skilled manpower had been put forward as argument against codification by Savigny in Germany and, more recently, by Hahlo in South Africa (1960) 77 SALJ 436.
4. The time involved is likely to be considerable. For example, although the Code Napoleon only took four years, Justinian's Code took six and the BGB twenty-two. The English Law Commission, which was established in 1965 to codify specified areas of the law is still working on the matter.
5. As in the case of Field in America; Livingstone in Louisiana; Cambaceres in France and Sarsfield in Argentina.
6. Hahlo & Kahn 72, 73 n 81. This is so even with re-codification or code revision. See Huin in Yiannopoulos 192; Meijers (1951) 33 Journal of Comparative Legislation 8. The cost is indicated by the fact that in Scotland work on codifying the law of contract by the Scottish Law Commission, was abandoned after six years because it was too demanding on resources: North (1982) 46 RABELSZ 490, 497.
7. For example the American Law Institute and the Louisiana Law Institute. Often separate bodies combine forces to undertake the work of codification as happened in America with the Uniform Code; and as has happened in England where codification of the criminal law is being undertaken by the Law Commission which is responsible to the Lord Chancellor, and the Criminal Law Revision Committee acting under the direction of the Home Office. Elsewhere the work may be delegated to a specialist body as was done by the English Law Commission in 1981 when, acting on a proposal of the Criminal Law Reform Committee of the Society of Public Teachers of Law, it appointed a committee of four law teachers to undertake the drafting of a criminal code. See Smith (1984) Statute Law Review 17.
8. As in France with Administrative Law: Tallon (1980) 15 Society of Public Teachers of Law 33, 38.
9. Eg Boissonade in Japan; David in Ethiopia.
10. As has happened in Turkey.
11. Maillet (1970) 44 Tulane Law Review 681, 685. Similarly David's view that there must be a sovereign strong enough to guarantee the success of such a project. See David & Brierley 61.

12. Even Napoleon had to overcome the problem. However it has proved an even greater difficulty in more recent times. See for example the situation faced by the English Law Commission discussed by Anton (1982) Juridical Review 15, 19, 23 et seq.
13. It was suggested by Lord Hailsham that besides the Lord Chancellor's efforts to find Parliamentary time for law reform bills, private members should assist by introducing such proposals. See The Lawyer & Justice (ed) Holdsworth Club (1978) 231, 235.
14. See the discussion by North on this issue as it affects the Landlord and Tenant Code in England op cit 490, 495. Compare however the situation with Family law where no large government departments were involved: idem 504.
15. Treatise on the Law of Partnership (1905) 7ed cited Anton op cit 28-29.
16. The issue of Legal reform can also be used as a weapon in the hands of the opposition to thwart the social programme of any government. As Lord Hailsham stated: 'Clearly the time taken by legislating material of this kind cannot become a weapon in the hands of the opposition It must be kept out of the arena of party politics': op cit 231, 236.
17. The problems occasioned by the legislative process are such that a number of writers have suggested that it would be better to reform parliamentary procedure before embarking on codification. See for example North op cit 507-508; Cretney (1981) MLR 1, 6-7 and Hailsham op cit 231. Note also Napoleon's tactics in this regard discussed supra. In France this problem has been partially avoided by using the Executive to pass statutes; for example in the field of administrative law. These are then collected and arranged in codes eg the Code of Pensions, the Code of Insurance and the Code of Taxation: Tallon op cit 38.
18. This has been done in England with the Matrimonial Causes Act 1973, which consolidated the Divorce Reform Act 1969, the Matrimonial Proceedings and Property Act 1970 and the Nullity of Marriage Act 1971: Cretney op cit 4. See also the (1948) Report of the Committee on the Law of Defamation Cmd 7536 in favour of piecemeal consolidation - discussed by Lloyd (1949) 2 Current Legal Problems 155; and the 'creeping' codification of family law discussed by North op cit 498.
19. One of the methods used to avoid this is that adopted by the English Law Commission in its work on a Family Code, where the various commissions work closely with a joint Parliamentary (Drafting) Committee.
20. This has happened with the Law Commission's efforts to codify the law of contract of England and Scotland into one code. It has proved virtually impossible to achieve satisfactory harmonization of the two legal systems or to reach consensus on the policy for reform. See North op cit 495; and Gower (1973) 23 University of Toronto Law Journal 257, 264. This problem still has to be faced with the

codification of criminal law in England, where a number of separate acts have reformed the law eg the Sexual Offences Act 1956 and the Theft Act 1968, but no coherent and cohesive general part has been finalised: North op cit 497.

21. For example separate acts may be interpreted in the light of previous rules of interpretation while the final code may include its own rules of interpretation different from previous ones. Similarly the provisions of the completed code may be governed by a set of general principles incorporated into the code on consolidation, but these may not be included in each of the separate, previously enacted bills.
22. See for example those put forward by Hahlo (1967) 30 MLR 241, 253; and (1975) 38 MLR 23, 25.
23. For a discussion of the importance of delimitation see Andrews (1969) CRIM LR 59, 61.
24. This was the method adopted in the case of the English Theft Act: Andrews op cit 63; and has also been considered in Israel; see Akzin (1956) 5 American Journal of Comparative Law 44.
25. The Generalklausen of the Allgemeiner Teil model. See David & Brierley 110-112. There is also the possibility of drafting a code containing both imperative rules - which cannot be avoided because they are based on general considerations of public policy; and suppletive rules - which may be excluded from applying by the specific wishes of the parties. This is used in France and in other countries with legal systems based on French law, such as Louisiana. See David French Law: Its Structure & Methodology (1972) 83, and Garro (1980-81) 41 - Part 2 Louisiana Law Review 1007.
26. See the remarks of Van Zyl (1895) 12 Cape Law Journal 16, 25.
27. See the comments of North op cit 507 who suggests that unless more flexibility and adaptability can be allowed in legislative drafting then it may be preferable to avoid legislation.
28. See for example the situation in America, discussed supra where legal opposition was very strong.
29. Clarence Smith (1980) Statute Law Review 14, 15. The civil law lawyer is more accustomed to working with general principles and thus legislation can state the law in fairly broad terms and leave it to be interpreted by the judge to cover cases as they arise. See infra on 'Role of the Judiciary'. There is moreover less inherent hostility and rivalry between lawyer and legislation in the civil law. See generally David English Law & French Law (1980), and Sauveplanne.
30. David Dudley Field, First Report of the Commissioners of the Code to the New York Legislature (1858): Honnold The Life of the Law (1964) 109. Hahlo regards the choice as one between the 'Scylla of vague generalities and the charybdis of detailed technical rules': (1967) 30 MLR 241, 256.

31. As Scarman suggests, 'the character of each code is determined not so much by theoretical considerations as to the nature of codified law but by the subject matter of the particular branch of law being codified': 'Codification and Judge Made Law' (1966) 15.
32. As was the BGB - see supra..
33. Which was the case in theory with the Code Napoleon.
34. For instance whether the legal practitioner has a university and practical education or whether he is a civil servant with very little specialised education - as was the case with magistrates and native administrators in South Africa discussed supra.
35. Despite differences in drafting however, it appears that in practice the role of the judge may not differ so greatly. See the role of the Judiciary discussed infra.
36. Compare for example the civil law lawyer's attitude to definitions with a lawyer from a common law system: Clarence Smith op cit 17.
37. For example, Canada, Ethiopia, The Seychelles, Louisiana.
38. For example in Natal, the Commission's understanding of the institution of 'ilobola' amongst the Blacks was very deficient, and by making legal provision for its administration in the Natal Code they perpetrated a number of misconceptions which have had far-reaching repercussions. See Church (1983) 16 CILSA 100; Cassim (1981) 25 Journal of African Law 131; Bekker and Coertze (1983) 46 THRHR 285.
39. A recent study paper of the Law Reform Commission of Canada has given the matter particular attention 'Drafting Laws in French - Study Paper 1977-1979'.
40. This may also mean re-arranging the provisions of the code for easy referral according to the logical thought process of the language - culture group.
41. Switzerland makes a similar provision.
42. Although Creole is the language of the majority of the population and English is a second language at school. See Chloros 5.
43. It was felt that retention of a French text - despite the influence of civil law and the French codes, would amount to a 'built-in handicap': Chloros (1974) Tulane Law Review 815, 823.
44. The three official languages in Ethiopia are English French and Amharic: David (1969) 37 Tulane Law Review 187, 199.
45. The different thought processes of the different languages also created difficulties as Amharic tends to combine in one long sentence, without punctuation, all the elements of an argument: ibid.
46. Some of these have been indicated in the discussion of the Natal Code supra.

47. 'Modern' in this sense is really post-medieval.
48. David & Brierley 505-507. Ancestors can play a very important role in the maintenance of law and order and in preserving moral and social values. This is particularly confusing for western-orientated lawyers especially in the field of private law.
49. This was the case with early European law where most crimes were punishable as delicts for which compensation was payable either to the victim or quite often to the ruler as well. See for example the provisions in The Visigothic Code (ed) Scott.
50. Because western-style codes are those most often referred to, the difficulty arises in trying to synthesise the principles of customary law with those of western law - be it civil or common law. See Church (1983) 16 CILSA 100.
51. This can be a very real problem where a country has a poorly developed, centralized, administrative and judicial system. The advantage of customary law is that although it may be characterized by local and tribal differences, at least some legal system exists. See for example the remarks of Maclean who felt that the customary law in the Transkei was not as bad as was made out; A Compendium of Kafir Laws and Customs (1906) 33.
52. See for example the criticism of the Natal Code expressed in Ilange Lase Natal 7 August 1908 cited by Welsh The Roots of Segregation (1971) 173; and also criticism of the same act by Cassim (1981) 25 Journal of African Law 131. Compare, however, the view of Lievestad - writing on Scandinavian customary law - who suggests that this flexibility may be exaggerated, and that customary law may in fact be less certain and stable than statute or case law, besides being less accessible: (1938) LQR 95, 104.
53. M'Baye International Encyclopedia of Comparative Law vol 2 (1975) 138, 154.
54. As in Ethiopia where customary law and the Fetha Negast (the Justice of the Kings) has existed together for years: David (1963) 37 Tulane Law Review 187, 193.
55. Similarly where there is no or very little previous customary law, as in many areas of mercantile law.
56. This difficulty can be overcome to a certain extent by incorporating illustrations of the application of the law in the code itself, as was done with the Indian Codes and later the Transkei Code.
57. The Natal Code reflects the failure of those drafting it to take into account the changing needs and life styles of the Blacks, particularly women. See on this Church op cit; Welsh op cit 173.
58. Although many of these were subject in varying degrees to the laws of their colonial powers - customary law generally remained in force

despite the efforts of missionaries and administrators alike.

59. This is particularly so in Africa where codification and independence have often gone hand-in-hand. Even in South Africa the Transkei Code and Natal Code have been retained despite their colonialist origins - see infra, codification in South Africa.
60. As in France, where the judiciary was associated with the old regime and consequently distrusted and despised by the bourgeoisie. Similar sentiments were expressed in Austria and Germany: Sauveplanne 7.
61. Such was the intention of Frederick the Great of Prussia, who had hoped to compile a Code of Law so complete that there would be no need for judges.
62. See for example the fate of Field's Civil Code in New York discussed supra. Had the Noblesse de Robe not been ousted during the Revolution, codification in France might have been confronted with similar opposition. Note however that even where the Bar or professional associations do support codification they do not always form a sufficiently powerful lobby to implement any legal change. See for example the support given to codification in the Cape by members of the bench: Graham (1907) 24 SALJ 112; Kitchin (1927) 44 SALJ 519; Wessels (1928) 45 SALJ 5.
63. Judicial opposition is not limited to codified law however, but extends to all forms of statute as opposed to case law. See David and Brierley 451; and North (1982) 46 RABELZ 490, 503; Tate in Dainow 23, 25 et seq.
64. North op cit 507.
65. Ibid.
66. David & Brierley 415. David believes that this is one of the major difficulties in achieving codification in common law systems. See his comments idem 357, 413 et seq. Certainly it is a problem that has to be faced by a country embarking on codification. See Akzin in Schwartz 298, 305.
67. For a full discussion of the significance of the existence of a rule of law in civil law systems and its absence elsewhere see David English Law & French Law (1980) 19 et seq.
68. David & Brierley 415.
69. Sauveplanne 21 et seq.
70. Hahlo cites this as one of the arguments against codification, (1975) 38 MLR 3, 24.
71. Scarman 'Codification and Judge-made Law' (1966) 11
72. Diamond (1968) 31 MLR 361, 363. Diamond illustrates the current inaccessibility of the common law by means of a statistical survey.

