

OPTIONS IN LAW REVISION: CODIFICATION OF THE LAW — GHANA'S EXPERIENCE

A Memorandum by the Government of Ghana

Before the advent of European Settlers to the then Gold Coast, there was only one system of law in the then Gold Coast. It was the unwritten law known as Customary Law which varied from one ethnic group to another, but which was readily enforced and observed by native kings and their subjects. This Customary Law cannot be classified as a Code. However, historians, lawyers, and social anthropologists, by the end of the 19th century, had ascertained the principles of the Customary Law and had reduced them into writing through text-books, for instance, Rattray on Ashanti Law and Custom and John Mensah Sarbah on Fanti Customary Law.

On 31 March, 1876, when the first Supreme Court Ordinance was enacted, two new systems of law appear to have dwarfed the indigenous Customary Law. The Courts Ordinance introduced not only the English Common Law, but also made applicable to Ghana All British Statutes in force on 24 July, 1874. Neither the English Common Law nor any of the English Statutes was a Code in the strict sense. On 4 April, 1877, the Interpretation Ordinance and the Criminal Procedure Ordinance were brought into force. These local Statutes were not Codes. Later, a Criminal Code (Act 29) and a Criminal Procedure Code (Act 30) were introduced. Under section 8 of the Criminal Code, no person shall be liable to punishment by the Common Law for any act. The Criminal Code itself does not encompass all criminal offences known to the law either under the Code or other separate legislation. Nevertheless, Part I of the Act 29 - General Provisions - applies to all offences whether under the Code or not, except where a contrary intention appears. The Code, therefore, lays down all the essential principles within which every court of law is expected to operate (see section 5 of the Criminal Code 1960 (Act 29). Similarly, section 1 of the Criminal Procedure Code 1960 (Act 30) also provides that all offences under the Criminal Code and all other offences shall be enquired into, tried and otherwise dealt with according to the Code, subject to the provisions of any enactment. The existence of the Criminal Code and the Criminal Procedure Code has enabled the Courts, the lawyers, the investigating agencies and the general public to ascertain the criminal law with certainty, clarity and predictability. These are some of the indisputable advantages of codification. Indeed, Ghana said farewell to English Common crimes and procedures several decades ago.

Another development in Ghana's laudable obsession with codification has been in the field of commerce and trade. On 24th May, 1961, the Ghana Bills of Exchange Act (Act 55) was enacted. This piece of legislature could have been a Code. Rather, it re-enacted, with minor modifications, the Bills of Exchange Ordinance (Cap 195) and was made to apply to the whole of Ghana. The earliest Ordinance was the Bills of Exchange Ordinance No. 10 of 1894 which operated in conjunction with English Bills of Exchange Acts passed in 1697, 1704, 1776, 1799, 1808, 1820, 1826, 1832, 1836, 1854, 1856 and 1871. When the 1961 Bills of Exchange Act was passed, these English Statutes ceased to apply; but then section 96 of the same Act provided that "the rules of Common Law, including the Law Merchant save in so far as they are inconsistent with the express provisions of the Act shall continue to apply to Bills of Exchange, Promissory Notes and Cheques". There is no doubt that in this branch of the law, both the draftsmen and the legislature were of the firm view that the law relating to bills of exchange could not be codified. The task of codification would have posed very difficult problems; first of all, it would not have been easy to ascertain with exactitude what the rules of Common Law and the Law Merchant were and, secondly which of these rules could

conveniently be incorporated in a Code. In any case, the relevant Common Law Rules are cluttered up with conflicting and inconsistent decided cases which would defy any attempt at codification. Here is a typical example of a subject-matter which is not suitable for codification.

