THE DESIRABILITY OF A UNIFORM COMMERCIAL CODE FOR SOUTH-EAST ASIA*

The word 'code', has been used by both academic and practising lawyers without any great degree of precision. In its various contexts the only common denominator appears to be that it invariably indicates a species of law enacted by the legislature in contradistinction to rules of law produced solely by the exercise of the judicial function. It is, therefore, necessary, before considering the desirability of codification, to examine the different ways in which that term has been understood and applied. This preliminary investigation may be conveniently carried out under three heads which are typical of the main schools of approach to the problem. In the first place there is the attempt of the English common lawyers of the nineteenth century to codify limited aspects of the law; secondly, there is the continental approach modelled upon Justinian's codification of the Roman Civil law and, finally, there are the significant developments in the United States of America during the present century.

THE ENGLISH COMMERCIAL CODES OF THE NINETEENTH CENTURY

The tendency of legal thinking in England in the direction of codification was largely inspired by the treatises of Pothier and their subsequent embodiment in the French commercial code. However, as Savigny had pointed out, codification is premature if it is carried out before the law has time to crystallize. Thus, it was perhaps unfortunate that the English proponents of codification devoted their attention to certain branches of commercial law at a time of accelerated progress in the fields of commercial enterprise and industrial invention. To give only one example: the concept of the limited liability trading corporation was still in its infancy but, once accepted, it was bound to have a profound and far reaching influence upon all other aspects of commercial law. In fact, the basic weakness of these excursions into the realm of codification lay in the misconception that specific branches of commercial law could be codified in isolation. Again, because at that period modern commercial practice was in a state of aggravated evolution, future developments were largely unpredictable. Therefore, the gaps in the enacted codes were more numerous than would have been the case had codification taken place during a more static ,phase of the economy.

Unfortunately, the legislature, instead of attempting to cover the gaps by an unequivocal statement of its intention and a clear direction to the judiciary as to the specific legal principles to be applied, evaded its

* A public lecture delivered in the University of Singapore on August 27th, 1963.

responsibility by inviting the judiciary to patch up the 'codes' with remnants of the common law. Thus, although both the Sale of Goods Act, 1893,[1] and the Bills of Exchange Act, 1882,[2] are expressly stated to 'codify' those aspects of the law, each of them contains an express direction to apply the rules of the common law and the law merchant, save in so far as they are inconsistent with the express provisions of the enactment.[3] The wording of this direction is curious. It appears to invite an interpretation of the statutes in the context of the pre-existing law rather than to restrict references to that law to those cases not expressly covered by the Act. Although Lord Herschell gave an authoritative direction as to the correct method for the judiciary to apply when interpreting the Bills of Exchange Act, it is doubtful whether that method has been extensively adopted. In *Bank of England* v. *Vagliano Bros.*[4] his Lordship said:

> "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated."

Now, it is arguable that a direction to apply the rules of the common law where they are not inconsistent with the statute means that you are to look at the express words and that, unless those words can be construed only in such a way that they are inconsistent with the pre-existing law, then you must give them an interpretation which accords with the pre-existing law. On this view the so-called code is not a substitution for the common law but is primarily a declaration of it and must be interpreted as not amending it, unless that is the only possible construction of the words used. This method of interpretation presupposes a preliminary investigation of the common law and it appears to have been the method adopted by the text writers. The learned editor of the current edition of *Byles On Bills of Exchange*[5] deems it to be necessary to invoke more than 1,700 cases, decided before the passing of that Act, as an aid to the interpretation of its 100 sections and two schedules. Similarly, the current edition of *Chalmers's Sale of Goods*[6] refers the reader to over 700 pre-Act cases as an aid to the interpretation of the 64 sections of the Sale of Goods Act. In any event, whatever view one takes of the correct method of interpretation, the established practice of text writers provides cogent evidence that, for the better part of

