How Codifying the Law Is Our Future Present
Or
Let's Talk About Leading Legislation As Well as Leading Cases

Notes to Accompany Seminar PPT Slides

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Slide 1: Title of Seminar
It was a great honour, 40 years after graduating from UCD, to be asked last year to be an Adjunct Full Professor in the Sutherland School of Law, and I'm extremely grateful to Dean Maher for suggesting this.

When I was asked to deliver this seminar, I thought that as I'd spent a lot of my academic life, and more recently my time in the Law Reform Commission, thinking and writing about legislation, that would be a reasonable subject. And then I thought, why not go for broke and talk about codifying the law.

Now, the idea of codifying the law may make your eyes glaze over or else make you think that this is about leaving behind our common law inheritance. I would say, no: it involves building on and developing that inheritance. In any event, the *Law Reform Commission Act 1975* provides that the Commission's statutory mandate to make proposals for the reform of Irish law defines "law reform" as:

> codification of the law, including in particular its simplification and modernisation, and the revision and consolidation of statute law.

When the Commission was established 45 years ago, John O'Connor wrote in the *Irish Jurist* about the various meanings that codification has been given in the common law and civil law literature.[1] I don't intend to get into that debate, because in practice I think the process of reform and codification is of the "how to eat an elephant" variety.

So, I think that we could think of codification on the basis of the template in the 1975 Act, as was done in the *Land and Conveyancing Law Reform Act 2009*, which involved:

- bringing together nearly all the key rules in a single Act (consolidation);
- updating older but still relevant rules (simplification and modernisation);
- adding completely new provisions (law reform for sure); and
- repealing obsolete legislation (statute law revision).

[1] O'Connor, "The Law Reform Commission and the Codification of Irish Law" (1974) 9 *Irish Jurist (ns)* 14.

The 2009 Act is not a complete code, in that areas such as adverse possession could, and should be added;[2] and in any event the law in this area can only be fully understood when the principles and rules of equity are taken into account.

I should also mention that another wonderful model of codification is to be found in the *Draft Criminal Code Bill* completed ten years ago by the Criminal Law Codification Advisory Committee, chaired by Professor Finbarr McAuley.[3] It is not only a model of how to prepare meticulously for such an important piece of legislation, it also provides us with a key rationale for codification: a set of general principles for this area of law (the General Part) and a consistent approach to drafting related areas (in this instance, four redrafted mini-codes).[4] There is an overwhelming case for enacting the draft Bill (and it's probably less than 10% the size of the *Companies Act 2014*).

When I say that codifying is our future present, I mean that we should be thinking about what codifying means now, and in the foreseeable future: a present and future that is, for most people, digital and online.

But was it a good idea to talk about legislation, let alone codification? Why not talk about leading cases instead of leading legislation?

I realise that one of the reasons why people talk about leading cases, and why people will stay awake listening to them, is because there are always great stories to tell, and there might also be a great quote from one of the judges; possibly even some pictures to tell the story.

Despite all those good reasons for talking about leading cases, I'm sticking with legislation, *and* codifying the law. But I'm in no way suggesting that we should forget about leading cases, just to give the story of legislation a bit of a look-in. So, that's why I have that sub-title, Let's Talk About Leading Legislation *as well as* Leading Cases.

For what I'm about to say, I better preface it by saying that I have a well-worn copy of the Constitution on my desk. But, from a day-to-day point of view, legislation is the most important type of law that we have. It regulates many significant things in our lives and our society, including: food safety, business regulation, virtually all crimes, education, family law, financial services, land law, social welfare, taxation and transport.

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[2] The Commission's Fifth Programme of Law Reform includes a project to address adverse possession, as well as difficulties in practice concerning prescriptive easements: see *Report on Fifth Programme of Law Reform* (LRC 120-2019), Project 15, available at https://www.lawreform.ie/_fileupload/Programmes%20of%20Law%20Reform/LRC%20120-2019%20-%20Fifth%20Programme%20of%20Law%20Reform.pdf

[3] The *Draft Criminal Code Bill*, which includes a detailed Commentary, is available at http://www.criminalcode.ie/ and http://www.justice.ie/en/JELR/Pages/draft-criminal-code.