73. Stephen A History of the Criminal Law of England vol 3 (1964) 351.
74. For example Castel discussing the relationship between legislator and judge in the Canadian mixed legal system states 'a code will live only through the interpretation which judicial practice will give it': The Civil Law System of the Province of Quebec (1962) 161.
75. For example Frederick the Great and the earlier Revolutionaries in France.
76. See for example the comments of Tallon concerning the significance of work of the English and Scottish Law Commissions' studies on this matter: (1979) Israel Law Review 1, 8.
77. See the remarks of Hubner (1977) TSAR 22, 26; Von Overbeck (1977) 37 Louisiana Law Review 681, 685 and Clarence Smith (1980) Statute Law Review 14.
78. Andrews (1969) CRIM LR 59, 61. This is a further reason why common law lawyers and judges should be more prepared to accept the continental concept of a legal rule, because ultimately the existence of these, in preference to specific provisions, gives the judge wider discretionary powers under a code.
79. This has been the case even in civil law countries where initial reverence for codified law which gave rise to a literal interpretation by the courts, has changed to a more teleological approach as social and economic conditions have created new problems. See Hubner op cit 26-27; Trudel (1954-55) 29 Tulane Law Review 311, 312.
80. Portalis, 'Preliminary Discourse of the Commission of the Year VII' cited by Sereni in Schwartz 55, 62.
81. For example, in Switzerland the judge has a number of alternatives outlined in the code:
 'If the Code does not furnish an applicable provision, the judge shall decide in accordance with customary law, and failing that, according to the rule which he would establish as legislator':
 or,
 'Where the law expressly leaves a point to the discretion of the judge or directs him to take circumstances into consideration, or to appreciate whether a ground alleged is material, he must base his decision on principles of justice and equity':
 Von Overbeck op cit 699-700. For a general introduction to the role of customary law and judicial decisions in Swiss law see Dessemontet & Ansay (eds) Introduction to Swiss Law (1981). A judge may also act independently of these provisions, as has happened in the field of Private International Law: Von Overbeck idem 689. Similar provisions may be found in the French Civil Code - Articles 4 & 5; the Louisiana Civil Code - see discussion by Dainow (1957) 17 Louisiana Law Review 273, 274 et seq; and Canada - see Castel op cit 160-161.
82. Von Overbeck op cit 685-687.

83. See the remarks of De la Morandiere on the possibility of increased judicial activity, cited by Scarman op cit 11-12.
84. This point has been emphasised repeatedly by other writers. See for instance Scarman op cit 8; Diamond 375; Chloros (1968) 17 International Comparative Law Quarterly 849, 863.
85. 'They must wipe out their knowledge of the cases from their memories and concentrate on the statutory words': Scarman op cit 16.
86. Ibid.
87. 'The emphasis should be placed upon the independence of judges from precedent, for freedom to dissent seems to be indispensable for a rational development of the law': Chloros op cit 865.
88. The rule of precedent is not limited to common law systems but has been important in civil law systems as well, see Goodhart (1934) 50 LQR 40; Castel op cit 218. The main distinction is that whereas in the common law precedent may be established by a single case, in civil law the emphasis is on a series of cases which create a practice and eventually establish a rule: Goodhart idem. However, in some systems adherence to precedent is diminishing and in others has been rejected. See for example the situation in America - Sereni op cit 66: and South Africa - Hahlo (1960) 77 SALJ 435; Kahn in Dainow 224, 254 et seq; and Hahlo & Kahn 214.
89. For instance the ousting of the noblesse de robe by the Revolution, the condemnation of the parlements and the subsequent appointment of civil servants as judges; together with the fact that few decisions are reported in any detail make judicial decision in France less authoritative than the law as stated in the code.
90. This has been the approach adopted with the English Bills of Exchange Act. See Scarman op cit 5, and the remarks of Lord Herschel in the Vagliano Bros case, discussed supra, under meaning of codification.
91. For example Field's code where his introduction to the draft stated:
'If there be an existing rule of law omitted from this Code and not inconsistent with it, that rule will continue to exist in the same form in which it now exists':
Donald (1973) 47 Australian Law Journal 160, 167-168.
92. The development of the law from case to case continues despite codification, because the first judicial decision interpreting the code re-instates the judiciary as a law-shaping force: Scarman op cit 5. See also on the role of jurisprudence (the decisions of the courts) in France; Carbonnier in Dainow 91, 97.
93. Article 5 stipulates:
'Il est defendu aux juges de prononce par voie de disposition generale et reglementaire sur les causes qui leur sont soumises'.
See also Article 1(2) & 1(3) of the Swiss Civil Code which state that where there is a gap or loophole in the code, a judge must first

consult customary law; then the rules he would have used had he been legislator; and finally approved legal doctrine and judicial tradition. For a discussion of this method of reasoning see Von Overbeck op cit 699 and 690. Similar provisions are also found in Article 11 of the Quebec Civil Code and Articles 18 and 19 of the Mexico Civil Code.

94. This can be done in a number of ways, for example by means of Standing Committees with the power to propose legislative amendments to the Code; or by Law Institutes or permanent Commissions. What is required however, is effective co-operation between judges, the appointed watchdog body, and the legislator. See Scarman's comments op cit 17.
95. For a discussion of the inevitable attraction of previous case decisions; see Mazeaud's comments cited by Scarman op cit 12-13; Carbonnier op cit 101; Bein (1977) 12 Israel Law Review 180.
96. Reference to decided cases is particularly a problem in mixed legal systems such as Louisiana discussed by Tate op cit 24; but also happens in systems where the law is codified more fully, such as France where case-law has become predominant in certain fields. See the comments of Savatier cited by Sereni op cit 73.
97. In some systems inadequate justification for such a choice is sufficient to warrant an appeal: Sereni op cit 67; David English Law and French Law 180.
98. Where judges chose to ignore the code or develop the law without reference to its provisions the significance of codified law is lost. See for example the situation in California where this happened. Englard (1977) 65 California Law Review 4.
99. McWhinney 216-217. If a code is to survive it seems essential that 'interpretation according to policy must supercede interpretation according to pedigree': David Encyclopaedia Universalis 5ed vol 4 652 cited Tallon (1979) 14 Israel Law Review 1, 10.
100. McWhinney ibid.
101. Commentaries on the code appear inevitable - even where attempts have been made to forbid them; as with Justinian and Napoleon. By the end of the nineteenth-century a number of text writers and commentators had begun to reinterpret the French Civil Code taking into account the new climate of industrial development. Their work did much to ensure the longevity of the code. See McWhinney op cit 216-217; Sauveplanne 26; Tucker (1965) 25 Louisiana Law Review 698, 713.
102. David French Law : Its Structure, Sources & Methodology (1972) 192. Compare in contrast the situation in France discussed by Carbonnier op cit 91, 105-107.
103. This happened in America where the publication of Story's works soon removed the need for developing a code of law. Similarly the presence of such authorities as Stair, Erskine and Bell in Scotland, and

- Halsbury in England, have satisfied many of the needs of the practitioner, which would otherwise have been filled by a code.
104. This is virtually the case with the Restatements of the American Law Institute, and may prove to be the case with the Reports and Working Papers of the English Law Commission.
 105. Such as the Corpus Iuris Secundum and American Jurisprudence collections of American law.
 106. First published in 1976 The Law of South Africa (LAWSA) is a compilation of texts by different writers, arranged in alphabetical order according to subject, which, once completed, will cover virtually every aspect of the law in South Africa.
 107. It may be that the judiciary are reluctant to act as law-makers and therefore shift the responsibility to the legislator - as has happened in Switzerland despite the wide powers given to judges under the code: Von Overbeck (1976-77) 37 Louisiana Law Review 681, 690. In other cases adherence to the confines of stare decisis may inhibit the necessary changes. See the comments of Goodhart 1934 50 LQR 40, 59; Stephen History of Criminal Law in England 352-353.
 108. As has been indicated supra in codified systems the legislator has to act at regular intervals to control the accumulation of case law.
 109. The enlightened Frederick the Great was one of the earliest codifiers aware of this need. He set up a special committee to undertake the task.
 110. As has been done in England, California and most of the Australian States: See Donald (1973) 47 Australian Law Journal 160, 171.
 111. As in America with the Law Institute.
 112. Even if such legal institutions do have legislative power this is likely to be limited to consolidating, rearranging and restating existing law rather than reforming it. See e.g. Louisiana where the Louisiana State Law Institute has the task of revising the Revised Statutes and Code of Civil Procedure. There are some exceptions, however, for example where legislating on a particular subject falls directly under the executive, as with much administrative law in France.
 113. Discussed supra.
 114. An Introduction to Swedish Law vol 1 (1981) (ed) Strömholm 32.
 115. Tallon (1980) 15 Society of Public Teachers of Law 33, 34. One of the reasons why the Commercial Code has suffered this fate is that the conceptual basis of the code was retrospective and therefore could not provide an adequate framework for the needs that arose during the nineteenth century industrial revolution. See also Audit (1978) 38 Louisiana Law Review 747, 749-750.

116. This took place in December 1975. Reform in this field was facilitated by the fact that procedural law falls under the control of the Executive - pouvoir réglementaire; consequently changes can be introduced with the minimum of delay: Tallon idem 35-36.
117. So for example the law relating to paternity was to be found in Article 311 of the old code, any changes would be found in Articles 311-1, 311-2 etc: Tallon idem 36-38.
118. Professor Jean Carbonnier. A similar one-man system was used in the Netherlands when Professor E M Meijers was appointed in 1947 to revise the (1838) Civil Code.
119. A new commission of twelve members was appointed in 1945. Audit op cit 754.
120. 1964 was when Dean Carbonnier was asked to draft a new title for the section of the code relating to Minority, Tutorship and Emancipation, which were areas of law urgently in need of reform. This initial commission was experimental but proved successful, and led to further reforms in like manner: . Audit op cit 757 et seq.
121. For example, developments in the study of criminology, legal sociology, and comparative law, may have to be taken into account when revising a code.

3. ACHIEVEMENTS AND FAILURES OF CODIFICATION

1. Introduction

Codification, like many things, has probably attracted more criticism from its detractors than praise from its supporters. While not all codes achieve the goals set for them, those that do, tend to operate quietly and efficiently attracting little attention or comment; whereas the failures of others are seized upon with glee by those who oppose codification.

Ideally one would like to have time and resources to research those areas where codification has proved to be a successful answer to legal needs.¹ Unfortunately the scope of this study does not extend to such research. Consequently, an examination of the achievements and failures of codification is limited to a consideration of some of the arguments raised against the use of codes, and whether in fact these are substantiated.

2. The Question of Legal Certainty

In both civil law and common law countries codification has been proposed as a means of creating legal certainty by stipulating the law in an accessible, authoritative form. The need for such certainty may be due to the existence of more than one legal system - as happened in France, Germany, Italy and the Netherlands; or confusion over which law is of force and effect - as happened in Quebec and Louisiana. There may also be uncertainty as to the applicable legal remedy in a given situation because the law is not clearly set out - as in common law systems where the law must be sought for in previous case-decisions, and the legal outcome can only be known once a matter comes before the court; or in customary law systems where the oral tradition of the law may change from one generation to the next.

The advantage of legal certainty is that it provides a sound framework for social and economic growth and development, by setting out a priori legal rules, by which persons subject to those laws might govern their conduct.² Clearly this is better than waiting for a dispute to arise and then bringing it to court in order to discover what the relevant legal rules are. However, while codification may achieve certainty on what the law is - particularly where there has previously been a multiplicity of laws - it has been argued that in specific cases, codified law is not more certain than uncoded law. This is because the provisions of the code still have to be interpreted, and applied to the facts of each case. Further, where the case is one for which there is no codified provision, but the judge may not avoid adjudicating on the matter, there may be greater uncertainty, particularly if the judge has a number of alternatives available to him, in terms of the code, when dealing with such problems.³ Also, if the law is only partially codified, legal uncertainty may be aggravated as the relevant legal provision may not be apparent until it is clear which legal source applies to the facts of the case.

On the other hand, where codification has been undertaken to reduce a mass of existing legislation to more manageable and accessible proportions - as with the American Uniform Commercial Code for example; then a greater degree of legal certainty relating to the actual location of the law is introduced, even if the code's provisions have, at times, to be interpreted. Of course legal certainty in this respect may be brought about by means of consolidating statutes,⁴ or restatements,⁵ without going as far as codification;⁶ provided these are regarded as the primary authoritative source of law on the matter.