1. 56 & 57 Vict. c. 71.
2. 45 & 46 Vict. c. 61.
3. Bills of Exchange Act, 1882, s. 97 (1); Sale of Goods Act, 1893, S. 61 (2).
4. [1891] A.C. 107 at pp. 144-145.
5. (21st ed., 1955) by Maurice Megrah.
6. (14th ed., 1951) by Paul.

a century, these two enactments, have failed to fulfil the functions of codification as envisaged by Lord Herschell, when he said:

> "The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions...." [7]

It is not only the necessity to refer to an enormous body of pre-existing case law that destroys the utility of these enactments as codes but also the fact that it is considered necessary to augment this source with an ever increasing body of case law arising out of the very application of the code. What then is the cause of this failure? The answer may well lie in an over anxious reciprocity of diffidence between the legislature and the judges. In other words, parliament is hesitant to appear to be imposing its intentions upon the judiciary, which, in its turn, is reluctant to saddle the legislature with an intention that it has not thought fit to express.

It is perhaps relevant to observe that the evidence adduced to indicate the failure of these two statutes as codes is not the esoteric speculations of academics but texts written and subsequently edited by practitioners primarily for the guidance of practitioners. In spite of Lord Herschell's *dicta,* neither Act was intended to be a substitution for the common law and, in effect, each does little more than declare the pre-existing state of the law. Chalmers was the draftsman of both enactments and, therefore, his observations in the preface to the first edition of his treatise on the Sale of Goods are convincing evidence as to the purpose of both statutes. He says:

> "The Bill, in its original form, was drafted on the same lines as the Bills of Exchange Act. On Lord Herschell's advice it endeavoured to produce as exactly as possible the existing law, leaving any amendments that might seem desirable to be introduced in Committee on the authority of the Legislature. So far as England is concerned, the conscious changes effected in the law have been very slight." [8]

From these abortive experiments in the field of codification we can turn with some relief to the Continental Codes.

EUROPEAN CONTINENTAL CODES

In Europe the widespread reception of the principles of Roman civil law, as codified by Justinian, may be said to have conditioned jurisprudential opinion with a favourable tendency towards codification. Indeed, it was left to Savigny[9] to point out that codification did not necessarily entail reception. One curious result was that he, who did so much to clear the path and lay the foundations for the German code, came to be

7. *Bank of England* v. *Vagliano Bros.* [1897] A.C. 107 at p. 145.
8. Reprinted in the 14th ed.
9. System of Modern Roman Law (1840); Translated into English by W. Holloway (1867).

regarded in some circles [10] as a reactionary opponent of codification.

Even on the Continent there appears to have been two schools of thought. It is true that both schools favoured the view that, to be effective, a code must endeavour to cover the whole field of legal relationships. The divergence was as to the method to be employed in the attainment of the desired object. Two distinct methods of approach emerged. They may be rather loosely described as the Germanic, or omniscient, system and the French, or humanist, system.

The Germanic system resulted in the evolution of a purportedly all embracing code consisting of 2,800 sections. It attempted to cover every factual situation that can give rise to a legal relationship. The conscious, or perhaps unconscious, intention would appear to have been to reduce the judicial function to a well disciplined bureaucratic exercise — a sort of judicial route march towards a pre-ordained objective and not a pilgrimage in search of truth. A Savignist might well justify the exercise as an exemplification of the *Volksgeist* of a spiritually regimented *Herrenvolk.* An omniscient legislature can only exist where it is also omnipotent. In other words, if you wish to predict with certainty the legal consequences of all forms of human activity you must have and use the power to restrict those forms of activity. This involves a question that may very well go to the root of legal evolution. How far must human activity be restrained in the interests of an effectual legal system?

It is not over difficult to prescribe formal conditions for the creation of legal relationships and, indeed, most legal systems have resorted to such devices. The difficulty lies in determining what precise legal rights and obligations are to flow from the infinite variety of factual situations that can motivate the execution of the requisite formalities. For example, where, in a common law jurisdiction, persons have signed, sealed and delivered a deed or where persons, subject to the civil law, have recited the liturgy of the *stipulatio,* one can state, with a reasonable degree of certainty, that they have entered into a legal relationship. However, it may well be a matter of considerable complexity to identify the specific legal rights conferred and obligations undertaken.