[4] The four specific mini-codes included in the draft Bill were redrafts of: the *Non-Fatal Offences Against the Person Act 1997*, the *Criminal Justice (Theft and Fraud Offences) Act 2001*, the *Criminal Damage Act 1991* and the *Criminal Justice (Public Order) Act 1994*.

The importance of legislation is not a recent revelation. Over 40 years ago, in 1978, Lord Hailsham (sometime UK Lord Chancellor) stated that about 90 percent of all cases heard by the Judicial Committee of the UK House of Lords (then the highest court in the UK system), was about applying legislation.[5] Well, in the 42 years since then, legislation has become even more the dominant form of law.

Any lawyer, practitioner or academic, will tell you the same. Even if we think of the case load of our busiest court, the District Court, every year it handles about 250,000 prosecutions under the Road Traffic Acts. And every year, you will see hundreds of judgments on the Courts Service website involving asylum legislation or environmental legislation.

And of course, court cases are really the tip of the iceberg as far as the application of the law is concerned. Legal practitioners, and other professionals such as accountants involved in applying and advising on the law every day, will be almost invariably advising on legislation, such as the *European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003* (the TUPE Regulations), or the *Companies Act 2014*, or both at the same time.

Okay, so my pitch is that legislation is important and worth talking about.

Slide 2: What I'll Talk About

This seminar is not about suggesting that we should replace talking about case law with non-stop talking about legislation. So, I'm starting with a leading case. Indeed, we are regularly reminded these days of the vital role that the courts play in protecting and defending the rule of law.

Cases are often how we learn about what's right, or wrong, with the law. But I will also suggest that legislation can reach places that even great case law can't, especially if there's a regulatory body attached to the legislation.

I will then make the claim that when we discuss legislation, we can, and should, talk about the good stories *behind legislation, not just the rules in the legislation*. This should include how bad cases (hard cases?) can, through the legislative process, be changed into good law (good legislation).

So, yes, we can include a good story that makes legislation quite interesting.

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[5] The opening sentence of his speech (judgment) in the UK House of Lords decision in *Johnson v Moreton* [1980] AC 37, [1978] 3 All ER 37 was: "Approximately nine out of ten appeals which come before you Lordships' House are concerned with disputes about the correct construction of Acts of Parliament." Lord Hailsham expanded on this in his 1983 Hamlyn lecture *Hamlyn Revisited: the British Legal System Today* (Sweet & Maxwell, 1984), p.65, cited in Bennion, *Statutory Interpretation: A Code* 3rd edn (Butterworths, 1997), p.1, and in the Law Reform Commission's 2000 *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61–2000), Introduction, paragraph 5.

But surely you might say, hadn't I read these quotes:

> "Laws are like sausages. It's better not to see them being made."
> or
> "Laws, like sausages, cease to inspire respect in proportion as we know how they are made."

Often attributed to Bismarck, but more likely to have been part of one of many lectures delivered by the American lawyer-turned-poet-and-lecturer John Godfrey Saxe in the 1850s and 1860s, probably in New York.[6]

Whoever said it, I don't agree: the process of legislating, in our time, stands up to detailed scrutiny and should make us feel proud.

This brings me to the detailed nitty-gritty about the title of the seminar. When we make any effort to organise our "statute book" into coherent subject titles, we already have the guts of what other countries would recognise as Codes of Law, sometimes in the form of Mini-Codes, but often virtually full Codes.

And what countries, you ask, would we look like if we really went about codifying our laws? That's right, Australia, New Zealand and, especially, the United States of America.

This brings me to the main message that I'm trying to get across this evening: codification is already here in the present (at least in part), it's online and it's also our future. The digital era allows us to present all our legislation in the form of a prototype of a complete Code of Law. This argument will involve a none-too-subtle ad for the Law Reform Commission's work on making legislation accessible online.