In common law countries, the advantages of codifying the law, or

consolidating legal sources in a code, in order to achieve some degree of legal certainty, have frequently been put forward.⁷ In such systems, not only is the law uncertain until the matter comes to court, but, in referring to previous case-decisions for guidance, the judge has a wide selection to draw from, and his choice may be highly arbitrary - particularly where the matter before him is unusual or obscure. If there is strong adherence to the rule of precedent then, where the matter is one which has come before the courts before, the judge is bound by stare decisis even if the authoritative decision was made at a time when quite different intellectual, social, economic and moral considerations prevailed. Where the courts do not feel bound by precedent and can freely depart from previous decisions, then greater uncertainty prevails and there is more risk of judicial arbitrariness and inconsistency.⁸

Those who are accustomed to seeking their law in case-decisions argue that the risk of judicial arbitrariness is minimal when one takes into account the provisions for review and appeal; the fact that important decisions must be reported; and that most cases referred to date no further back than the past thirty years - if that.⁹ On the contrary, they suggest that the law faces greater uncertainty when codified, particularly at first, because lawyers must re-learn the law and find their way round the code.¹⁰ Moreover, there can be no legal certainty emanating from the code itself until a substantial body of case law and judicial comment has built up to show how the provisions of the code are to be applied.

As has been shown, the role of the judiciary does not disappear once the law is codified, and a certain amount of extra-codal law is bound to accumulate. The problem with persuading judges to start from the code and not case-decisions - particularly in common law systems - has also been

mentioned. No doubt some legal issues are inherently complex and obscure, and will inevitably require the intervention of the judge or lawyer before there is legal certainty on the matter. However, it has also been suggested that much of the uncertainty that surrounds the law in non-codified systems has been artificially created by lawyers themselves,¹¹ who, by obscuring the law in complicated terminology have managed to conceal its content even from themselves.

Legal certainty can only be achieved in a code if the law is expressed clearly and logically. Whether the dangers of complexity and obscurity can be avoided will depend largely on the way a code is drafted; the language used; the rules governing the interpretation of its provisions; and the area of law under consideration.¹² With reference to the latter, it is clear that some legal subjects are better suited to codification than others. Thus legal certainty may be more easily achieved where these are codified, rather than those areas which, either because of their complexity or volatility are less suited to codification. For example, where the law is fairly self-contained - as in the private law areas of matrimony and matrimonial-property rights - there is less uncertainty compared with, for example, the law of contract which overlaps with many other branches of the law.¹³ Similarly, while criminal law is usually regarded as being suitable for codification because the basic principles are subject to very gradual modification or change, subjects such as labour law and public international law are less so, because they are more volatile and tend to lack doctrinal consensus.¹⁴ Consequently legislation on these areas may demand greater provision for flexibility than can easily be accommodated in a code.

While a 'code should seek to clarify, not petrify, doubt',¹⁵ there is

always the danger that in attempting to achieve legal certainty through codification, old defects will be incorporated and perpetuated, and new ones introduced.¹⁶ However, if legal certainty is one of the envisaged aims of codification then there are a number of technical aids which can be used to promote this end and avoid the pitfalls. For example, the thorough examination of proposed drafts by their redactors and by independent assessors; the use of experts on technical or specialised matters; the appointment of sub-committees to work through selected areas; and public participation in the project, by means of debates and seminars,¹⁷ may all contribute towards achieving legal certainty, and thus the success of the code.

Although the question as to whether codification creates greater legal certainty than that found in uncodified systems remains controversial, it seems that codified law is no more uncertain than that which is uncodified.

3. Flexibility vs rigidity

Another argument raised against codification is that it makes the law less flexible and by reducing the law to writing, creates a rigid, unadaptable, legal system which necessitates constant amendments in order to keep up with changed demands.

This argument seems particularly popular in common law countries where codification is seen as being a direct threat to the continued existence of the courts'

'substantial law-making power which they exercise under the pretence of finding and setting forth pre-existing unwritten law.'¹⁸

However, where the doctrine of stare decisis prevails, the discretion of the courts is already fettered by the existence of well-established legal

principles which cannot lightly be departed from.¹⁹ Similarly, where statutory law has replaced judge-made law, providing specific legislative solutions for each situation encompassed by the act, there is also little room for judicial discretion. As the bulk of statute law increases, so judicial law-making diminishes, except where such enactments confer wide discretionary powers on judges in their role as interpreters of such legislation.

In theory, a code, like any statute, can be drafted in such a way as to be very inflexible. In practice, however, codes have proved to be remarkably flexible and adaptable, partly because the need to avoid rigidity was realised at the time of drafting, but largely through the ingenuity of judges working within the provisions of the code. The judge's task of maintaining the flexibility of the code is facilitated or complicated according to the way in which the code is drafted, and the type of language used. For example, where broadly drafted rules are used, the courts are able to treat as questions of fact, those issues which in a common law system would generally be classified as questions of law. This means that the courts have fairly extensive discretion to decide whether a situation falls under the provisions of a particular section of the code or a residual section.²⁰ Similarly, where the wording of a particular section is general, rather than specific, its scope is potentially wider and its application more flexible. Where a separate general part is included in the code - as in the EGB - this may be used to overcome limitations in a more specific provision. Also, general principles themselves may be re-interpreted in the light of juristic comment or public policy considerations.²¹ Moreover, in most civil law systems, there exist certain super-eminent principles - similar but distinct from those of common law equity -

which can be utilised to adapt the code to changed conditions without altering its substance.²² These principles include such concepts as unjust enrichment; the immorality of certain contracts; consideration of extenuating circumstances; fraudulent misrepresentation; and mala fides. If the application of the provisions of the code will result in an unjust solution contrary to the ideals of the legal system, then the judge can use these principles to avoid such a situation.²³

The flexibility of codified law is best illustrated by the following examples, which indicate that codified law need not be rigid in the hands of good judges.

In Switzerland, the law of nuisance as set out in Article 684 of the Civil Code, provided only two alternatives. If something amounted to an excessive nuisance it had to stop, if not, it could continue. However, in 1964, as a result of new, mechanical, building methods, and an increase in commercial development, the court had to decide whether an excessive, but necessary, nuisance should be allowed to continue or be forced to stop. If the latter was decided upon then the whole building project would have to be abandoned and commercial development in the area halted. The courts answered the problem by allowing the builder to continue, despite the nuisance, but ordered him, in terms of another article to pay damages.

Another instance of the flexibility of the Swiss Code was illustrated in the field of family law.

Article 253 of the Swiss Civil Code gave the husband an action to rebut the presumption of his paternity of his wife's children. However, experience showed that it could be advantageous to the child to have a similar action - for example, if the mother divorced and married the real father. The Swiss Federal Court concluded that Article 253 was incomplete,

i.e. there was a gap. It held that although the intention of the articles was to secure the stability of marriage and legitimacy, the interest of the child wishing to be incorporated, as legitimate, into its real family should also be protected. Thus the action was extended to the child. This judicial interpretation was ultimately incorporated into the code by legislative amendment.²⁵

In Israel, it has been accepted by the courts that the criminal law must adjust to cope with increasing anti-social behaviour and the sophistication of organized crime. As a result the courts have extended the scope of the provisions of the Criminal Code in a number of ways, without amending the legislation.

First although it is generally held that criminal law requires strict interpretation in order to ensure certainty and avoid arbitrariness, in some instances the Israeli courts have adopted less strict canons of interpretation so as to bring a wider number of public welfare offences within the provisions of the code. Secondly, the boundaries of general doctrines such as attempt, conspiracy, aiding and abetting, have been extended so that, in some instances, an attempt may be punishable regardless as to whether the principal act has occurred or not. Thirdly, certain defences have been narrowed down. For example, the defence of self-defence is no longer available to a person who places himself in a situation in which he might be attacked, similarly the defence of duress. On the other hand, in line with greater medical and sociological appreciation of the problem, the defence of insanity has been extended to include retarded or backward persons as well as those afflicted by mental disease.²⁶

In Argentina, the courts, confronted by passivity on the part of the legislator, tried to cope with the effects of rampant inflation on the law

of contract while remaining within the framework allowed by the Civil Code of 1869. In terms of the nominalistic principle contained in the code, if a person undertook to pay a certain sum on due date, he fulfilled his obligation by delivering that sum on due date regardless of its purchasing power. However, due to inflation, the nominal value, and the purchasing value, of a sum of money were often widely different. The courts sought to provide a remedy for this by borrowing from the law of delict, and creating a distinction between debts of money and debts of value, thereby taking the depreciation of currency into account. Fortunately the code gave adequate support for this legal device. However, not all the courts were agreed on the procedural steps to be taken to reach an equitable solution and eventually a plenary session of the courts had to sit over a period of three years to reach a decision.²⁷

In Germany the formal construction of codified provisions have also been departed from in order to adapt the law to the changed social and economic conditions of the twentieth century. For example in the sphere of labour law it became necessary to modify the liability of the employee for acts of negligence. In terms of Paragraph 276 BGB responsibility is based on intent or negligence. However the Federal Labour Court of the Federal Court deviated from the institutional concepts slightly by holding that an employee could not be responsible unless his liability was grave,²⁸ thus introducing degrees of negligence in such situations.

A further example of the flexibility of the BGB was indicated when the depression after the Second World War made money virtually valueless. Faced with this situation, the courts interpreted Paragraph 249 BGB - which dealt with payment of compensation - as including restitution in kind, whereby a defendant could hand over to the plaintiff a different chattel,

of approximately the same value, in lieu of monetary payment.²⁹ A flexible approach was also adopted in interpreting Paragraph 275 BGB which concerned release from a contractual obligation due to supervening events or changed circumstances. Initially the courts extended the meaning of impossibility of performance to include the events of the 1914-18 War, and later to include the increase in prices caused by currency depreciation after the War.³⁰

Bentham believed that codification could change the life of the law from one 'of decrepitude and deformity into a life of strength and beauty'.³¹ Today even the most ardent supporters would take such a claim with a large pinch of salt.³² However, the above examples show that the apparent permanence, rigidity and immutability of a code may conceal an inherent ability to adapt and change which is quite distinct from other forms of law, and must surely be considered an achievement.

4. A Layman's Guide to the Law

One claim made by those advocating codification, which has been generally shown to be fallacious, is that a code makes the law accessible to the man in the street, and no longer the exclusive preserve of a small judicial elite.³³ This misconception, which was adopted during the revolutionary fervour of France, was promoted and fostered by Bentham, who, in offering to assist in the codification of American law in 1817, wrote:

'Accept my services - no man of tolerably liberal education, but shall, if he pleases, know, and know, without effort, much more of law than, at the end of the longest course of the intensest efforts, it is possible for the ablest lawyer to know at present'.³⁴

Professor Hahlo has labelled such a claim as a 'snare and a delusion'³⁵ and the possibility of the law - whether codified or not - becoming intelli-

gible to the man in the street, as unlikely to happen as a man catching a 'will-o-the-wisp',³⁶ and therefore not worth pursuing.

The theory behind this idea was that if laws were reduced to writing, then those whose lives were governed by them, would be able to know the law and order their lives accordingly.³⁷ As has been indicated, there are certain areas of the law which are inherently complex, and even when codified are only intelligible to the trained lawyer. Further, there are distinct drawbacks to expressing the law entirely in terms comprehensible to the laymen - not the least being the imprecision of expression incurred thereby. Also, if the law is to remain accessible and comprehensible to the layman it has to be up-dated by means of frequent amendments and annotations, so that all the law may be found in the code at any given moment. Moreover to strive to achieve this end may not be worthwhile, as, even if the effort is made to make legal knowledge available to the man in the street, few seem to avail themselves of the opportunity.³⁸ Even where the language and expression of a code are sufficiently simple for a layman to understand its contents, judicial interpretation and the publication of academic comment may soon obscure the codified law. Thus although copies of the code may be freely available in pocket-size editions, there is no guarantee that the layman will understand the contents therein even if he can read them.

Nevertheless, supporters of codification argue that where the law is codified, citizens are kept better informed, directly, publicly and generally, of the actual state of the law governing them.⁴⁰ Whether this greater awareness is due to codification per se or to other factors such as higher levels of education; popularisation of legal issues through the media; or the increasing sphere of influence of public law; is difficult

to determine. However, the very fact that the law is published in a concise, accessible, printed form is in itself an achievement, particularly when it means that the substance of the law can be made available to those who have no, or limited, access to law libraries, case reports and judicial commentaries.⁴¹ Moreover, codification makes the law more easily accessible to those who, although trained in the law of their own national system, wish to consult that of other systems. Thus from an academic point of view codification offers valuable facilities for juridical study and research, both on a national and comparative level.

Despite the fact that in most cases codification does not automatically provide 'a layman's guide to the law' it is interesting to note that in this do-it-yourself age of litigation, the idea persists that the law should be codified for easy reference and use by the layman. This is particularly so in the case of procedural law relating to the use of small-claims courts by the public, without the assistance of legal representation. The Report of the Hoexter Commission,⁴² which undertook an extensive comparative survey of the use and success of such courts in other countries, indicated that in systems where there was no code of procedure, considerable confusion existed as to pre-arbitration procedures and those governing the conduct of the case.⁴³ It would seem therefore, that where a country - such as South Africa - is considering encouraging the man in the street to take certain legal disputes to court himself, it may be necessary and desirable, to establish a 'layman's guide to the law' by codifying the law on such matters.