The French draftsmen, although perhaps less industrious than their German counterparts, were infinitely more percipient in their appreciation and anticipation of the diversity of human relationships. At a very early stage they recognised that, although it may be possible to attain a high degree of comprehensiveness in matters of principle, it is virtually impossible to foresee and to codify every factual situation to which those principles are to be applied. This acute perception of the French draftsmen is exemplified by an excerpt from their report, in which they said: [11]

> "At the start of our discussions we were of the opinion, so generally held, that, in the drafting of a civil code, certain short texts on each subject could suffice and that the great art is to simplify everything while foreseeing everything.

10. Lloyd *Introduction to Jurisprudence* (London, 1959) at p. 332.

11. Portales, Tronchet, Bigot-Préameneu and Maleville, *Discours preliminaire",* in 1 Locré, La Législation de la France 251, 255-72 (1827) quoted from Von Meerhen, *The Civil Law System* (1957).

> To simplify everything, that is an operation on which one needs to agree. To foresee everything, that is a goal impossible of attainment....
>
> We have thus not felt that we are obliged to simplify the laws to the point of leaving the citizens without rules and without guarantees as to their most important interests,
>
> We have equally avoided the dangerous ambition to desire to regulate and foresee everything.
>
> A code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge. Because the laws, once written remain as they were written. Man, on the contrary, never remains the same, he changes constantly; and this change which never stops, and the effects of which are so diversely modified by circumstances, produce at every instant some new combination, some new fact, some new result.
>
> The function of the law is to fix in broad outline the general maxims of justice, to establish principles rich in suggestiveness, and not to descend into the details of the questions that can arise in each subject. It is for the judge and the lawyer, embodied with the general spirit of the laws, to direct their application. . . . . .
>
> There is a science for the legislator, as there is one for the judges; and the one does not resemble the other. The science of the legislator consists in finding in each matter the principles most favourable to the common good; the science of the judge is to put these principles in action to develop them, to extend them, by a wise and reasoned application...."

The French view leaves the truly judicial functions vested in the judges whilst at the same time precluding them from usurping the functions of the legislature. It envisages the code as comprehensive of legal principles and as being in that sense pre-emptive or exclusive in its fields but without any pretensions to omniscience regarding the factual situations to which those principles may have to be applied. The French codes have been criticised on the ground that they are antiquated but this is a criticism not of the principles from which those codes were evolved but, in effect, of the era in which they were conceived. However, whatever may be the merit of the French code in the modern world, the principles enunciated by its draftsmen remain as a source of inspiration to those of us who would prefer to have the principles of the law enshrined in a code rather than entombed beneath an ever increasing cairn of judicial decisions — a monument to rather than an exposition of the principles of the common law.

AMERICAN TWENTIETH CENTURY DEVELOPMENTS

Although the United States of America, as a whole, might be said to have acquired a bequest of the common law from their English forebears, that bequest was more of a devise than a legacy. Although at the time of separation from the mother country the common law relating to the ownership of land and the basic equitable principles, supplementing it, were firmly established, it was not until after the secession of the American colonies that Lord Mansfield's endeavours to incorporate the Law Merchant in the common law came to fruition. The position, then, was that at the outbreak of the Revolution the common law principles of land law were firmly grounded in the United States, whereas the newly-emergent States of the Union had no established principles of commercial or mercantile law upon which they could build. The result was a diversity of somewhat parochial developments in that field.

Now, in a commercially under-developed country, where difficulties of transport and of communications tend to localise trading activities, there is no urgent demand for extensive uniformity in the law governing those activities. It suffices that there is a reasonable consistency in the administration of the law within each self-contained trading area. However, once the areas of trading operations are extended by improvements in transport and communications, the old parochial laws become inadequate and their divergence from one another is a serious impediment to commerce.