I'm also suggesting two other related things: that the story behind legislation is often a very positive public story, and that the text of legislation can be clear, and maybe even as interesting as talking about case law.

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[6] https://quoteinvestigator.com/2010/07/08/laws-sausages/. The earliest reference cited by this online Quote Investigator (established in 2010 by Gregory Sullivan, a former Johns Hopkins University computer scientist who uses the pseudonym Garson O'Toole) is to the University of Michigan's *The Chronicle*, of 27th March 1869, where John Godfrey Saxe is quoted in the course of a report of the impeachment trial of Mr Henry Lamm, chair of the university's Alpha Nu literary society. The report cited the phrase "Laws, like sausages, cease to inspire respect in proportion as we know how they are made", and attributed it to Mr Saxe, because the reporter expressed severe disappointment at the poor conduct and management of the impeachment trial. Thus, the reporter compared the process of impeachment trials with the legislative process: very disappointing when seen close up. It is worth noting that Mr Lamm was acquitted, by 34 votes to 23. For an offline collection of the findings by Quote Investigator, see O'Toole, *Hemingway Didn't Say That: The Truth Behind Familiar Quotations* (Little A, 2017).

Slide 3: What a talk about leading cases could have looked like
Who's this? [Photograph of May Donoghue]

Slide 4: Would this help?
[Photograph of dark bottle from David Stevenson, Paisley, Glasgow]
The previous slide was May Donoghue, born May McAllister. As others have pointed out,[7] the law reports could not get her name right: "M'Alister" and "McAlister" are both wrong. This slide is probably not the actual bottle from *Donoghue v Stevenson*.[8] I have often wondered why the case was not called *Donoghue v Stevenson Ltd*? David (Davie) Stevenson must not have heard about the benefits of limited liability, because he had not incorporated the business, so Mrs Donoghue's claim was against David Stevenson personally. By the time the case came back to Scotland in 1932, Mr Stevenson had died, but the case continued against his estate, so it is really a case about what claims follow the deceased person and the administration of estates. It appears that, like most civil cases, this one was settled by the administrators of the estate, apparently for £200, equivalent to about £14,050 in 2020. So, the equivalent of a District Court level claim made famous.

Mr Stevenson's sons took over the business and they decided to get the benefit of limited liability: the business was incorporated as David Stevenson (Beers and Minerals) Ltd.

I suppose this case if really famous because of Lord Atkin's turn of phrase in his leading judgment. He made the point that rules of morality do not always turn into legal rules:[9]

> "The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy."

Slide 5: Common law rules can be clear
Then he goes on to give us the neighbour principle, a neat adaptation of the parable of the Good Samaritan:[10]

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[7] See, for example, Hedley, "*M'Alister (Or Donoghue) (A Pauper) v Stevenson* (1932)" in O'Dell (ed), *Leading Cases of the Twentieth Century* (Round Hall Sweet & Maxwell, 2000).
[8] [1932] UKHL 100, [1932] AC 562, 1932 SC (HL) 31, [1932] All ER Rep 1.
[9] [1932] AC 562, at 580.
[10] *Ibid*.

> "The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

If you really have to learn a quote off by heart, this is not too bad. Of course, Lord Atkin has used a bit of judicial licence here, because in the biblical story of the Good Samaritan, it was also a lawyer who asked the question "Who is my neighbour?"

Slide 6: A previous application of the Good Samaritan parable: *Buch v Amory Manufacturing Co*, 69 NH 257 (1897)

In any event, Lord Atkin's summary is a bit easier to digest than the reference to the Good Samaritan parable by Carpenter J delivering the judgment of the New Hampshire Supreme Court 35 years previously in *Buch v Amory Manufacturing Co.*[11] In that case, the plaintiff was 8 years old and could not speak or understand English. His older brother, aged 13, was employed in the defendant company's factory, a mill, as a "back-boy" in the mule-spinning room. It appeared that the older brother had brought his 8 year old brother into the factory to show him how to work the machinery. The plaintiff had been there for over a day, was wearing a company back-boy's overshirt, and was at some stage told to leave by a supervisor, but he stayed on site. About 2 hours later, his hand was caught in some of the machinery gearing that the back-boys were instructed to avoid, but there was no evidence that the plaintiff was given any instruction or warning whatever. Carpenter J stated:[12]