On 11th July, 1962, the Ghana Sale of Goods Act (Act 137) was enacted and the preamble makes it quite clear that it is an Act to codify with amendments the law relating to the sale and hire purchase of goods. Before this law came into force, the Common Law and English Statutes of 1603, 1823, 1825, 1842 and 1856 governed the sale of goods in Ghana. It is of interest to observe that when M.D. Chalmers drafted the English Sale of Goods Act which was enacted in 1893, his idea was to codify the law. The Bill was originally drafted in 1888, but it took both Houses of the British Parliament 5 years to enact the law in 1893. On codification, M.D. Chalmers has this to say in the introduction to the first edition (1894) of his book on sale of goods:-

"It is always easier to amend an Act than to alter common law. Legislation, too, is cheaper than litigation. Moreover, in mercantile matters, the certainty of the rule is often of more importance than the substance of the rule (a). If the parties know beforehand what their legal position is, they can provide for their particular wants by express stipulation. Sale is a consensual contract, and the Act does not seek to prevent the parties from making any bargains they please. Its object is to lay down clear rules for the case where the parties have either formed no intention, or failed to express itOur common law is rich in the exposition of principles, and these expositions lose none of their value now that the law is codified."

The Ghana Sale of Goods Act 1962 followed the example of M. D. Chalmers, but departed from the English 1893 Act where the principle involved is conflicting and confusing. For instance, although section 62 (2) of the English Act provides that "a thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly whether it be negligently or not", the Ghana Sale of Goods Act refrained from defining what is "good faith" and it is the duty of the courts to put their own construction on the words "in good faith". The Ghana Sale of Goods Act is therefore a Code which not only clarifies the law but makes the law easily accessible and ascertainable through the Code for the benefit of the whole mercantile community.

The next major development in codification in Ghana was the enactment of the present Ghana Companies Code (Act 179) on 1 July, 1963. Before the commencement of this Code, the relevant law was the Companies Ordinance (Cap 193). When Professor L.C.B. Gower was appointed sole Commissioner to enquire into the Company Law of Ghana on 25 August, 1958, he described in his Report the nature of his task as follows:-

"The existing Companies Ordinance was introduced in 1907. It appears to have been enacted hastily as a result of the influx of a number of companies from South Africa. In effect what was done was to re-enact almost verbatim the Companies Act of 1862, an Act which was already regarded as obsolete in England, where it had been substantially revised by later legislation, and where it was about to be repealed and re-enacted with substantial amendments in the Companies (Consolidation) Act of 1908. This Ordinance, virtually unamended, still remains the only statute law in Ghana relating to companies. It was nearly 50 years behind the times when enacted; it is now a century out-of-date."

As a result of this Report, the present Ghana Companies Code was enacted. Both the Report and the Code appear to have the last word on any matter relating to companies in Ghana.

Professor Gower's own feeling about the Code is summed up in the following words:

"When it is borne in mind that the Act attempts to codify the common law and to cover not only the matters dealt with by the English Companies Act but also many of those covered by the Prevention of Fraud (Investments) Act, 1958, I think it can fairly be claimed that it compares not unfavourably in brevity and simplicity with other Acts based on the English model. On the other hand it is not suggested that it is light reading; it deals with a highly technical subject and is necessarily technical."

The Companies Code has been in force for 23 years. It has operated well, it is the second Bible of any entrepreneur in Ghana and it will continue to help in the promotion of commerce and industry. It has simplified the task of the courts, the lawyers and the businessmen. It has proved that codification of the law should be one of the tools of progress and prosperity in a developing country.

Another interesting development in Ghana has been the codification of the Law of Evidence. Before the Evidence Decree 1975 (N.R.C.D. 323) was enacted on 18 April, 1975, the Law of Evidence in Ghana could be found only in imported English legal text-books, local rules of procedure and English Statutes of 1806, 1851, 1853, 1854 and 1869. It was impossible to ascertain the law of evidence with clarity, with alacrity and with confidence. Notwithstanding that the subject matter of evidence is a highly technical subject-matter in which various authors have propounded their own theories in the past, a daring attempt was made to codify the Law of Evidence in Ghana. It was not an easy task; nevertheless, it was worth trying. As early as 1971, the Ghana Law Reform Commission, with the approval of the Ministry of Justice, embarked upon the whole review of the Law of Evidence in Ghana. With very detailed research work, discussions and comments from authoritative legal authors, judges and lawyers, a first draft of the Evidence Code was circulated in October, 1971. The strategy of the Law Reform Commission was to pick and choose from the Common Law and from other sources all the available salient rules of evidence. The Commission had to rely on the following sources:

- The American Law Institute Model Code of Evidence;
- The California Evidence Code;
- Thayer - Preliminary Treatise on Evidence;
- McCormick on Evidence;
- Cross on Evidence;
- Phipson on Evidence;
- Nigeria Evidence Ordinance;
- Wigmore Evidence;
- Proposed Israel Evidence Act;
- Proposed U.S. Federal Rules of Evidence.