Today the claims advanced for codification are less arrogant and less idealistic. This is not because the history of codification is one of failure rather than achievement - if it were no one would still be using

codes or codifying their law. Rather it is because there is greater awareness of the difficulties confronting codification, and consequently more caution in expressing the goals which a code is to achieve. Those who advocate or support codification now accept that it is not a 'panacea' for all the ills and defects of a legal system, but point out to those who oppose codification, that neither are codes monsters,⁴⁴ and even if they are, they can be trained.⁴⁵

1. For example where codification has made the law more accessible to the legal profession in developing countries, or where codification has removed uncertainty about a particular legal rule, such as the defences in criminal law.
2. See for example the move towards codification in the Seychelles where economic and social development were important factors influencing the desire for a code: Chloros (1973-74) 48 Tulane Law Review 815, 819.
3. As with the Swiss code discussed supra under the role of the judiciary.
4. As in England during the late nineteenth and early twentieth century - discussed supra under codification in common law systems.
5. As in America, where the Restatements of the American Law Institute have done much to clarify the law.
6. The distinction between a consolidating statute, restatement, and code may be very slight and even obscure at times, despite the different names given to such statutes. See supra on the meaning of codification and the difficulties occasioned by this overlapping.
7. See supra on the history of codification in common law countries.
8. See the comments of Wessels (1920) 37 SALJ 271 in this regard.
9. Hahlo (1960) 77 SALJ 432, 435.
10. Hahlo (1975) 38 MLR 23 note 2. See also Clark's remark that:
'It is easier to decide one case correctly and give a true reason therefor, than it is to decide all cases that may arise correctly, and by one form of words express the general rule and its exceptions':
cited by Hahlo (1967) 30 MLR 241, 251.
11. Lloyd (1949) 2 Current Legal Problems 155, 163.
12. The first three aspects have been considered supra under the difficulties confronting codification.
13. See for instance the problems encountered by the German HGB and the French Commercial Code: Tallon (1979) 14 Israel Law Review 1, 6 note 3; see also Hahlo's criticisms of the attempts of the English Law Commission to codify the law of contract (1967) 30 MLR 241, 242; compare however Gower (1969) 30 MLR 259.
14. Tallon op cit 7.
15. Lloyd op cit 165.
16. This was a fear expressed by Von Savigny in particular. See also Pound Jurisprudence vol 3 730; Findlay (1904-7) Natal Law Quarterly 3.

17. See the discussion in the preceding section on difficulties confronting codification and the ways in which these may be overcome.
18. Sereni in Schwartz 55, 69. Donald makes some interesting comments on Lord Denning's contributions in this respect (1973) 47 Australian Law Journal 160, 170.
19. Stephen History of Criminal Law in England vol 3 (1964) 352, 353.
20. Sereni op cit 70. See also David's remarks on the progressive interpretation of the law adopted by the Council of State: French Law - Its Structure, Sources & Methodology (1972) 187.
21. For example the American Uniform Commercial Code makes specific provision for this mode of interpretation in s 1-102 where it states:
'This act shall be liberally construed and applied to promote its underlying purposes and policies':
Tallon (1979) 14 Israel Law Review 1, 8. Statutory interpretation used to be much less restrictive in civil law systems than in common law systems. However this appears to be changing as the latter adopt a less restrictive approach. See Bayitch in Yiannopoulos 186; Stephen op cit 353.
22. See David French Law 194-196 for the role these principles play in France and the way in which they differ from principles of equity. See also Lawson Many Laws vol 1 (1977) 47.
23. The theory behind the existence of these super-eminent principles is that the law is the realisation of society's concepts of order and justice. Thus no provisions in the code should be applied in such a way as to contradict these: David idem 194 et seq.
24. For a detailed discussion of the case see Von Overbeck (1976-77) 37 Louisiana Law Review 681, 692-693.
25. Ibid.
26. Bein (1977) 12 Israel Law Review 933.
27. Carrio (1981) 41 Louisiana Law Review 933.
28. Hubner (1977) TSAR 22, 30.
29. Zweigert & Kotz 141-142.
30. Idem 191 et seq.
31. Bentham Of Laws in General (ed) Hart (1970) 236.
32. This does not mean that one has to entirely accept the opposite view expressed by Professor Gilmore that 'the Benthamite claims on behalf of a codified law were absurd' cited by Hahlo (1975) 38 MLR 23, 30.
33. The origins of this theory are obscure. Cicero claimed that the Twelve Tables, one of the archaic codes, was known by every schoolboy;

which may account for the popularization of the idea: Diamond (1968) 31 MLR 361, 370.

34. Lloyd 163 note 39.
35. Hahlo (1960) 77 SALJ 433, 434 note 10.
36. Ibid.
37. Stone (1954-55) 29 Tulane Law Review 301, 303.
38. See for example the statistics extracted by Diamond evincing the general ignorance on legal matters among the public in England, op cit 372. It could be argued that codification would remedy this but the experience of other countries makes this doubtful.
39. See for example the comments of Donald (1973) 47 Australian Law Review 160, 173; and Stone op cit 307 note 12.
40. Trudel (1954-55) 29 Tulane Law Review 311, 312.
41. For example where the law is codified to assist legal administration - as in the Transkei; or where the area to be governed is vast and much of it remote from legal centres - as in Ethiopia.
42. (Hoexter) Commission of Inquiry into the Structure and Functioning of the Courts 4th Interim Report RP 52/1982. Hereinafter cited as (Hoexter) Report.
43. See for example the remarks of Appleby in England cited at 9.2.3, and 9.16.5, of the (Hoexter) Report. See also the quotations from Jacobs Access to Justice vol 1 cited at 2.3 and 2.4 of the (Hoexter) Report.
44. Lawson Many Laws vol 1 (1977) 48.
45. Tallon (1979) 14 Israel Law Review 12.

4. CODIFICATION: SOUTH AFRICA AND THE FUTURE

1. Introduction

Although the bulk of South African law has not been codified, despite its civil law origins, codification is not unknown here. Mention has already been made of the two codes introduced under the influence of British colonial administration, namely that in Natal, and that in the Transkei. However, these were not the first forms of codified law to reach southern Africa. The Roman-Dutch law introduced into the Cape Colony in its early days under the Dutch East India Company included two codes of law emanating from the Company's headquarters in Batavia; those of Van Diemen and Van der Parra. Moreover, despite the geographical distance separating Southern Africa from Europe, and the isolation brought about by the Napoleonic wars, interest in codification re-emerged during the latter part of the nineteenth century, and the subject has been mooted from time to time ever since. As will be shown, most attempts or suggestions to codify the law have been largely unsuccessful, or short lived. However, recent developments in the law indicate that perhaps the time is ripe to revive interest in codification and to encourage a more objective look at this legal phenomenon than has hitherto been adopted.

2. South Africa's Legal Background

South African common law has been described as 'the Roman-Dutch law of old modified by three centuries of life in South Africa'.¹ It includes elements of Roman law; seventeenth and eighteenth century Dutch law - particularly that of the province of Holland; and English law, which modified much of the Roman-Dutch law during British occupation of the Cape.

In order to understand the role played by codification in the history

of Roman-Dutch, and thus South African law, it is necessary to look at the development of this system of law prior to its introduction in the Cape.

Before Roman law became influential in the Netherlands the law there was characterised by the variety of autonomous, local laws and weak national law. There was very little legal uniformity, nor any centralisation of legal administration.² This situation was not conducive to the reception of other European legal systems, and the early European codes - such as those of the Franks and Goths - had little influence on the Netherlands as a whole, although in theory the provisions of the Salic Law, the Saxon Code and the Frisian Code extended to the territory of the Netherlands.³

Until the late Middle Ages the greater part of the law of Holland and the other provinces was unwritten customary law.⁴ During the 1500's private collections of provincial statutes and local customary law were made in compliance with the instructions of Charles V, who issued a placat in 1531, and again in 1540, ordering that these laws be reduced to writing.⁵ The resulting compilations were however, not recognised as official documents, and indeed cannot really be described as codes, although they paved the way for further attempts to codify the law at provincial and national level⁶ - particularly once the United Provinces declared independence in 1579.⁷

Interest in codification continued during the next two centuries,⁸ and the resulting written law encompassed a wide range of legal subjects.⁹ Some of these works incorporated only statute law, others statute and customary law. Similarly while some set out to state the law in a comprehensive manner,¹⁰ others were limited to specific subjects. None can be regarded as true attempts to codify the law however, as not only were they

generally incomplete and unsystematic, but a great deal of legal diversity, uncertainty and lack of uniformity persisted.¹¹

This unsatisfactory state of affairs led Dutch jurists to consider alternative sources on which to base legal reform, particularly those of the Roman law, interest in which had revived during the twelfth century and been fostered in the Universities during the succeeding centuries.

The decentralised legal organisation of the Netherlands prevented a formal or wholesale reception of Roman law, although Roman law had been influential in the area long before the sixteenth century renaissance of learning.¹² The Netherlands had been under Roman rule prior to that of the Saxons and Frisians, and although the principle of personality of laws was applied, some elements of Roman law probably insinuated themselves into the local system. Roman law was subsequently re-introduced indirectly into the Netherlands via the canon law of the Christian church.¹³ Although knowledge of Roman law declined in the period between the tenth and fourteenth centuries, due to the disintegration of the Carolingian dynasty; the invasions of the Northmen; and the demise of Latin as a language; it began to revive during the late fourteenth and fifteenth centuries. The revival was first evident in the universities where interest in the original Greek and Roman republics led to the study of classical Roman law.¹⁴ The gradual appointment of academic lawyers to the bench resulted in increased reference to Roman law in the courts, particularly in cases where there was no satisfactory provision in the Dutch law.¹⁵ The law referred to in this way was largely the Code of Justinian, as received and commented on by the Glossators and Commentators of the past four centuries. The reception of Roman law was further aided by the publication of academic theses on Roman law concerning its application to, and assimilation into,

the Dutch system. Modelling their works on the style and technique of Justinian, and improving and adapting this to their needs, the resulting commentaries of these Dutch jurists, although not called codes, had many of the characteristics of codes.¹⁶ First the law contained therein was comprehensively based on the existing legal system, taking into account legislation; customary law; Germanic law; canon law; and Roman law. Secondly, the contents were set out in a systematic, logical and comprehensive manner. Thirdly, although these commentaries were not regarded as official sources of law in the Netherlands, they carried considerable weight there, and elsewhere were regarded as primary sources of the law, with a status similar to that of a code.¹⁷

Meanwhile true codification was not entirely neglected in the Netherlands. As early as 1732 a commission had been appointed to consider revising the criminal law and law of criminal procedure by means of penal codes, and a further commission, for the same purpose, was appointed in 1773.¹⁸ Neither commission produced results, but interest in codification was given renewed impetus when the Republic of the United Provinces was set up in 1795.¹⁹ In 1796 the National Assembly of the new Republic resolved to codify the law and appointed a commission for the task.²⁰ A further commission was appointed in 1798 - in terms of Article 28 of the constitution of that year²¹ - but had only partially completed its task when political unrest, influenced by events elsewhere on the Continent - particularly in France - disrupted the work.

The accession of Louis Napoleon to the throne of Holland in 1806 introduced a new era of codification into the Netherlands. In 1807 Johannes van der Linden was commissioned by the new regime to draft a Civil Code based on Dutch law.²³ Later in the same year the Emperor Napoleon

ordered that a commission should be appointed to draft a code modelled on the French Civil Code. As a result the Code of Holland, which was virtually a direct translation of the French code, was produced in 1808 and promulgated in 1809.²⁴ By the introduction of this code all Roman law and other forms of Dutch law were repealed,²⁵ and codified law was firmly established in the Netherlands.²⁶

Such was not the case in South Africa, where, due initially to historical fate more than anything else, neither the Code of Holland, nor the Code Napoleon which replaced it, nor the later Dutch Code of 1838, were ever introduced, despite the Roman-Dutch origins of the South African legal system.