It was this absence of uniformity in the laws of the various States, coupled with a certain tendency of the judiciary to interpret the law in a way more favourable to the State of their own jurisdiction than to the Union as a whole, that occasioned a virtual breakdown of a system of total case law. Towards the end of the nineteenth century it was sought to remedy this situation by the introduction of a number of independent but uniform statutes for separate adoption by each State. The experiment was not a success. The only one of those Acts to be adopted in all of the States was the Uniform Negotiable Instruments Law, but the last State to adopt it did not do so until thirty-two years had elapsed since its introduction. Perhaps the most important of all these Acts, the Uniform Sales Act, had been adopted by only thirty-six of the States over fifty years after its promulgation.

There were probably two reasons why this attempt to unify commercial law was foredoomed to failure: one political and the other jurisprudential. A number of independent statutes entailed several submissions for the consideration of each State legislature, with all the consequent delays, occasioned by the lobbying of pressure groups representative of opposing vested interests. Needless to say, such groups will be at their most vocal when the legislation concerns commercial matters and, because they represent strong financial interests, their political influence will not be negligible. Moreover, the State itself may have a vested interest in the comparative laxity of its commercial laws as a means of attracting capital investment to the State. This problem will, of necessity, be aggravated in a federation where some of the States are less developed than others and, consequently, are in more urgent need of investment capital.

In attempting a piece-meal codification of the various branches of commercial law the Americans fell into the same jurisprudential error as the English. They failed to appreciate that the various aspects of commercial law are not only inseparable, but often incomprehensible when viewed other than in the context of one another. Individual traders, traders working in partnership and incorporated traders all operate in the allied fields of Sale, Negotiable Instruments, Hire-purchase, Securities, Shipping contracts etc., and these cannot be divorced one from the other without either extensive overlapping, with its inherent danger of inconsistency, or an inevitable multiplication of gaps in the law.

It was largely due to the jurisprudential researches of the late Karl Llwellyn and the recorded experience of the National Conference of Commissioners on Uniform State Laws that it was determined to abandon

the approach to codification by way of Uniform Statutes and to replace them by a comprehensive Uniform Code. Although work on this formidable enterprise did not commence until 1945, the Official Text of the code was adopted by the American Law Institute and approved by the National Conference of Commissioners on Uniform State Laws in 1952. As a result of considerable textual criticisms, and in spite of the fact that Pennsylvania had already enacted the Official text of 1952, the Uniform Code was reviewed and an amended version promulgated as the 1957 Official Text. This version of the code was adopted by Kentucky and Massachussetts, whilst Pennsylvania amended its enacted version so as to conform with the 1957 text. A further revision was effected in 1958, in order to simplify the provisions dealing with fiduciary transfers, and the 1958 Official Text now appears as the current Uniform Code.

To date, eighteen of the States have adopted the code and it is under consideration by many others. It is true that, even in those States where it has been adopted, various amendments have been made and, to that extent, the code does not entirely fulfil its avowed object of Uniformity. Nevertheless, it represents the most significant advance in the field of codification during the present century and must, inevitably, be a major source of inspiration to any federation of States that contemplates a uniform code of commercial law.

It is therefore, perhaps, not out of place to mention briefly some of the major criticisms levelled at the content of the 1958 Official Text.

The first objection was that uniformity could have been more easily obtained through a process of amendments to the existing statutes. This objection clearly ignores one of the primary purposes of a code, namely that of unifying a branch of the law into an integrated whole and thereby eliminating gaps, duplications and inconsistencies. Furthermore, in drafting a code, as it were from scratch, antiquated concepts can be discarded and new aspects of commercial practice may be incorporated. It is hoped that it is not inappropriate in this context to cite an example from English law.