The Evidence Decree is a compact Code and it is now read together with a Commentary prepared and published by the Ghana Law Reform Commission. It is now the only authority on the Law of Evidence in Ghana. It is the text-book for law students; it is the authority cited in court by judges and lawyers. One need not now look elsewhere to ascertain the Law of Evidence in Ghana. It has saved Ghana's foreign exchange by dispensing with the importation of text-books on the Law of Evidence. Here is another remarkable example of one of the benefits accruable to a developing country which adopts codification as a tool of reform.

Resources to Codify

The present situation in Ghana is that codification of any branch of the law must involve the marriage of common principles with supplementary statutory provisions relating to any subject-matter. The ascertainment of any relevant law principles depends on the availability of the requisite research staff with the right aptitude for research in

specialised fields. In Ghana, the problem is acute on account of poor salaries and the tendency to seek employment in more lucrative fields. The second problem is the absence of adequate lawyers trained in legal drafting. The Director of Legislative Drafting in the Attorney-General's office can bear testimony to this problem. When the appropriate law has been adequately researched into and conflicting rules are resolved, the researchers' proposals for codification can only be reduced into proper legal drafting. Without legal drafting facilities, the law cannot be codified. Another problem is the cost of printing which is now very prohibitive and must necessarily slow down any attempt to codify the law. A very serious handicap for legal research in Ghana is the absence of well-equipped law libraries in the courts, law schools, the Attorney-General's office and, especially the Law Reform Commission. The constraints on the economy have prevented the importation of legal books published outside the country. This factor has made legal research into some legal topics impossible prior to codification.

Codification of the law need not be undertaken solely by law reform agencies who have enough work on their hands. It is therefore desirable and necessary that depending on the technical nature of the subject-matter, outside bodies and specialists should be commissioned to undertake codification. For instance, in Ghana Professor Gower undertook the codification of the Companies Code; Professor P. S. Atiyah prepared the Sale of Goods Act when he was attached to the Ghana Ministry of Justice; Mr. Jeff Newman of the California Bar, U.S.A. on secondment to the Law Reform Commission drafted the Evidence Decree. In England, the Law Commission invited a group of distinguished academic lawyers, chaired by Professor J.C. Smith, to draft the Criminal Code published last year.

It should also be mentioned that codification of the law is a very slow process and therefore the introduction of any modern technology that will accelerate the pace of codification should be welcomed.

Benefits of Codification

Codification has obvious benefits as pointed out earlier in Ghana's own experience with the operation of the Criminal Code, the Criminal Procedure Code, the Companies Code and the Evidence Decree as examples. Codification has dispensed with the publication of legal text-books. Judges, lawyers, students and the general public can always ascertain the relevant law from these Codes, which may be procured from the Government Printer.

Impact of Codes on Judicial Creativity

There is no doubt that the absence of a Code in England encouraged, and, indeed, compelled English Judges to use their initiative and mental creativity in developing the common law through decided cases. Lord Asquith stated the English tradition as follows:

"English jurisprudence does not start from a broad principle and decide cases in accordance with its logical implications. It starts with a clean slate, scored over, in course of time, with ad hoc decisions. General rules are arrived at inductively, from the collation and comparison of these decisions." (Chapman vs. Chapman 1954 A.C. 429 at p.470).

In similar language, Lord Denning stated:

"We do not seek as continental jurists do, to lay down principles first by abstract reasoning and then apply them to concrete cases. We decide cases according to their merits and then see what principle emerges from them." (The Changing Law p.50).