Roman-Dutch law was brought to South Africa by the Dutch East India Company when it established a refreshment station at the Cape of Good Hope in 1652.²⁷ Among the sources of law applied in the Cape were the statutes and ordinances of the Governor-General and Council at Batavia - the headquarters of the company in the East.²⁸ Included amongst these were two codes which, although never applicable in the Netherlands, were used in the Cape. Known as the Statutes of India, the first of these, that of Governor Antonio van Diemen was passed in 1642, and an amended and revised version, that of Van der Parra, appeared in 1766.²⁹

Van Diemen's code was drawn up in compliance with a request from the Council of Seventeen - who managed the company - to the Indian Council in Batavia. In formulating the code Van Diemen expressly stated his intention

'to have all the plakaten and ordinances issued by our predecessors and ourselves examined and the substance thereof amplified where necessary, from the common laws of the fatherland, or from the written imperial laws, codified under proper titles'.³⁰

The resulting code, which was a compilation of the laws in operation in the East Indies - some of which were of Batavian origin, some of Dutch origin -

included all the ordinances and placaaaten issued at Batavia since 1619. These covered a wide range of legal matters, including judicial organisation, civil and criminal procedural matters, administration of estates, matrimony and criminal law.³¹ Also included was the provision that if there was no law in the code on a matter, then the case should be decided by reference to the laws, statutes and customs observed in the Netherlands. The code was promulgated by the Governor in Council in July 1642 and approved by the Council of Seventeen and the States General of Holland in 1650.³² Following a request by the Raad to the Governor in the Cape, for guidance as to what laws should be applied, use of Van Diemen's code was officially sanctioned by a resolution of the Governor - De Chavonnes - and the Council, in 1715.³³ This resolution stated that the Statutes of India should be taken as the basis of the law, together with Roman law and modern law, and without derogating from local statutes issued at the Cape.³⁴

Shortly after 1715 there were requests - which continued intermittently - that the code be revised.³⁵ The first response to these was made when Governor-General Mossel appointed Mr J. J. Craan to work on a revised code in 1761.³⁶ This was completed in 1764 and promulgated in September 1766. Known as Governor-General Van der Parra's 'New Statutes of Batavia', or Van der Parra's Code, this version revised, amplified, and updated the previous code; to include all laws, ordinances and placaaaten in force as at August 31, 1764. Intended for the 'enlightenment and direction of all the judges and judicial officers at all the settlements of the Netherlands Indies outside Java,'³⁷ the new code superceded the old one except where the former was silent, in which case the existing law remained in force.³⁸ It is uncertain whether Van der Parra's Code was ever formally adopted in the Cape, despite the fact that the Governor ordered the Council

of Justice at Batavia, as well as the various councils of justice in all the subordinate comptoirs of Dutch India - which would have included the Cape - to observe these amplified and amended statutes.³⁹ Nevertheless it appears that many of the revisions contained therein reached the Cape by way of separate legislative amendments.⁴⁰

The impact and authority of the Statutes of India is difficult to ascertain, but it seems probable that judicial administrators in the Cape were acquainted with much of the law contained in these in as far as it was applicable to local conditions, and were therefore not wholly unaccustomed to referring to codified law for guidance.

In 1795 the Dutch East India Company ceased to exist, and in the following year the British occupied the Cape, effectively isolating the colony from the influence of the Napoleonic Codes in Europe, and the codification movements in the Netherlands. Had Dutch re-occupation of the Cape occurred a few years later than it did, the Napoleonic Code may well have been introduced into the colony. As it was, during the re-occupation period, 1803-1806, political and legal upheaval in Holland meant that little attention was given to the small colony in Africa. Although Jacob Abraham de Mist was sent out to reorganise the Cape, legal activity during the period was minimal.⁴¹

In 1806 the Cape reverted to British control. Under the Articles of Capitulation the inhabitants of the colony were guaranteed the rights and privileges - including the laws - which they had hitherto enjoyed.⁴² In practice however certain aspects of English law - particularly those relating to procedure - were introduced into the colony either to replace the existing law or to supplement it.

The promulgation of the Natal and Transkei Codes has already been

mentioned.⁴³ Although these were formulated by people living in South Africa, they cannot be regarded as South African codes as such, but rather as Anglo-African codes, undertaken to satisfy administrative needs more than ideological ones. Neither code was based on Roman-Dutch law, and in fact Roman-Dutch law was generally abrogated in those areas governed by the codes.⁴⁴ Nevertheless the existence of the codes did establish a codification-presence in South Africa.

In Africa, as elsewhere, codification in countries under British rule was reserved for the indigenous people rather than the colonists.⁴⁵ However this did not mean that those living in the Cape had no interest in codification of their own legal system, nor did it mean that once independence was achieved these Anglo-African codes would be jettisoned. Although South Africa continued to have a largely uncodified system of law - which has persisted to this day - support for codification and attempts to codify the law have not been absent from the legal development of the country.

3. Codification to Date

The above history has been included to show that codification has been an integral part of South Africa's legal background. Although the introduction of the Napoleonic code in the Netherlands marked a complete break with the past and meant that the Roman-Dutch law of South Africa could no longer depend upon that of its parent system, the civil law origin of the law remained. Nor could South Africa entirely escape the codification movements taking place in other national systems.

The first South African - as opposed to Anglo-African - code was that of the Trekker Republic of the Transvaal. This Code of Criminal Procedure was incorporated into the Transvaal Criminal Procedure Ordinance of 1903.⁴⁶

Based on earlier Cape legislation⁴⁷ and strongly influenced by part of the code drawn up by Mr Justice Ward in the Orange Free State,⁴⁸ this Ordinance has been described as 'both the most advanced and comprehensive code of criminal procedure in Southern Africa'.⁴⁹ Not only did it take into account the laws in force in the Cape but also the criminal codes of Canada, Queensland and India.⁵⁰ The Code was substantially re-enacted in the first criminal procedure act of the Union Parliament, the Criminal Procedure and Evidence Act, 31 of 1917; and reference to subsequent acts as codes has persisted to this day.⁵¹

Interest in codification was not however limited to procedural law. Several years before the Transvaal Code was passed, the Cape Law Journal published a lecture given by C.H. van Zyl to the Cape Town Forensic Society during the previous year.⁵² The title of the lecture was 'Codification', a subject chosen by Van Zyl

'not from any pretention to knowledge of the subject, but rather to broach it with a view to inducing others to take it up, and thus bring the matter to the notice of the Legislature, so as to gradually pave the way for a code of our own.'⁵³

Although he indicated an awareness of the difficulties confronting codification, Van Zyl nevertheless believed that a code written in clear, unambiguous language, in which each subject was methodically arranged under proper headings, would be of immense benefit to the public. It was, he maintained, ridiculous to expect every man to know the law,⁵⁴ when the sources of law were so complex and numerous, that only very few, who felt duty-bound to master the subject, ever acquired more than a superficial knowledge. The consequent result was legal uncertainty, not only because different commentators expressed conflicting views on the content and meaning of the law: but also because it was virtually impossible to know whether or not a law had become obsolete, and as a result the public were

at the mercy of the courts. From the practitioner's point of view there was the problem of having to consult a number of Roman-Dutch legal authorities before it was possible to accurately ascertain the law on any matter.⁵⁵

Van Zyl therefore proposed the wholesale codification of all the laws in force in the Colony. Conceding, however, that this might prove to be too immense a task for the resources available, he acknowledged that the legislature might first prefer to consolidate all the statutes relating to specific subjects. Once this was done, he suggested the appointment of a Code Committee to criticise and improve such consolidations and then bring them together in a Code.⁵⁶ In the interim, any new or proposed acts or amendments, should be considered by the Code Committee and drafted in a manner suited to a Code before they were submitted to Parliament for discussion.⁵⁷ He also recommended that the Code Committee look to the Code of Holland - De Nederlansche Wetboeken - for guidance, maintaining that the basic principles of the law reflected in this Code had changed very little from the late eighteenth century law which had been introduced into the Cape.⁵⁸ Van Zyl saw no reason to fear that codification would make the law rigid and inflexible, as part of the work of the Code Committee would be to continually criticise and improve the code;⁵⁹ nor would there be restraints on writers producing commentaries and theses on the Code, or on the law generally.⁶⁰

Although the Legislature did not take up the challenge as Van Zyl had hoped, the idea of codification received support from other quarters. For example, in 1907 Mr Justice Graham spoke enthusiastically in favour of codification.⁶¹ Comparing the Transvaal system of criminal procedure with that in the Cape he praised the former, attributing its superiority over

the latter to the fact that it was codified. He went on to say that he had never heard a 'single sound argument' against codification and urged the legal profession to exert their influence to encourage a move towards codification; and thereby perform a great service both to their country and the profession.⁶² Moreover, given the procedural guidelines laid down by Van Zyl, and confident that there was sufficient legal talent amongst the lawyers of South Africa, Mr Justice Graham saw no insurmountable problems to preparing a code.⁶³

Nor was it only the legal profession that was urged to support and advocate codification. The business sector also felt that there would be advantages in codifying certain areas of the law, particularly as it related to commercial matters.⁶⁴

However, political reorganisation during the first decade of the twentieth century, culminating in the Union of South Africa in 1910, meant that the legislature, and those with political clout, were pre-occupied with other matters. Thus although arguments in favour of codification persisted,⁶⁵ the time was not ripe to implement such changes.

The South Africa Act of 1910 brought about legislative union, but unlike legal developments experienced elsewhere under similar circumstances, unification of the law and greater political autonomy did not lead to codification,⁶⁶ although in many respects Union provided an ideal opportunity to undertake such a task. After all, the body of common law, and particularly statutory law, was still relatively small - despite the grumbles of lawyers; and it appears that there were sufficient judges, lawyers and astute business men to sit on an independent commission.⁶⁷ Moreover such a move would have been a natural expression of the new political status of the country, and provided a means whereby the civil law

tradition of the Roman-Dutch law could be affirmed, and its future secured.

Perhaps - and this can only be speculation as Parliament seems to have given the matter little consideration⁶⁸ - the main obstacles confronting codification at the time of Union were the immaturity of the 'South African' legal system, and an insufficiently stable and established political structure to carry through such a programme.

The transition from independent colonies to a Union had not been easy, and fear of losing the limited judicial and legislative autonomy that was left to the new provinces; together with party and sectional politics; mitigated against achieving the consensus necessary for a codified system of law.⁶⁹ Also, the heated debate over the question of which language was to be given official recognition, and the subsequent adoption of both English and Dutch⁷⁰ would have meant that any code would have had to be simultaneously drafted in both languages; a task that would have been extremely difficult to achieve within any reasonable length of time given the differences of legal expression found in the Roman-Dutch and English systems of law, and the antagonism between the two language groups existing at the time.

As it was, the principle of legislative unity could only be achieved by granting concessions of a federal nature to the provincial governments. The ensuing debate between unification and federalism also influenced the structure of the courts. The subsequent establishment of provincial and local divisional courts, in place of the former colonial supreme and superior courts, ensured continued provincial jurisdiction. Thus even if a code had been introduced uniform application of its provisions throughout the Union would have been unlikely.⁷¹

Once the move towards Union had commenced, practical politics made it

desirable that it was achieved as speedily as possible. Indications of political instability were apparent by 1909, and it was feared that hostility from sectors of the South African population towards voluntary Union would aggravate relations between Britain and Germany. Moreover, if war broke out there was a strong probability that Britain and her allies would need to use the Cape sea route as an alternative to the Suez Canal. In such a case a friendly and united South Africa was essential.⁷²

Britain's attitude towards the laws of South Africa at the time of Union appears to have been that once the country was self-governing it would be free to determine its own internal affairs - including the choice of a legal system. The outbreak of the First World War delayed consideration of such matters, but during the 1920's efforts were once more made to revive interest in codification.

The main advocate of codification during this period was Sir John Wessels. Whereas Van Zyl had seen codification as a means of making the law more accessible and comprehensive to lawyer and layman, Wessels saw codification as the only means of preventing the Roman-Dutch common law from being submerged beneath the onslaught of English law.⁷³

The threat to the continued existence of Roman-Dutch law was caused not only by the introduction of English statutes and English forms of substantive and procedural law; but also by the fact that original Roman-Dutch sources were becoming increasingly inaccessible to those without a sound knowledge of sixteenth and seventeenth century Latin and Dutch. This meant that lawyers trained in English law and at the English Inns of Court, and also members of the Privy Council - when it acted as a court of final appeal - had tended to rely on English law for some time. Also insufficient knowledge of the basic principles of much Roman-Dutch law, and the

lack of academic legal institutions to research these, meant that the traditional legal system was not being adapted sufficiently to provide for changed circumstances.⁷⁴ The result was that valuable, as well as obsolete laws, were being rejected and discarded because they were not readily available to the lawyer.

Therefore, Wessels suggested that if

'we want to preserve our system of law, it seems to me that we ought to crystallise its essential principles in a code in such a way that its adaptability is not marred'.⁷⁵

A code would have a number of advantages. First it would 'save the Roman-Dutch law from being corrupted out of existence;⁷⁶ secondly, the established and underlying principles of the law could be stated methodically and scientifically in a convenient form; thirdly, a code would provide the opportunity to abandon complicated legal jargon in favour of greater clarity and simplicity of expression.⁷⁷

As with Van Zyl, Wessels' plea for codification was never taken up by the legislature although it did find support amongst lawyers and academics. For example, in 1930 the Law Society of the Cape passed a unanimous resolution proposing the codification of the laws of the Union of South Africa.⁷⁸ Early in the following year a conference of judges, discussed the issue of codification and concluded that although the time was not yet ripe for codifying the civil law, the codification of criminal law; the consolidation of statute law; and the elimination of obsolete statutes; should be undertaken.⁷⁹ In 1938 the suggestion was made that a Law Institute - similar to that found in America - should be set up, and that one of the main tasks should be to lay the foundations for codification by the gradual and thorough systematization of the law.⁸⁰

Although nothing came of these various suggestions and proposals, many

of the English law elements which Wessels had regarded as a threat to the true principles of Roman-Dutch law, did eventually come before the South African courts for decisions as to whether or not they should be part of South African law.⁸¹ The resulting movement during the 1940's and 1950's to purify the law, meant that a number of these English law concepts were rejected in favour of Roman-Dutch principles.⁸² In this way the establishment at Union of the Appellate Division, contributed to the clarification of the law and; as more cases concerning questions of law were decided, created greater legal certainty on many issues. Also the establishment of Afrikaans schools of law meant that interest in the traditional principles of Roman-Dutch law was revived and academic comment from these institutions contributed greatly to the strengthening of Roman-Dutch law.