> "He [the plaintiff] was a trespasser in a place dangerous to children of his age. In the conduct of their business and management of their machinery the defendants were without fault. The only negligence charged upon or attributed to them is that, inasmuch as they could not make the plaintiff understand a command to leave the premises and ought to have known that they could not, they did not forcibly eject him."

Slide 7: Common law rules can be clear (but cruel?)

Then Carpenter J turned to the law, and the allusion to the Good Samaritan:[13]

> "Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the

[11] 69 NH 257 (1897).
[12] 69 NH 257, at 259-260 (1897).
[13] 69 NH 257, at 260 (1897).

> continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death. P.S., *c.*278, *s.*8."

A bit much to try to memorise, though Star Wars or Yoda fans might like "With purely moral obligations the law does not deal." At the end of the quote, the reference to "the statute" and "P.S., c.278, s.8" is to section 8 of Chapter 278 in Title 23 (Labor) of the New Hampshire Statutes, which in effect was that state's codified legislation as of 1897. It is fairly clear that Carpenter J was not an innovator along the lines of Lord Atkin, so you will not be surprised to discover that the plaintiff's claim was dismissed. He was, apparently, also known as a stickler for precedent, and this is borne out by the decision in the *Buch* case. It may be a good example of a leading case of the 19th century, but perhaps worth forgetting too.

Slide 8: What legislation does that case law can't

Now, I'd like to get back to talking about why legislation is so important. First of all, because it can do things that case law simply can't, especially when the legislation is accompanied by a regulator with effective supervisory and enforcement powers.

Donoghue v Stevenson is, like any tort case, really a pathology case: it involves after-the-event civil liability for when something goes wrong.

By contrast, modern legislation on, for example, food safety does what a case can't: before-the-event prevention. I won't go through all the details of what the Food Safety Authority of Ireland does in a given year, but it includes what you see on the slide.

Food is safer now because of scientific developments and legislation on:

- safe disposal of sewage,
- improved quality of drinking water,
- the use of refrigeration and freezing (commercial and domestic) and
- General food safety legislation

In 2018, there were 49,268 registered food businesses in Ireland.

The Food Safety Authority of Ireland (FSAI) is the national food safety regulator in Ireland, acting in collaboration with other agencies, notably:

- the Health Service Executive (Environmental Health Service)
- the Department of Agriculture and Food (veterinary inspectors) and
- The EU's European Food Safety Authority (EFSA).

The FSAI has a wide range of supervisory and enforcement powers, including:

- standard setting codes and guidance,

- entry and inspection,
- formal warnings,
- closure orders and
- criminal prosecution

In 2018, food safety inspectors carried out 49,846 inspections of food businesses.

In 2018, the FSAI's Advice Line dealt with 9,434 requests; 3,424 of these were complaints about food or food premises, labelling, or allergens.

In 2018, there were more than 2,500 new notifications to the FSAI of food supplements, which the FSAI assessed for compliance with legislation on:

- composition,
- health claims,
- labelling and
- nutrition claims.

In 2018, the FSAI dealt with 799 food incidents (concerns that may require general consumer protection notices); as a result, it issued 51 general food alerts and 45 food allergen alerts.

In 2018, FSAI inspectors served 230 Improvement Notices; 95 Closure Orders (in 2019, 107 Closure Orders) and brought 9 prosecutions.

FSAI's link to EU-wide food safety system in 2018:

- the EU's Rapid Alert System for Food and Feed (RASFF) issued 3,628 notifications about unsafe food products in 2018
- of these, 132 (3.6%) were flagged as being distributed to Ireland
- products of Irish origin were implicated in 25 notifications (0.7%)
- FSAI (supported by its agencies) identified and reported 29 products to the EU's RASFF network.