One cannot quarrel with these learned and wise statements. Nevertheless, the British tradition does not condemn codification. The statements only mean that there are two systems

of jurisprudence and the English have in the past relied on one of them. However, it is gratifying to note that even in present day England, the Law Commission is required by statute "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 any particular codification of such law. The Report on Codification of the Criminal Law in England, published in March, 1985, is a typical example of this new trend.

Construction and Interpretation of Codes

Since the beginning of the century, all bills laid before the Ghana Legislature have been accompanied by a memorandum explaining the objects of the proposed law with explanatory notes on individual sections. The Interpretation Act 1960 (C.A.4) provides as follows:

"19. (1) For the purpose of ascertaining the mischief and defect which an enactment was made to cure and as an aid to the construction of the enactment a court may have regard to any text-book or other work of reference, to the report of any commission of inquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly.

(2) The aids to construction referred to in this section are in addition to any other accepted aid."

As such the task of interpretation in Ghana has been rendered less onerous. Professor Gower's Report on the Companies Code discussed all the relevant decided English cases on every principle. The Memorandum to the Sale of Goods Act is also very detailed; the Memorandum and Commentary on the Evidence Decree are also illuminating. So long as these memoranda and commentaries continue to be made available, construction and interpretation of Codes could be without difficulty.

To Codify or not to Codify

The decision whether or not to codify depends on past experience with the law. Where the law is easily ascertainable through a series of statutes and amendments, it is always easy to consolidate these Acts and to codify the whole law including common law principles. On the other hand, where the common law is not easily ascertainable owing to conflicting rules and principles which are outmoded and cannot meet the contemporary needs of the society, then every attempt should be made, depending on resources, to improve the law through piecemeal legislation because the nature of the subject-matter defies codification.

When should the law be changed

Developing countries have the legacy of depending mainly on principles of the old Common Law. Although the British Parliament has constantly enacted new legislation to cater for new developments and problems which the old Common Law rules could not have anticipated, these new Acts are not statutes of general application in some developing countries, (i.e. former colonies). The result is that these developing countries continue to apply the old Common Law principles which are out of date. In the fields of Contract and Tort, developing countries have to rely on old Common Law principles some of which have ceased to apply in England through legislation; for instance, the U.K. Defamation Act does not apply in Ghana although it was enacted to cater for modern developments. Ghana still relies on the old Common Law of Libel and Slander. As such a new Defamation Law has been drafted which is

still under consideration by the P.N.D.C. The new Defamation Law is an attempt at codification as it abolishes the distinction between libel and slander and takes into consideration continental jurisprudence relating to retratopm amd apology as remedies in actions for defamation. Another field in which changes in the law have been prominent is the Customary Law in Ghana which has been in existence for centuries before the Europeans settled on the West African Coast. In Ghana the injustice emanating from some of these ancient customary rles have been elminated. For instnace, in the field of intestate succession, the former outrageous predicament of widows and children has been removed by giving them inheritance rights and privileges under Ghana's new Law of Intestate Succession and the Law of Accountability of Heads of Families and Customary Successors. Another area is the new Copyright Law which protects the rights and financial income of writers, artists, etc. Formerly, these artists had no adequate protection because their works were exploited for large financial gains by others with impunity. There appears to be one laudable criterion for changing the law. Whenever there is an injustice in any existing law, then the law must be changed to ensure fairness and justice.

Consultation

The Ghana Law Reform Commission, since its establishment, has always embarked upon extensive public consultation through advertisements, seminars, radio discssions and correspondence to ascertain the views of the public and interested parties. A typical example is the current exercise in fixing a new age of marriage in Ghana. There is now a general feeling that child marriages are an abomination and should be discouraged. There is also a general consensus that young men and women should not rush into marriage until they are matured and financially sound to undertake the responsibilities of marriage and parenthood. Ghanaians are now reappraising their moral and social values and are encouraging the transformation of Ghanaian society through law reform. So long as the benefits of these reforms are appreciated and are considered necessary, the cost of reform should be borne by the Government in all sincerity and in earnest. The Ghana Law Reform Commission operates on an annual subvention provided by the P.N.D.C. and the Commission is proud that this subvention has been made available regularly over the years and has been regularly augmented to enable the Commission to promote law reform which is its main statutory function in Ghana.