Thus in many ways the judges and academics of this period fulfilled the role which might otherwise have been allocated to codification. Today it is generally accepted that South Africa has a mixed legal system which might more accurately be described as South African law rather than Roman-Dutch or English; civil or common law.⁸³ consequently there is no longer any need to advocate codification as a means of preserving the Roman-Dutch law from contamination or extinction.⁸⁴

It has also been suggested that as the Appellate Division settles legal issues which were previously uncertain, there is less need for lawyers to refer to a large number of cases, thus codification is no longer required to reduce the bulk of legal sources to more manageable proportions.⁸⁵ While this may perhaps be true of case-law - although the value of such decisions may fall away where the rule of precedent is abandoned; lawyers are having to come to terms with an ever growing amount

of statute law. For this reason, there may still be grounds for codifying the law in order to make it more accessible.

A further reason why codification may seem a more remote possibility today than ever before, is the increasing complexity, specialisation and diversification of the law. In 1960, one of the main arguments raised against codification in South Africa, was the magnitude of the work involved, and the shortage of available skilled manpower to undertake the task. To substantiate this fact it was pointed out that a few years earlier

'one of the leading South African publishing houses attempted to organize the publication of a South African restatement of the law on the lines of Halsbury's Laws of England a far easier job than codification, they found that there were simply not enough men competent and willing to undertake the work'.⁸⁶

However time was to show that this problem was not insurmountable. Fifteen years later a major publishing house - perhaps the same one - initiated the idea of an encyclopedia of South African law. The aim of the publication was the systematic exposition of the law in an as authoritative and comprehensive manner as possible, in order to make the law more accessible to practitioners, academics, and students, in South Africa and elsewhere. Due largely to the diligent persistence of the chief editor, and careful and consistent monitoring of the contributions of a large number of authors, the first volume of The Law of South Africa (LAWSA) appeared in 1976. The work was received with enthusiasm, its successful production being attributed to the increase in the number of legal academics in recent years; improvements of university library facilities; greater interest in the scientific study of law; and greater participation in legal writing by members of the bench.⁸⁷

The appearance of LAWSA would indicate that there are in fact a

sufficient number of competent people willing to contribute to a major legal work. Whether that work will prove to be the basis of further legal development remains to be seen.

Two codes of law remain of force and effect in Southern Africa - excluding the 'Code' of Criminal procedure. These are the Natal Code - as amended; and the Transkei Code; both products of British colonial rule.

In Natal, the Natal Code, which was amended in 1932 and 1967,⁸⁸ was reviewed by a Commission appointed by the KwaZulu Legislative Assembly in 1978. As a result of this Commission, the KwaZulu Act on the Code of Zulu Law, Act 6 of 1981, was passed. The new Act does not repeal the Code but amends it.⁸⁹ That the Code has been retained at all, is particularly interesting when one takes into account not only its historical background, but also the fact that it has frequently been criticised for its inflexibility, and consequent inability to provide for the needs of Blacks living in a westernized and urbanized environment. Moreover, because the Code only applies to KwaZulu citizens living in KwaZulu itself, a great number of Blacks are subject to the laws of two different legal systems as they move from one area to another. Also, although the 1981 Act has been drafted by those having a much greater knowledge of the complexities of customary law than those who drafted the Natal Code, many of the faults and inadequacies of the original code persist.⁹⁰ Whether independent states in South Africa will choose to codify their customary law remains to be seen, none have done so to date, but KwaZulu's approach may be an indication of future legal developments in such areas.

In the Transkei, which has been an independent state since the mid-nineteen seventies, the Transkei Penal Code remained in force until last year when it was replaced with a new Transkei Penal Code in terms of Act 9

of 1983. The introduction of the Act proposed

'to establish a revised Code of criminal law for the Republic of Transkei. Whereas it is desirable to amend and consolidate the criminal law applicable in the Republic of Transkei and to provide a revised code of criminal law for the Republic of Transkei'.

The new code repeals the whole of the former code,⁹¹ and introduces a code of law which is more closely based on South African rather than English criminal law.⁹² It is interesting to note however that while the old code was being used, judges were seconded from the South African bench to the Transkei and apparently applied the codified law there without any great difficulty; and that until the late 1960's its provisions were referred to with approval in South Africa.⁹³ Whether the close proximity of a code of criminal law based on South African law will have repercussions within South Africa itself remains to be seen.

4. Future Prospects for Codification in South Africa

Although the publishers of LAWSA stated in their advance publicity notices that the work should not be regarded as a code, its appearance and comprehensive nature, raises the question of whether it might not be used as the basis of a code. As indicated, its successful publication shows that there is sufficient manpower to undertake such a task, and the presence of such a work will accustom lawyers to looking for the law in a single, authoritative reference before searching elsewhere. On the other hand, as has also been mentioned, the publication of LAWSA may have similar repercussions as that of the works of Halsbury in England, and Bell or Erskine in Scotland, and, in fact, obviate the need for codification by presenting the law in a systematic form through comprehensive legal texts.

However mention has also been made of the fact that KwaZulu and the

Transkei have both recently re-promulgated codes of law. If South Africa persists in granting political independence to territories within her borders, it may well be that she should consider drafting her laws in a more easily transplanted form, suitable for use and adaptation in newly independent territories.⁹⁴ Such a move would not only facilitate international transactions but also minimalise conflicts of laws.

A more immediate reason for codification has emerged from the Report of the Hoexter Commission tabled recently in Parliament.⁹⁵ This Report suggests potentially far-reaching changes in legal administration, particularly through the establishment of small-claims courts. As has been indicated, it would greatly assist the administration of the law in these courts if the law, particularly procedural law, was to be codified, and thus made more accessible and comprehensible to the layman who is to use, and appear in, these courts.⁹⁶

Although codification of the substantive law for use in these courts would be a more extensive undertaking, the fact that the courts may only deal with disputes of a certain limited monetary value,⁹⁷ and may not adjudicate on any factors affecting personal status,⁹⁸ suggest limitations to the areas of law most likely to come before the courts. Besides the fact that codification of substantive law might assist the litigant who is to appear without legal representation,⁹⁹ it could also help to curb arbitrariness and inconsistency in resolving legal disputes where the adjudicator is envisaged as participating more actively participant in the arena of legal combat than is normally the case.¹⁰⁰ Although the Commission was largely concerned with an examination of procedural rather than substantive law, it is interesting to note that a number of the legal systems which it referred to, are themselves codified, although no particu-

lar attention seems to have been paid to this fact.¹⁰¹

A further area where codification might be considered is the law of persons. As the bulk of law in this field is already in statute form,¹⁰² most of it fairly recent, codification would not be too great an undertaking.¹⁰³ Such a code may become particularly desirable once Family Courts - a further suggestion of the Hoexter Commission - are established.¹⁰⁴

It is in many ways strange that while the civil law origins of the South African legal system are frequently stressed;¹⁰⁵ and reference is made by the courts and academics, to codified systems of law in other civil law countries, particularly Germany; that resistance and antagonism to codification persists. As has been indicated, this may be partly due to widespread misconceptions about codification, which are not peculiar to South Africa. It is also, no doubt, partly due to the fact that no sufficiently powerful body has taken up the cause of codification. Essentially, support for a code must come from a strong lobby in Parliament and to date this has not been the case. Nevertheless in many respects the time is ripe for codification in South Africa. The legal system is mature and well established; there are sufficiently skilled people to undertake the research and drafting of a code, and much of the foundation work has been done. In Parliament the Government holds a majority strong enough to manoeuvre the necessary legal reform through the cumbersome procedure of legislation. The only essential ingredient that is lacking for a successful programme of codification is a sufficiently dynamic and powerful person to initiate and promote the idea of codifying South Africa's laws. Perhaps he, or she, will appear in the near future, before political instability and disunity make it too late to achieve this form of legal change in South Africa.

5. CONCLUSION

The history of codification shows that the use of codes has been an important and widespread factor in the legal development of a great number of national legal systems. Nor is the use of codified law merely a thing of the past. Those countries which already have codes continue to use them, and many are revising their existing codes; others are engaged in an examination of the feasibility of codifying their law or parts thereof. Moreover few countries that have codified their law have reverted entirely to uncodified law, while overall more countries have codes than do not.

The difficulties and problems that confront codification, or which may result from it, have been discussed in the course of this study. From these it is clear that codification is not always an easy solution, nor always completely successful. On the other hand the apparent difficulties need not be insurmountable provided careful consideration is given to them.

The general popularity of codified law should not make law-reformers blind to the complexity of the issues involved and the probable extent and cost of the undertaking. However, codification as a method of legal reform has reached a stage of sufficient maturity so that those contemplating its use have the opportunity to examine it from every angle, in an objective and comparative fashion, before committing themselves.

An awareness of the above is not of itself sufficient reason for law reformers or legislators to choose codification, rather than other means, to introduce legal changes or modifications of the law. On the other hand, it is submitted that for a country to adopt the attitude that simply because other countries favour codification there is no reason to follow suit, and thereby reject codification out of hand, is an expression of short-sighted, nationalistic, superiority.

Many advantages can be gained from the pooling of experience, knowledge and resources, without sacrificing national identity. This has been shown to be the case in science, technology, education, and, no less so, in law. The ostracism of South Africa - usually on political grounds - from many of the activities and developments taking place in the rest of the world, has not prevented the country from participating in, and benefitting from this exchange of ideas and information. Indeed political and geographical isolation might be said to have led to greater efforts to acquire knowledge and develop skills than would otherwise have occurred. As a result, the country has undergone tremendous industrial and technological growth and development since Union. This in turn has led to socio-economic changes, particularly the urbanisation and westernization of the life-style of most of the population. This has created new and more complex legal and administrative problems. Today the life of the man in the street is regulated by a multitude of laws, many of which he may never have heard of. In the course of daily transactions more people are becoming involved in potentially litigious matters. Consequently more people need to know the law, and have access to it. Yet in South Africa, despite these social and economic changes, knowledge of the law remains the preserve of a small elite, while access to it is largely the prerogative of those who can afford to pay for it. Although legal aid is available to some, free of charge, many are ignorant of its existence and often do not have the time necessary to apply for it. Moreover, the official resources available are inadequate to keep up with the actual needs of society, a fact evidenced by the emergence of alternative organisations to provide legal assistance, such as university legal aid clinics, the Legal Resources Centres, Lawyers for Human Rights, Black Sash and the Housewives League, to mention a few.

Proposals have already been made by the Hoexter Commission to effect certain reforms in the administration of the law and the structure of the courts. These have yet to be implemented, but it is to be hoped that they will go some way to alleviating the pressures on the courts and legal profession which exists at present. However, it is submitted that the creation of additional courts and encouraging members of the public to conduct their own litigation in certain matters, is unlikely to solve the problems outlined above. Moreover, increasing sophistication and complexity in the law, reflected in fuller law school syllabi, and specialisation amongst practitioners, suggests that it is time to make the law more easily accessible to the lawyer as well as the layman. While this study has indicated that some areas of the law are more difficult to codify, there are others that are easier, and in South Africa may be ripe for codification - the law of procedure and the law of persons have been mentioned. For codification to succeed, the legislator or redactor requires unselfish objectivity and an ability to enquire how the legal needs of tomorrow might best be served by the lessons learnt up to today. Perhaps ultimately this means that a decision has to be made on whether to legislate to preserve the past and the present, or to lay the foundations for the future.

At the time of writing South Africa has just witnessed a new political dispensation. It is not ideal, it is not without faults, and may well encounter problems in the future. Many, however, see it as a step forward. This study concludes with the hope that by the twenty-first century South Africa will have had the courage and determination to bring about a new legal dispensation which more accurately reflects the political, social and economic reality of South Africa, and in which codification will play a

major role.