The law relating to negotiable instruments was 'codified' in the Bills of Exchange Act, 1882, but since that date the general practice of financing international commercial transactions has undergone vital and far-reaching changes. Although, letters of credit have been known and used in one form or another at least since the Middle Ages, their general acceptance as a method of financing overseas commercial transactions dates from the 1914-18 war. They are, therefore, not dealt with in the Bills of Exchange Act and many features of their legal significance remain shrouded in doubt. Their increasing importance is exemplified by the fact that the draftsmen of the American Uniform Commercial Code considered it necessary to devote the whole of one of the ten articles of the code to letters of Credit.

A second objection involves the purely textual criticism that the wording is in some places too vague and in others obscure. However, this criticism can be levelled against most enacted legislation. Moreover, those of us, who spend our lives attempting to sift a few legal principles

from an accumulation of case law, may well feel that a certain vagueness and obscurity are the only weapons available to the judiciary, in the battle to prevent *stare decisis* from developing into *rigor mortis.*

The last important objection is that the code does not go far enough; that there are fields of law in which commercial traders may find themselves involved but which are not covered by the code. This ground for criticism will, or necessity, remain until the whole field of legal relationships is codified. Those, who teach commercial law to students, who have studied the law for a number of years and who have already defeated the examiners over a wide range of legal topics, are constantly causing alarm and despondency by reminding their classes that many of those half-forgotten principles of contract, tort and equity are indispensable allies in the final battle against the examiner in commercial law.

Having all too eliptically summarised the more recent history of codification, it may now be possible to indicate some of the advantages of a uniform code for an area that, whatever may be its cultural and ideological diversities, has commercial ties that can only be sundered at the risk of economic disaster. There are two basic features to this problem. That is to say, there are advantages peculiar to Malaysia and advantages common to the whole South-East Asian area.

LOCAL ADVANTAGES

There are at least two substantial advantages to be derived by Malaysia from a codification of commercial law. In the first place, and this advantage will be shared by other common law jurisdictions within the area, codification should result in the complete elimination of existing case law and act as a brake on the too rapid accumulation of new case law. Secondly, the fresh start entailed in codification will facilitate the presentation of the law in a language understood by the people. Perhaps, a few observations on each of these advantages would not be out of place.

(i) Reduction of Case Law

We have already had some examples demonstrating the failure of the piecemeal commercial legislation of the United Kingdom to eliminate the necessity for a reference back to the pre-existing case law. A further examination of the tables of cases in the leading works, dealing with those branches of the law that are allegedly codified, will quickly reveal that the so-called codes have raised as many problems of interpretation as they were designed to solve. Sir Frederick Pollock, who drafted the Partnership Act, almost invariably referred to that Act as a code, yet the Table of Cases in the current edition of *Lindley on Partnership* runs to one hundred and twenty-five pages, containing, at a rough estimate, over five thousand cases.

It is, perhaps, a truism to state that the practical value of a reported decision lies in the principle of law that it expounds. It follows that, if a code, unequivocally and exhaustively, declares the principles of law to be applied over the whole field, a reference back to decided cases will be

unnecessary. The true code directs the attention of the judge to the applicable principles and precludes him from consulting sources not indicated by the code.

This does not mean that the jurisprudential wisdom and experience of the centuries are to be abandoned but merely that principles evolved by them are to be collated and those that are considered to be worthy of preservation are to be embodied in the code. Furthermore, codification does not entail a reduction of the judicial function to a purely automatic process. There will remain what may well be the two most important functions of the lawyer, namely the skilful abstraction of relevant facts and the selection of the legal principle that is appropriate to them.

If there is any value in a system of precedent, based on judicial decisions, surely it is that legal principles can be extracted from those decisions? It follows that it should be possible, after nearly three hundred years of case reporting, to abstract a sufficiency of legal principles from the reports to form the basis of a comprehensive and pre-emptive legal code. If this cannot be done, then it is a clear indication that the system of case law has failed in its major purpose and it emphasises the need for a code, even one based on *a priori* principles.