My point is that tort cases are unlikely to sort out food safety: we need statutory regulators for that.

Slide 9 Legislation can have major historical significance

The second point I want to make about legislation is that it can, as we know, have really profound historical significance, such as the US *Voting Rights Act 1965*.

The US federal *Civil Rights Act 1964* had not included provisions on voting rights, and the enactment of the *Voting Rights Act 1965* was therefore a significant achievement of the US civil rights movement.

US President Lyndon Johnson signed the Voting Rights Act 1965 in the White House watched by leading civil rights activists such as the Reverend Martin Luther King Jr and Rosa Parks.

You can also see a large group of US Congressional leaders (Democrats and Republicans).

Section 2 of the 1965 Act is the key provision, and is quite clear and nicely succinct.

Section 2 of the 1965 Act provides that no voting qualifications or prerequisite to voting, or standard, practice, or procedure is to be imposed or applied to deny or abridge the right of any citizen of the United States to vote "on account of race or color."

In practice, the enforcement provisions in the 1965 Act, authorising the US Department of Justice to ensure that section 2 is implemented on the ground, are also of huge significance. The Department's big stick, of enforcement through court action, is also important and signifies the collaborative role involving legislation and the courts.

Slide 10: The story behind the law on unaccompanied learner drivers

Another point that's worth making about legislation is that:

- unfortunately, it often needs a tragic or shocking case to push us to reform;
- the resulting reform can often be clear, making the point that the content of legislation is not always the product of compromise, or what we refer to as the art of the possible: it can be exactly what's needed to achieve the desired outcome, at least to the extent that any law can do that.

That is the story behind the law on unaccompanied learner drivers.

On 22 December 2015, Geraldine Clancy (58) and her daughter Louise Clancy (22) died in a car crash when their car was hit by a car being driven by an unaccompanied learner driver.

Louise Clancy was a student in UCC at the time, and an active blogger.

The driver of the car was 21 and a law student in UL at the time. In November 2016, she pleaded guilty to dangerous driving causing death at Cork Circuit Criminal Court. The Court imposed a 3 year suspended sentence of imprisonment on her, and a 15 year driving ban.

Noel Clancy (Geraldine's husband and Louise's father) campaigned for the enactment of an offence for the owner of a car to allow a learner driver to drive their car unaccompanied, sometimes referred to as the "Clancy Amendment".

The offence was enacted as section 35A of the *Road Traffic Act 1961*, inserted by section 5 of the *Road Traffic (Amendment) Act 2018*, which came into force on 22 December 2018, the third anniversary of Geraldine's and Louise's deaths.[14]

Anyone who goes past second level schools in Ireland will have probably noticed that, since December 2018, L plate cars have been replaced by N plate cars. In other words, the amendment made in 2018 appears to be working.

Slide 11: Bad cases [can] make good law [legislation]
Now I'd like to give an example of legislation that arose from an extended review of existing law, insurance contract law.

Some of the core principles and rules of insurance contract law date from 18th and early 19th century case law

- Disclosure and "utmost good faith": *Carter v Boehm* (1766):[15] insured must disclose information that a hypothetical "prudent insurer" might have thought relevant , even if this particular insurer might not have
- Insurance warranties: *DeHahn v Hartley* (1786):[16] an irrelevant breach of contract can allow insurer to repudiate (burglar alarm broken, fire alarm okay; claim for fire damage can be repudiated)
- Insurable interest: *Lucena v Craufurd* (1806):[17] you must have a direct financial interest the insurance contract; otherwise, insurance contract is void because it amounts to gambling (holiday insurance taken out by parent that includes cover for injury to children could be invalid)

Lord Eldon, who delivered the leading judgment of the UK House of Lords in *Lucena v Craufurd*, was not a fan of gambling, and amongst other things, developed the common law rule that gambling contracts were contrary to (late 18th Century and early 19th Century) public policy. It appears that he was especially concerned when he became aware that some people were taking out life insurance policies on the life of King George III. He therefore developed the common law rule that a person needed to have an "insurable interest" in the life of the person whose life you were insuring. In later cases, this concept of insurable interest became confined to the policy holder, and possibly the policy holder's spouse, but not their children. This is why the Law Commission of England and Wales is still consulting on extending the scope of insurable interest.