1. Hahlo and Kahn 586.
2. Indeed it has been stated that the legal system of the Netherlands was characterised by 'Individualism, particularism, separatism, - also even schismatism': Continental Legal History vol 1 455.
3. This was because until the ninth century the early inhabitants of the Netherlands were part of the large Germanic tribes of the Franks, Saxons and Frisians: idem 456; see also Wessels History of the Roman Dutch Law (1908) 40.
4. Continental Legal History 457. This was largely due to the principle of allowing a conquered people to live under their own laws; which was followed by the Romans and subsequently the Franks, and remained effective until the Carolignian period when the publication of Capitularia undermined the principle: Wessels History 45-49.
5. The 1531 placaat stated:
 'That the customs of our lands on this side of the Rhine shall be reduced into writing within six months, and that these customs, so reduced to writing shall be presented to us in order that we may examine them, and after due deliberation promulgate them, in the interest of reason and justice and for the well-being, profit and advantage of all our vassals and subjects': Groot Placaat Boek van Utrecht vol 1 414 cited in Wessels History 214.
 Such compilations were made in a number of provinces, for example Friesland in 1542, and in Overijssel in 1559: Continental Legal History 462.
6. For example a certain amount of uniformity in matrimonial law was achieved through the adoption of similar ordinances in the different provinces e.g. the Political Ordinance in Holland in 1580.
7. In 1579 the Union of Utrecht was declared and led to the constitution of the Dutch Republic. In 1581 Dutch Independence was declared following the abjuration of Philip II of Spain. Signatories to the Act of Abjuration were Holland, Zeeland, Utrecht, Friesland, Brabant, Flanders, Gelderland, Zutphen, Overijssel and Mechlin: Wessels History 90.
8. For example, efforts were made to collect and compile existing legal documents into charter-books during the 1700's, although these remained incomplete: Continental Legal History 460 note 3.
9. For example in 1602 a compilation of written and customary law covering the laws of persons, sale, real rights, prescription, succession, master and servant and maritime law, was made in Friesland: Idem 463.
10. For example the Groot Placaat-boek of Holland and Zeeland contained statutes ranging from 1658-1796.
11. Economic development of the country created an urgent need for greater legal uniformity. See Wessels History 127-128.

12. The actual date of the reception of Roman law into the Netherlands has been the subject of some debate. See Wessels History 95.
13. The Lex Romana which crept in via the Lex Ecclesiastica was that of the Lex Burgundionum and Lex Romana Visigothorum rather than the law of Justinian: Idem 97-98.
14. The first evidence of the change towards a scientific study of law was reflected in the methodical arrangement of legal provisions and administrative regulations in the Keurboeken. For a full discussion of the reception of Roman law in the Netherlands see Bisschop (1908) 24 LQR 157, 160.
15. For example, according to Wessels, in 1531 the Court of Holland was composed almost entirely of jurists who had been educated in Roman law: Wessels History 127.
16. This is particularly true of Grotius's Introduction to the Jurisprudence of Holland (Inleiding tot de Hollandsche Rechts-Geleertheyd) incorporating, as it did, the customary and statutory law of Holland, as well as Roman law principles, arranged and expounded scientifically and methodically.
17. In South Africa, both the South African Republic in the Transvaal, and the Orange River Colony gave official recognition to the works of Dutch jurists. In the former an addenda to the Grondwet of 1844, made in September 1859, listed the works of Van der Linden, Van Leeuwen and Grotius as sources of Roman-Dutch law, while in the latter Article 1 of the Grondwet, concerning miscellaneous subjects, made similar provisions in February 1856: Eybers 310 and 416.
18. See Van der Keesel Praelectiones ad Jus Criminale (ed) Van Warmelo vol 1 xx note 13.
19. For a history of this period see Van Zyl (1895) 12 Cape Law Journal 16, 21.
20. No report from this commission was forthcoming. Van Zyl suggests that the commission found the task too laborious ibid.
21. Article 28 required the making, within two years, of codes of civil procedure, civil law, criminal law and criminal procedure: Hahlo and Kahn 70 note 75; 563 note 90.
22. Drafts on procedure were produced in 1799, and on criminal law, evidence and a general introduction in 1804; however the political changes occasioned by Louis Napoleon's accession meant that these came to nothing.
23. Hahlo and Kahn 563 note 90.
24. The extent to which Van der Linden's draft code was incorporated into this later one, or the Dutch Code of 1838 is unclear: ibid. For a discussion of the 1809 code see Bisschop (1901) 3 Journal of Comparative Legislation 109.

25. In promulgating the code the King of Holland declared:
 'By the introduction of this Code is repealed the Roman Law, together with all the laws and ordinances, in force in this country, whether they are known by the titles of Placaaten, Publications, Advertisements, Ordinances, Regulations, Customs, Statutes, Licences or under what name soever, unless expressly retained in this Code':
 Van Zyl (1895) 12 Cape Law Journal 16, 22.
26. This code was subsequently replaced by the Code Napoleon itself, in March 1811, as a result of the cession and subsequent incorporation of Holland into France in 1810. In substance there was little difference between the two codes because the Code of Holland had been so closely modelled on the latter.
 The Code Napoleon remained in force in Holland until 1838 when De Nederlandsche Wetboken came into effect following the establishment of the Kingdom of the United Netherlands.
27. The Dutch East India Company (Vereenigde Geoctroveerde Oost-Indische Compagnie (VOC)) was founded on March 20, 1602, under a Charter of the Estates General. In practice the law introduced by the Company was that of Holland as there was no single system of Dutch law at the time, and Holland - the wealthiest and most powerful of the provinces - exercised the greatest influence in the affairs of the Company.
28. There were a number of different sources of law applicable besides these. See Hahlo and Kahn 574 note 46.
29. Van Diemen's code was drawn up by an advocate Jan Maetsuycher on the Governor-General's instructions: ibid. Van der Parra's code was drafted by a certain Mr Craan on the instructions of Governor-General Mossel. Whether the latter ever actually applied in the Cape seems to be a matter of dispute. See Roos (1897) 14 Cape Law Journal 1, 6.
30. Roos op cit 5.
31. See idem for a full list of the code's provisions.
32. Bisschop (1908) 24 LQR 157, 165. The last article of the code provided:
 'that all Vice-Governors, Presidents, Justiciaries and Judges of the far-off countries, towns and places situated under the sovereignty of the State of the Netherlands, in these countries, shall be bound to regulate themselves according to this book of ordinances as far as the constitution of such countries, towns and places shall admit and allow': Bisschop op cit 166.
33. See Hahlo and Kahn 474. Van Zyl however suggests that Van Diemen's code did not reach the Cape until 1769: (1908) SALJ 4, 5.
34. For a copy of the resolution (in translation) see Van Zyl (1908) SALJ 246, 250; also Roos op cit 1, 6.

35. See Van Zyl for details of the requests from the Council of Seventeen and subsequent attempts to revise the Code (1907) 24 SALJ 366, 373.
36. Craan's draft was submitted to a committee of two, Louis Taillefeit, and Willem Atting - both members of the Council of India - who introduced certain amendments; Roos op cit 6; also Van Zyl (1907) 24 SALJ 373, 374-375. Note that Stock suggests that the work of revision started earlier in 1752 (1915) 32 SALJ 328.
37. Bisschop op cit 166.
38. The scope of Van der Parra's code was more extensive than Van Diemen's and some of the more severe punishments had been modified. The motivation behind the two codes was very similar. See Van Zyl (1907) 24 SALJ 376 et seq.
39. It seems that the new Code never received the official approval of the Council of Seventeen. See Roos' consideration of the matter op cit 8; and the comments by Van Zyl (1908) 25 SALJ 241, 251 et seq.
40. Stock suggests that the original version of Van der Parra's Code was never in force in the Cape, but that an alphabetical index based on the Code and drawn up in the Cape between 1784 and 1790 was in use and, that subject to local laws, was a primary source of law: op cit 336.
41. Some proclamations, of a temporary nature, were issued by General Janssens - who was appointed Governor-General of the Cape by De Mist; and an Ordinance was issued by De Mist in 1804: Van Zyl (1908) 25 SALJ 246, 249. Apart from these little seems to have been done to alter the existing laws, despite Hahlo and Kahn's statement that 'From 1803 to 1806 the Cape was governed by men imbued with the latest ideas of revolutionary France': Hahlo & Kahn Union 5.
42. See Eybers 15. These conditions were similar to those that had been contained in the 1795 Articles of Capitulation signed at Rustenberg on 16 September and were subsequently affirmed in the First and Second Charters of Justice of 1827 and 1832.
43. See supra under common law codes.
44. For example, in Natal the Black population ceased to be governed by Roman-Dutch law in 1849, except for those situations where their own law was repugnant to the general principles of humanity. See Brookes & Webb 55.
45. Although in the Transkei the provisions of the code applied in theory to everyone living in the territory.
46. Ordinance 1 (1903) T. A brief code of procedure had been included in Biljage No 3 of 1859 and elaborated by Ordinance No 5 of 1864: Dugard Introduction to Criminal Procedure (1977) 30. De Villiers suggests that in fact the Wetboek of the Orange Free State which consisted of ordinances and Volksraadbesluiten collected and arranged according to subject should be regarded as the first South African Law Code. See

his comments in (1931) 63 SALJ 318. It appears however that this was really a compilation of laws rather than a true code.

47. In the Cape, Ordinance No 40 of 1828; and Ordinances Nos 72 and 73 of 1830 (as amended) had consolidated a large part of criminal procedure.
48. Part one of Mr Justice Ward's draft code dealt with procedure, crimes, and punishments, and it was this that was most influential in the Transvaal.
49. Burchell & Hunt 42 note 359: see also Dugard op cit 31.
50. Ibid.
51. See for example Dugard op cit 57-58.
52. C H van Zyl, an attorney, was an early pioneer of legal education in the Cape. It is interesting to note that arguments in favour of codification during this period came largely from practitioners and not academics or jurists.
53. Van Zyl (1895) 12 Cape Law Journal 16.
54. It used to be the rule in South African law that ignorance of the law was no excuse to criminal liability, hence the need for every man to know the law. Since the decision in S v De Blom 1977 (3) SA 513 (A) however, this rule has been moderated. See Burchell & Hunt 160-172.
55. The relevant sources of law included local statutes and customs; decisions of the Supreme Court; the placaaten of Holland; the 'terrible' commentaries of the Roman-Dutch writers (Van Zyl's description); Roman law; general, and equitable principles of law. Van Zyl op cit 81.
56. The method proposed by Van Zyl was very similar to that later used in America to bring about the Uniform Commercial Code.
57. Van Zyl appears to have fully realised the problems caused by parliamentary procedures and the opportunities these afford for obstructive tactics. He also hoped that this method would avoid the 'tedious elaboration' of the law which tended to result from Parliamentary drafting - he cited the Bills of Exchange Act as an example of a poorly drafted code. See op cit 83-85.
58. Although the 1838 Code was largely based on Roman-Dutch law, Van Zyl seems to have overlooked the fact that the introduction of French law had made a considerable impression on the Dutch system. However, Kitchin, writing in (1913) 30 SALJ 10, 17 supports Van Zyl's view.
59. Van Zyl suggested that one means of modernising the Code would be by means of parallel columns. See op cit 27 for the exposition of this idea.
60. Van Zyl closed his lecture with the Napoleonic sentiment that codification would achieve a monument more lasting than brass - in the

shape of a Codex Capensis: idem 87.

61. Mr Justice Graham expressed his views during a legal dinner, the proceedings of which were reported in (1907) 24 SALJ 112.
62. (1907) 24 SALJ 112, 114.
63. Further support for codification was expressed by C Findlay in an article in the (1904-07) 2-6 Natal Law Quarterly 3, although he did concede that legislative activity in this respect seemed 'improbable for many years to come'. See also Kitchin (1913) 30 SALJ 10.
64. In 1913 during a Congress in Kimberley, the Association of Chambers of Commerce passed a resolution that:
 'legislation should be introduced by the Government at the earliest possible moment for the codification of divergent laws of the Union, more particularly those relating to insolvency, companies, weights and measures, tacit hypothecs, registration of deeds, patents, trade marks, designs and copy right'.
 See the Report in (1913) 30 SALJ 454. In fact certain areas of commercial law were partially codified through the adoption, in whole or part, of English consolidation bills such as the Bills of Exchange and the Law of Master and Servants. See Kitchin (1913) 30 SALJ 10, 15; and (1927) 44 SALJ 519, 520.
65. See for example the comments of Kitchin idem 13; and 532; who suggested that Union brought about a greater need to codify the law because the creation of the Appellate Division of the Supreme Court led to increased legal uncertainty, as provincial decisions were now not considered as generally binding until confirmed by the AD.
66. Compare for example the situation in Germany where codification was seen as a means of assisting and promoting the spirit of national unity achieved through political union in 1871.
67. See Kitchin (1913) 30 SALJ 10, 18; and Graham (1907) 24 SALJ 114.
68. Kitchin states that Mr Justice Murray Bisset tabled a motion for the codification of South Africa's laws in Parliament, but history does not relate when this was, or what became of it: (1927) 44 SALJ 519.
69. The prevalent mood of the colonies is indicated by a resolution passed on 2 November 1908, by the Convention on the Constitution, which provided that subject to the provisions of the Constitution, all laws in force in a colony at the establishment of the Union should remain in force in the respective province until repealed: (my emphasis): Thompson The Unification of South Africa 1902-1910 (1960) 242.
70. Provision for both languages is found in s 137 of the 1910 South Africa Act. See also the remarks in Hahlo & Kahn Union 25-26; Thompson op cit 135-138, 192-198.
71. Further, the established rights of all existing judges were protected, which would have no doubt led to further local discrepancies. See

section 99 of the South Africa Act, and Thompson op cit 186-192.