On the other hand, if the case system has been effective in developing legal principles, the embodiment of those principles in a code, which also contains unequivocal directions by the legislature for the guidance of the judiciary in its application, will not only eliminate the need for reference to cases decided prior to the code but should drastically curtail the growth of a new body of case law devoted to the application of the code.

(ii) Use of the Vernacular

During my last visit to Singapore, I was privileged to hear a brilliant eulogy of the English language delivered by the then Chief Justice, Sir Alan Rose. With respect, I yield to none in devotion to that tongue, for the very good reason that it is the only one in which I attain the slightest measure of coherence. Nevertheless, it appears to me to fail in the role of a precision instrument for legal communication. This failure might even stem the very fecundity that has so enriched the world's literature and poetry. As a language English tends to be inspirational rather than informative; most effective in urging one's friends into the breach but, when requested to indicate the precise location of the breach, one is well advised to resort to a diagram.

In legal contexts the meanings attributed to words in ordinary usage are to say the least extraordinary. There are still many common law jurisdictions where, if you attempt to transfer land to A for his life with a remainder over to his heirs, you will give A everything and his heirs nothing except an impious hope that A will die intestate before he has disposed of the land.[12] If in your will you leave your "money" to a cats'

12. *The Rule in Shelley's Case* (1579) 1 Co. Rep. 93b; "Its feudal origin was a disgrace. Its antiquity was a reproach. . . . It was always being disparaged and, what was perhaps worse, it was always being explained." *Van Grutten* v. *Foxwell* [1897] A.C. 658 at pp. 669-670, per. Lord Macnaghten, who, nevertheless, felt obliged to uphold the rule.

home, the cats may well enjoy your personal household effects, the dividends from your investments, and many other forms of your property in addition to your actual cash.[13] The Privy Council has held that there are circumstances in which pound sterling may be construed as pound Australian, but bank managers are not so easily convinced.[14] In England if you are benevolent you are not necessarily charitable.[15] In Scotland charity and benevolence go hand in hand. These are but random examples of the legalistic vagaries of the English language. Those who require further convincing should spend a few hours cloistered with any of the standard legal lexicons.

It is true that much of the linguistic difficulty arises from the efforts of the lawyer to give effect to what might possibly have been the intention of a lay scribe but lawyers, themselves, all too often find it necessary to resort to Latin as a means of expressing a purely legal concept. Indeed, it is perhaps no exaggeration to say that many House of Lords judgments make greater contributions to literature than to jurisprudence.

For centuries a multitude of scholars and legal practitioners, whose native tongue is English, have occupied themselves almost exclusively in the task of extracting legal principles from the expositions, in English, of the judiciary and the legislature. The volume of the literature on the subject is terrifying and to translate the whole of it into another language, if it were remotely possible to do so, would involve a preposterous waste of time and money. This may seem like an argument in favour of the retention of English as an official legal language. It is not. It is an argument in favour of extracting the principles from the mass and embodying them in a code written in the language of the people.

In a democracy, at least, the law cannot be respected unless its basic principles are generally understood. If the understanding of the law, as opposed to the techniques of its application, is to be the prerogative of lawyers and bureaucrats, there can be no democracy. For centuries the development of the common law in England was stultified by the use of Norman-French. After their assimiliation by the English, this imposition of the conquering Normans was continued by those who had a vested bureaucratic interest in its survival. Certainly, England did not start moving towards democracy until the Courts of Law had started to adopt the language of the country.

In short, if the laws of a country are to be upheld by and not merely imposed upon the people, they must be stated with reasonable lucidity in the language of the people.

The study of the law and the mastering of its techniques is a formidable task even when one is working in one's own native language. The additional burden of study in an alien tongue may well exclude from the

13. *Perrin v. Morgan* [1943] A.C. 339.

14. *Skelton* v. *Jones* [1962] 1 W.L.R. 840.