Slide 12: Mind the policy wording
What has been the effect of these insurance contract rules?

[14] Section 5 of the 2018 Act replaced the previous section 35A, inserted by section 39 of the *Road Traffic Act 2016*, which was never brought into force.
[15] (1766) 3 Burr 1905.
[16] (1786) 99 ER 1130.
[17] (1808) 1 Taut 325, 127 ER 630.

Of the parties in this case known as *Three Little Pigs v The Big Bad Wolf*, this was the pig who had actually taken out the policy and signed it. The insurance underwriter (or possibly broker) is making the point that the policy wording did not apply to the specific type of wind damage on which the claim was being made. He may also have later pointed out that it would be hopeless to bring a case because: (a) they had not disclosed that they lived in an area where wolves, including big bad ones, were present; (b) there appeared to be a fire alarm in the house that was out of guarantee; and (c) one of the other pigs had the title deeds to the house so this little pig had no insurable interest.

Slide 13: Making good law [legislation] from bad cases
What has been done about these insurance contract rules? I'm afraid that what follows is a blatant ad for the Law Reform Commission's work in this area.

- Law Reform Commission 2015 *Report on Consumer Insurance Contracts* (LRC 113-2015)
- Recommended wide-ranging reforms, including replacing the 18th and 19th century principles and rules
- Report included a draft *Consumer Insurance Contracts Bill*
- *Consumer Insurance Contracts Bill 2017* (Private Member's Bill sponsored by Pearse Doherty TD) was based on the Commission draft Bill
- There was cross-party support for the 2017 Bill, and significant additions and improvements made during the Oireachtas debates
- *Consumer Insurance Contracts Act 2019* was the last Act enacted before the General Election 2020
- The 2019 Act applies to individual consumers, and also business consumers (businesses with an annual turnover of €3 million or less)

I think it is correct to describe the 2019 Act as a mini-code: most of the key principles and rules concerning insurance contracts are in the 2019 Act, supplemented by a number of important Regulations and Codes of Practice already made by the Central Bank of Ireland. The effect of section 3 of the 2019 Act is that the Central Bank may make further Regulations and Codes of Practice in connection with the requirements of the 2019 Act; and that the 2019 Act also now forms part of the Central Bank's general regulatory and supervisory framework under the Central Bank Acts. The effect of section 4 of the 2019 Act is that the Financial Services and Pensions Ombudsman may take account of the requirements of the 2019 Act in making determinations under the *Financial Services and Pensions Ombudsman Act 2017*.

Slide 14: Legislative rules can be clear
Section 8 of the *Consumer Insurance Contracts Act 2019* provides:

> **"Pre-contractual duties of consumer and insurer**
> 8. (1) The duties in this section replace, at the pre-contractual stage of a contract of insurance, the principle of utmost good faith (*uberrima fides*) and any duty of disclosure of a consumer (including any duty on the consumer to volunteer

information) that applied prior to the commencement of this section (whether that principle or duty arose at common law or under an enactment).
(2) The pre-contractual duty of disclosure of a consumer is confined to providing responses to questions asked by the insurer, and the consumer shall not be under any duty to volunteer any information over and above that required by such questions.
(3) Where the insurer requests the consumer at the pre-contractual stage to provide information to the insurer, the insurer shall be under a duty to ask specific questions, on paper or on another durable medium, and shall not use general questions.

The Commission had recommended in its 2015 Report, and the Oireachtas agreed in the 2019 Act, that it is appropriate and useful to include a "purpose clause" in legislation, setting out not just the statutory rule, but what its purpose is. This follows the more general approach taken in, for example, section 6 of the *Education Act 1998* (a general objects clause for the 1998 Act) and section 8 of the *Assisted Decision-Making (Capacity) Act 2015* (guiding principles for the 2015 Act).