72. Thompson op cit 398-400.
73. See Wessels (1920) SALJ 265 and (1928) 45 SALJ 5. Compare however the view of J C de Wet (1942) 6 THRHR 306, 313. Wessels' fears were not without grounds. Roman-Dutch law had already been largely replaced by English law elsewhere, for example in British Guiana by the 1916 Civil Law of British Guiana Ordinance. See Ledlie (1917) 17 Journal of Comparative Legislation 210. Similarly in Ceylon, see Nadaraja The Legal System of Ceylon in its Historical Setting (1972) 232 et seq.
74. Wessels' argument that codification would remedy this situation was criticised many years later by Hahlo, who suggested that the argument had been based on a confusion between Roman-Dutch proper and the Roman-Dutch law of South Africa.
 However, as has been indicated supra in mixed legal systems such as South Africa, it is not unusual to find codification being used as a means of preserving the authoritative status of a particular branch of the law, even if the threat thereto is more feared than apparent. See for example the situation in Canada and Louisiana. See also the remarks of Smith in Yiannopoulos 3.
75. Wessels (1920) 37 SALJ 265, 282.
76. Idem 283.
77. Wessels described the characteristics of traditional legal drafting as 'interminable sentences, with their embarrassing parenthetical clauses and vigorous crop of sesquipedalian words' ibid. Wessels considered that the main difficulty confronting codification was finding a sufficiently capable draftsman. However he felt that in South Africa Chief-Justice Rose-Innes was the ideal person for the task, as he had a profound knowledge of Roman-Dutch law and of the commentators on the civil law. See (1928) 45 SALJ 5, 18.
78. The resolution was recorded in the President's annual report for the Society published in (1931) 48 SALJ 473, 483. The resolution was communicated to the Secretary for Justice in the same year but nothing appears to have come of it.
79. Ibid.
80. Roberts (1938) THRHR 202. Compare however De Wet's view expressed in a critique of Roberts' views in (1942) 6 THRHR 306.
81. For example the English law doctrine of consideration in contract, discussed by Wessels (1920) 37 SALJ 272.
82. For a detailed discussion of this period and the role of the A.D. see A van Blerk's unpublished LL.M thesis 'The "Purists" in South African legal literature and their influence on the judgements of the Appellate Division in Selected Areas' UN (1981).

83. Hahlo & Kahn 586. See also Hahlo & Kahn Union 41-50.
84. J C de Wet echoing the view of Von Savigny consistently maintained that codification would impose severe limitations on the development of Roman-Dutch law, and divorce it from its historical background. See his remarks op cit 313.
85. See the remarks of Hahlo (1960) 77 SALJ 432, 435. On the other hand it could be argued that the work of the Appellate Division in this regard greatly facilitates codification and lays the foundations for such an undertaking.
86. Hahlo (1960) 77 SALJ 436.
87. Kahn (1976) 93 SALJ 482. The law contained in LAWSA (The Law of South Africa) is divided according to a basically civil law system, and arranged alphabetically. Although the work consists of a number of volumes, uniformity has been maintained by careful editing and the establishment of guidelines for contributors. Changes and additions to the law are provided for by means of an annual cumulative supplement.
88. Proclamation 168 of 1932 and Proclamation 195 of 1967 promulgated new codes although the law in fact remained virtually unchanged.
89. Certain areas still remain outside the Code. However, certain improvements have been made, for example provision is now made for reference to unwritten customary law where the code is silent, and legislative procedures have been incorporated to establish the content of the law where the code is unclear or there is a dispute. For a discussion of the provisions of the new act see Bekker and Coertze (1983) THRHR 285; Church (1983) 16 CILSA 100.
90. It may be that the Code has been retained for both ideological and administrative reasons. The fact that it did not emanate from the South African government may be in its favour - although this is purely speculation. Administratively it is a form of law which judicial officers - some of whom have very little legal training - have become accustomed to.
91. See s 185 of Part 12 of the Schedule of Laws Repealed.
92. In fact the new code appears on the face of it to closely resemble the work of certain South African authors on the subject, although no acknowledgements are made.
93. See Burchell & Hunt 39.
94. With the ever present threat of Soviet expansion in Africa perhaps South Africa should appreciate that Soviet law is itself codified, and that codes of law have proved very popular in other African countries gaining independence.
95. This was the Commission of Inquiry into the Structure and Functioning of the Courts. The Report concerning small-claims courts is the

Fourth Interim Report RP 52/1982.

96. The comparative survey undertaken by the Commission indicated that the greatest barriers concerning access to justice, were poverty and ignorance, on the part of either party to a dispute. This problem was compounded by 'difficulty in understanding the language of the law, especially where it is expressed ... in terms of doubts and hypothesis': 4th Interim Report 13.
97. Idem Paragraph 13.47.
98. Idem Paragraph 13.48.
99. Idem Paragraph 14.3(k).
100. The Report sees such participation as being necessary because the adjudicator will have to assist the litigants to understand the legal issues involved and to prepare their cases. This seems to create the potential danger of a law-making adjudicator, and may well give rise to a confusing degree of procedural flexibility in such courts.
101. For example New York, Massachussettes, California and Quebec. The legal systems of New Zealand, New South Wales, Queensland and Western Australia which were also referred to, all have law revision agencies which are competent to assist in, or undertake, the task of codification; and which act as monitoring institutions for law reform.
102. For example: The Age of Majority Act of 1972; the Divorce Act of 1979; the Children's Act of 1980 and recently the Matrimonial Property Act of 1984. See also Paragraph 9.61 Part VII of the Fifth and Final Report of the Commission.
103. In England the Law Commission appears to be successfully undertaking the codification of Family Law by means of separate acts which will later be consolidated. See on this Cretney (1981) 44 MLR 1.
104. See generally Part VII of the Report on the Desirability or Otherwise of establishing a Family Court.
105. See for example Hahlo (1960) 77 SALJ 432, 433.

APPENDIX ACHRONOLOGICAL INDEX OF CODIFICATION

c 2270-2000BC	Code of Hammu-rabi
c 1969-1870	(Old) Assyrian Code
1450-1250	(New) Assyrian Code (Hittite Laws)
900-850	Pentateuch Code
900-800	Codes of Draco & Solon (City States)
700-600	Deuteronomic Code
451-449	Twelve Tables (Roman Law)
450	Gortyn Code
200	Laws of Manu
300AD	Codex Gregorianus
323	Codex Hermogenianus
438	Codex Theodosianus
450	Lex Salica
c500	Edictum Theoderici
	Visigothic Code (Code of Euric)
501	Lex Romana Burgundionum
506	Lex Romana Visigothorum
529	(Justinian) Codex 'Vetus'
534	(New) Codex Justinian
600-700	Chinese Code
643	Lex Langobardorum
c750	Saxon Code
780	Frisian Code
900	Laws of the Welsh (Howel Dda)
1241	Danish Civil Code (Jydske Law)
1259	Schwabenspiegel

1532	Carolina Code (CCC)
1634	Massachusetts Code
1642	Batavian (VOC) Code (Van Diemen)
1682	Pennsylvannian Code
1683	Danish Code
1687	Norwegian Code
1734	Swedish Code
	Finnish Code
1751-6	Bavarian Code
1766	Batavian (VOC) Code (Van der Parra)
1769	Austrian (Theresiana) Code
1786	Lombardian Code
1787	Austrian (Josephine) Code
1793	Indian (Cornwallis) Code of Criminal Law
1794	Prussian Code
1803	Austrian Code
1804	French Civil Code (Code Napoleon)
1806	French Civil Procedure Code
1807	French Commercial Code
1808	French Criminal Procedure Code
	Territory of New Orleans Code (later Louisiana)
1810	French Penal Code
1811	Austrian Civil Code
1813	Bavarian Code
1819	Code of Scicily
1825	Louisiana Civil Code (Livingstone)
	Haaiti Civil Code
	Dominican Republic adopted French Civil Code

1827	Indian (Elphinstone) Criminal Law Code
1830	Bolivian Civil Code
1832	Russian (Svod Zakonov) Code
1838	Dutch (Netherlands) Code Dutch Commercial Code
1843	Bolivian Civil Code
1848	New York Code of Civil Procedure
1852	Peru Civil Code Austrian Penal Code
1855	Russian Penal Code
1855-65	Chilean Civil Code
1857	Columbian Civil Code; Portuguese Civil Code
1859	Indian Code of Civil Procedure
1860	Indian Penal Code
1861	German General Commercial Code Ecuador Civil Code Indian Code of Criminal Procedure
1864	Rumanian Civil Code
1865	Italian Civil Code Territory of Dakota Civil Code
1866	Quebec Civil Code (Province of Lower Canada)
1867	Portuguese Civil Code
1869	Argentinian Civil Code; Uruguay Civil Code
1869-1876	Ottoman (Turkish) Civil Code (The 'Mejelle') Ottoman Code of Civil Procedure
1870	Mexican Civil Code

- 1870 Spanish Penal Code
- 1872 Californian Civil Code & Penal Code
- 1873 Civil Code of Columbia
Civil Code of Montenegro
Civil Code of Venezuela
- 1875 Chilean Penal Code
- 1875-1881 Egyptian Civil Code
- 1877 Guatemala Civil Code
- 1878 Natal Code of Bantu Law
- 1880 Japanese Penal Code & Code of Criminal Procedure
Civil Code of Honduras
- 1881 Swiss Civil Code (Code of Obligations)
New York Criminal Procedure Code
- 1883 Ceylon Penal Code
- 1884 Civil Code of Dominican Republic
Mexican (Federal) Civil Code
- 1886 Costa Rica Civil Code
Transkei Penal Code
- 1887 Idaho Civil Code
Ecuador Civil Code
- 1889 Spanish Civil Code
Salvador Civil Code
- 1890 Italian Criminal Code
- 1892 Canadian Criminal Code
- 1893 New Zealand Criminal Code
- 1895 Montana Civil Code
- 1897 Austrian Commercial Code
- 1898 Japanese Civil Code

1900	German Civil Code (BGB)
1907	Swiss Civil Code
	Japanese Criminal Code
1908	Siamese Criminal Code
	Thai Penal Code
1910	(New) Criminal Code of Republic of China
1912	Swiss Civil Code
1916	British Guiana Civil Code
1917	Codex Juris Canonici (Catholic Code)
1917-1919	Brazilian Civil Code
1921-28	(NEP) Russian (Soviet) Codes;
	(New) Mexican Civil Code
1923	American Restatement
1926	(New) Turkish Civil Code
1927-1935	Iranian Civil Code
1928	(New) Mexican Civil Code
1929-1931	Chinese Civil Code
1930	Chinese Land Code
1932	Chinese Code of Civil Procedure
1934	Lebanese Code (Contract & Obligation)
1936	Civil Code of Peru
	Colombian Penal Code
1937	Swiss Penal Code
1942	Louisiana Criminal Code
	Civil Code of Venezuela
1946	(New) Italian Civil & Commercial Code
	French Africa & Malagasy adopt French Penal Code

1946	Brazil Penal Code Civil Code of Greece
1948	(New) Egyptian Civil Code
1949	Syrian Civil Code
1954	Burma Code
1955-56	Hindu Civil Code
1956	Tunisian Code of Personal Status Bahrain Penal Code
1957	Ethiopian Criminal Code Virgin Islands Code
1958-68	USSR Revised Codes
1958	Civil Code of Republic of Korea
1959	Hungarian Civil Code
1960	Ethiopian Civil & Commercial Codes
1962	American Uniform Commercial Code
1963	Czechoslovakian Codes
1964	Polish Civil Code : Code of Family Law & Civil Procedure Ivory Coast Civil Code
1965	German Democratic Republic Family Law Code (New) Swedish Penal Code
1966	(New) Portuguese Civil Code Algerian Penal Code
1971-72	Sudan Codes
1973-75	(New) Cuban Codes
1976	Seychelles Civil Code
1977	South African Criminal Procedure 'Code' Seychelles Commercial Code

1980

Peoples Republic of China Penal Code

This index is by no means exhaustive, but has been included to give some indication of the chronological and geographical extent of codification. Main source material: David & Brierley; 'National Reports' International Encyclopedia of Comparative Law vol 1; Kocourek & Wigmore