15. *Re Diplock* [1948] Ch. 465 (C.A.) *affm'd. sub.nom. Ministry of Health* v. *Simpson* [1951] A.C. 251.

service of the law many persons of high intellect who have no facility with foreign languages. Although I have classified this as a local advantage, it will probably have a wider appeal. It will be appreciated that the languages of the quondam colonial governors of the South East Asian area varied, whereas the Malayan tongue has a common basis with those in general use over much of the area.

GENERAL ADVANTAGES

A uniform commercial code will confer four substantial advantages upon the S.E. Asian area as a whole. In the first place, a competently drafted code should introduce a greater element of certainty into the field of commercial dealings, secondly it will facilitate the course of international trade within the area, thirdly it will assist in the evolution of uniform standards of commercial ethics and finally it will rejuvenate legal thought.

(i) Commercial Certainty

The necessity for some degree of certainty as to what legal rights and obligations will result from various forms of human activity is generally accepted as a desirable element in the law. Although this need for certainty is sometimes regarded as antithetical to the concept of justice, it is in fact an essential, but variable, element of justice. In spheres of the law where property rights are involved the element of certainty is a major constituent of justice. In commercial matters it is essential that persons should be able to predict the probable legal consequences of their business transactions so that they can take reasonable precautions to protect themselves from financial loss.

One of the results of the vagueness of common law and statutory rules in commercial matters has been the growth of what might be described as private mercantile codes. These codes appear in the guise of standard form contracts prepared for their own use by the larger commercial undertakings. They are often successful in ousting the consumer protection conferred by the nineteenth century codes and the general protection afforded by the rules of common law. Judicial interference is reduced to a minimum by the widespread use of arbitration clauses.

These standard form contracts, like the commercial codes of the nineteenth century, are the product of *laissez-faire.* They tend to leave the weaker party to the contract at the mercy of the stronger one, who prepared the contract, with a view to obtaining for himself the maximum benefit with the minimum of responsibility. A properly drafted code, whilst introducing the element of certainty into mercantile dealings, should clearly lay down irreducible minimum obligations. There is nothing radical about this approach. Section 48 of the English Law of Property Act, 1925, substantially eliminates the use of standard form conveyances, prepared by vendors of land, and modern hire purchase legislation tends to impose minimal obligations upon those who provide the goods and the finance.

(ii) International Trade

Students of Private International Law will appreciate that where a contract is entered into between two persons carrying on business in different countries with distinct legal systems, many difficult and at times insoluble problems can arise. In cases of dispute questions immediately arise not only as to the appropriate country for the trial of the action but also as to which legal system should govern the rights and obligations under the contract or even the question as to whether there ever was a valid contract. Clearly, uniformity of laws will eliminate these last two questions and render the first a matter solely of convenience. Furthermore, cases frequently occur where the trial court located in country A, having decided that the law of country B governs the contract, proceeds either to misunderstand that law or, in the absence of evidence of what the law is, incorrectly assumes that it is the same as its own. Again these problems and the international distrust engendered by them should vanish under a uniform code.

At the moment an enormous amount of money and skilled labour is expended on the drafting of contracts that seek to overcome the problems arising out of conflicting legal concepts in the sphere of international trade. Within the South East Asian area there are two major systems of commercial law, one based on the Roman Civil Law and one on the English common law. A code, incorporating the best features of each, would go a long way towards promoting international understanding and the advancement of international trade.

(in) Commercial Ethics

Where each country within a trading area remains free to formulate its own rules of commercial practice, there will always be a tendency on the part of some countries to enact laws that are designed to attract trade rather than to effect a just result. For example, there are countries whose shipping laws allow depressed working conditions for crews and a low standard of sea-worthiness of vessels for the sole purpose of inducing foreign shipowners to register their vessels under the national flag. There are countries whose company laws favour financiers and promoters at the expense of the investing public of their own and other countries.

In the common law jurisdictions there are concepts that shock the moral sense of civil lawyers. Those, to whom *pacta sunt servanda* is the corner stone of contractual relationships, may well question the ethical basis of a legal system that nullifies a solemn promise because it is not given under seal or for valuable consideration and they cannot be blamed if they distrust a system which refuses to enforce certain contracts because there is no written evidence although there may be an overwhelming body of oral proof.

