THE POTENTIALS AND LIMITATIONS OF CODIFICATION

*by Arthur Taylor von Mehren**

On May 5, 1960, the Emperor promulgated the Ethiopian Civil Code. In the Preface to the new code, the Emperor speaks of the need for "precise and detailed rules" and further states that: "It is essential that the law be clear and intelligible to each and every citizen of Our Empire so that he may without difficulty ascertain what are his rights and duties in the ordinary course of life, and this has been accomplished in the Civil Code. It is equally important that a law which embraces a varied and diverse subject matter, as is the case with the Civil Code, form a consistent and unified whole...."

In this passage are underlined two of the values traditionally emphasized in discussions of codification, simplicity and intellectual coherence. The problem of codification is, however, more complex and subtle. My purpose is to develop a fuller statement of the potentials and the limitations of codifications. Such a consideration may assist in understanding better the proper role and possible contribution of the new code.

The classical Western codifications, for example, those of France and of Germany, can be looked upon as historically inevitable responses to their society's need to have a law coextensive with effective political and economic units that had already emerged. France and Germany were for historical reasons politically and economically nations before they had a uniform national law and administration of justice. Indeed, England is the only European country in which a gap between the effective political and economic units and the effective legal unit did not persist into relatively modern times. And when a contemporary polity faces the need and has, politically speaking, the opportunity to close such a gap, considerations of convenience and of expedition make recourse to legislation normal.

A somewhat related purpose — that of modernizing the society's legal rules and principles—is typically encountered in developing societies where it is desired to change certain aspects of social and economic patterns that are not fully consistent with the requirements of a modernized social and economic structure.

Both these potentials of codification underlie in significant measure the Emperor's decision to promulgate a Civil Code. Of course, promulgation alone does not ensure that these goals will be achieved. A wide gap often exists between official law, whether codified or not, and actual practices and conceptions. Article 32 of the Ethiopian Civil Code, which requires that every individual have a family name, furnishes a convenient example of this proposition. The difficulties of obtaining legal unity and modernization through formal law—in particular codification—are many in a society such as Ethiopia. This is not, however, an occasion for the exploration of this topic. For present purposes, it suffices to note that codification serves to

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provide the structures of formal and uniform rules and principles in terms of which legal unity and modernization can be pursued by a society.

Let us turn then to a consideration of some of the other purposes that a codification serves. The Preface of the Civil Code emphasizes, as pointed out above, simplicity, clarity, and coherency. In what sense and to what extent can a Code promote these values? A well-drawn Code forwards simplicity and clarity in the administration of justice by providing a very useful law ordering and finding device. A successful code is a sophisticated index to legal rules and principles and draws together subject matter that is related in terms of policy and purpose so that interrelations are more easily perceived and understood. Other, but more cumbersome, devices serve these functions in uncodified systems. For example, in the United States elaborate digest-indices keyed to a comprehensive system of unofficial law reports orders the decisional materials in terms of which so many problems are approached in a case-law system.

In addition, a code can provide a definitive answer to certain kinds of problems; in particular, questions that are frequently encountered in identical or nearly identical terms in the administration of justice and that admit of categorical answers as distinguished from answers derived from a weighing of various relevant elements. Thus the age for majority can be clearly prescribed but not what constitutes hinderance of performance "so that the essence of the contract is affected" and cancellation is available under Article 1788 of the Civil Code. No system of law, codified or otherwise, can provide simplicity or certainty where the problem requires for wise resolution an exercise of judgment by the adjudicator as distinguished from a mechanical application of a dispositive rule. And for various reasons, including the tendency of life to defy attempts to contain it in a single, simple category, the areas in which legal rules can be truly simple and precise are fewer and more restricted than one initially assumes. Some codes, in particular the ill-fated Prussian Allgemeines Landrecht at the end of the 18th century, have ignored this natural limit upon codification. The effort to do too much inevitably results in a confusing and unworkable situation. When natural limitations upon codification are largely ignored by the codifier or, subsequently, by those charged with the code's administration, the codified system can not long endure.

Another limitation upon codification that must be kept in mind is that the Code, with the passage of time, inevitably becomes less central to the administration of justice and loses, as well, a significant measure of its original simplicity and intellectual coherence. The reasons for this phenomenon are obvious. As time passes, new problems and new values, which the code did not—indeed, could not—take into account, emerge. Consequently, new solutions are required that may not derive easily or directly from the code. In addition, the materials that must be mastered in order to understand what meaning the code has in actual application expand significantly as a body of adjudicative experience is built up with respect to code provisions. Ultimately, this process of aging reaches the point at which the code is nothing more than a formal starting point for legal reasoning and—in the form of annotated editions—a convenient law ordering and finding device. In some fields, for example, that of delicts, the French Civil Code of 1804 is now in this position.

There is another limitation upon codification that deserves mention, a limitation that flows directly from certain advantages of codification, those already mentioned of simplicity, clarity, and intellectual coherence. There is a human tendency, especially

where a code is still relatively young, to overestimate its potential. This leads to rather mechanical and wooden interpretation and impedes the further development of the legal order. A code is a useful aid in our thinking about legal problems but it should not replace thought and reflection.

In reflecting upon codification it is also well to keep in mind that wise solutions to legal problems require attention not only to general structure and intellectual symmetry but also to the specific facts of individual cases. A code system, especially when it is still relatively young, tends to operate in many fields on a higher level of generalization than is probably wise. (Conversely, uncodified systems in many areas may be too particularized and lose the ordering and disciplining value of intellectual structure and coherence.) Codified systems thus benefit greatly from study of the judicial decisions applying the code. Such study sensitizes the jurist to the importance of understanding a particular problem in its full factual complexity. (Conversely, uncodified systems benefit greatly from the structure and discipline that are imposed by reflective legal scholarship upon the particularized solution of disputes.)

In suggesting some of the potentials and some of the limitations inherent in codified legal systems, my basic purpose is to show that no legal system—codified or uncodified—can provide complete or permanent solutions. At some periods, it has been urged that certain codified systems were logically complete; that is to say, that the system either contained explicitly the solution to any given problem or, if not, a solution could be derived from the code through purely logical procedures that did not involve considerations of policies and of values. This audacious claim of logical completeness has not survived the hard test of experience. The legal materials—in the case of Ethiopia, a civil code—with which we begin our efforts to resolve wisely legal problems embody, of course, a great deal of organized and disciplined human experience. A sound legal order accepts the discipline and direction contained in the system's authoritative starting points for legal reasoning, but does so understandingly and with awareness that where circumstances or values have changed, new solutions may be required. A jurist's responsibility is always to understand and, where past solutions no longer appear appropriate, to create new solutions adapted to the society's needs and to its legal and social traditions.

You will, therefore, as future men of the law do your country and your profession a disservice if you approach understanding your code as a simple exercise in grammar and in dictionary definition. You need to study the policies that inform its provisions and to be aware, as well, that the drafters could not fully grasp even the complexity of the present, let alone what the future will bring. With such awareness, you will be less likely to abdicate your responsibility as jurists to develop and adjust the law as society comes both to understand more fully problems that were foreseen when the code was drafted and to face new problems that either did not then exist or were not foreseen by the drafters.