Those who are entrusted with the preparation of a uniform code should have every opportunity of discovering what is considered to be good mercantile practice by the reputable business men throughout the area. This will enable them to frame the code in such a way as to promote

a high standard of commercial ethics, whilst at the same time discouraging dubious practices.

(iv) Rejuvenation of Legal Thought

Sir Frederick Pollock once started an address to the University of Columbia with these words: "We are here to do homage to our lady the Common Law; we are her men of life and limb and earthly worship ...." [16] Now, it is true that Sir Frederick later modified this emotional exuberance but, nevertheless, it is not unfair to say that the quotation substantially represents an attitude adopted by him and by far too many others. Most of us, who devote nearly all our labours to the service of the common law, regard it with affection. If we did not, presumably, we would find other and more congenial occupations. However, the common law, like most women who inspire affection, has a certain versatility. She is as much at home in the role of a Magdalene as in that of a Madonna. She has not hesitated to conjure up fictitious suitors to excite the interest of her devotees. How reluctant she was to part with those figments of her imagination, John Doe and Richard Roe, to say nothing of her "loving friend", William Styles. Even her devoted biographer, Sir William Blackstone, expressed deep concern over the degraded and protracted affair with her own court crier,[17] the common vouchee. Moreover, our lady, has never hesitated to adopt highly artificial and very feminine aids in order to produce an illusion of symmetry. An illusion that has betrayed many a susceptible lawyer and his unfortunate clients.

Since Sir Frederick Pollock's time the practice of the law has undergone substantial changes. The modern practitioner is inundated with a mass of statutory material dealing with matters of detail rather than principle. He has little time to appreciate the beauties of the common law and still less to devote to the extraction of principles from a mass of reported decisions. Even the judiciary appears to have abandoned the struggle. One of the greatest English commercial lawyers of this century, Lord Devlin, has said: "I doubt, if judges will now of their own motion contribute much more to the development of the law. Statute is a more powerful and flexible instrument for the alteration of the law than any that a judge can wield...." [18] Later his Lordship said: "You did not, you may say, provide a magnificent banquet this evening in order to have it consumed as funeral meats; you came hoping to hear a careful diagnosis of the state of the common law, an interesting prescription and the promise of a long life, and instead you have been offered nothing but a death certificate." [19]

It appears, then, that our lady's arteries are hardening, if not actually decomposing. The least that we can do is to erect a memorial to her and what better form could it take than a code of laws perpetuating her virtues and containing no indiscreet references to her bewitching frailties?

16. *The Genius of the Common Law* (1912), p. 2.

17. Commentaries, Vol. II, pp. 360-361.

18. *Samples of Law Making* (London, 1962) at p. 23.

19. *Ibid*, at p. 119.

Much of our teaching of law in the universities tends to be destructive. We encourage our students to analyse and criticise. This is, of course, essential. A critical and analytical mind is indispensable both in the study and in the practice of law. It is inseparable from the understanding of the law. On the other hand, the common law academic lawyer has played a very minor role in the construction of the law either as judge, legislator or draftsman. The preparation of a uniform code should enable him to play his part. As a draftsman he has certain advantages; the capacity and facilities for research and a very large measure of freedom from political and commercial pressures. In fact, what is needed for the production of a sound commercial code is the establishment of an institute of applied law, staffed by lawyers, economists, linguists and social scientists drawn from all the subscribing countries and charged with the task of production. Such an institute might well prove a jurisprudential Mecca for the postgraduate student of commercial law. His thesis could be a contribution to a code of living law instead of another corpse in the vaults of his university's library, †

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† Acknowledgment: I am indebted to the editor of the Illinois Law Forum and to Professors Hawkland and Surrency for their very helpful articles on the Uniform Commercial Code in volume No. 3 of the 1962 edition of that journal.

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