Slide 15: How they codify in Maryland: Legislative Code of Maryland
You might be thinking: codifying is all very well for the Civil Law jurisdictions. And you might also be thinking: hasn't he heard that since the end of last month Ireland is the last remaining common law jurisdiction in the EU (you'll also be thinking: okay, Malta too, and Cyprus, are common law jurisdictions, but they're really, really small; and, yes, a lot of Greek lawyers go to England for their law degrees; and yes, the French and Germans are awarding law degrees that are really degrees in common law, but that's just detail).

And if you've forgotten those bits in parenthesis, you'll be thinking: isn't he telling us to throw out our common law inheritance, and suggesting that we should just codify everything, like Napoleon. Of course, the civil law jurisdictions did Codes in the 18th and 19th Century, just like Justinian had done (kind of) in the 6th century. Justinian was like many people from Galway, a native speaker (Latin). But to say that only the French, or the Germans, do Codes is to live in the past. For example, Napoleon may have left the French with six Codes by about 1814, but in the 200 years since then, they have been deconstructed, or decodified, and completely reimagined. No civil law jurisdiction can survive in the third decade of the 21st century on six Codes alone.

If you want to see what comprehensive codification looked like from the second half of the 20th century, and what it looks like in the first half of this digital online 21st century, then you need to look at the USA, at both federal and state level. This is because they have had the benefit for over 100 years of major institutional drivers of codification, the Uniform Law Commission (ULC) and the American Law Institute (ALI). Between them, during the 20th Century, and continuing, they have influenced the widespread codification of civil and criminal law.

So, at federal level, they have the United States Code (USC), broken down into 50 Titles or subject headings. Even on this side of the Atlantic, we've heard of companies filing for

Chapter 11 protection: that's in Title 11 of the USC (called Bankruptcy), Chapter 11 being the sub-title that provides the equivalent of examinership protection from creditors; in effect, therefore, the equivalent of Part 10 of the *Companies Act 2014* (and, as if attempting, but not quite achieving, a mirror image of its US counterpart, Part 11, Chapter 11 of the *Companies Act 2014* deals with the court's powers in company liquidations).

At state level, many states (not just Louisiana) have virtually full Codes: the Legislative Code of Maryland has 32 Titles of subject headings.

So, I would suggest that we should not make more of a deal about this kind of codification than is needed: all that they've done in the USA is to organise all their legislation under subject headings.

Slide 16: Steps towards codification in Ireland

In that respect, it's important to point out that we have really made fairly significant strides towards the kind of codification that you find in the US. Here's the recent story of that work in the 21st century.

- Irish legislation ("Irish Statute Book") consists of about 3,100 In-Force Acts, from 1204 to 2019
  - Beginning with: the *Fairs Act 1204* (enacted in the 6th year of the reign of King John, of Robin Hood fame)
  - Most recent (for now): the *Consumer Insurance Contracts Act 2019* (2019, No.53) (signed by President Higgins on 26th December 2019)
- *Statute Law Revision Act 2007*: which repealed many thousands of obsolete Acts, and also (uniquely by comparison with comparable Statute Law Revision Acts in the common law world) set out a list of 1,364 pre-1922 Public Acts (mostly 19th Century) that should be retained in force (over 200 of which have since been repealed, leaving about 1,100 as of February 2020)
- There are about 2,000 post-1922 In-Force Acts, of the 3,000 plus enacted since 1922;
- We have an online database of Acts as enacted: the electronic Irish Statute Book, the eISB, available at www.irishstatutebook.ie;
- There have been a number of Consolidation/Codification Acts enacted: for example, the *Social Welfare Consolidation Act 2005*; *Land and Conveyancing Law Reform Act 2009*; *Companies Act 2014*
- Still waiting to be enacted: the *Draft Criminal Code Bill* (and others)
- Revised Acts: text of over 360 Acts as amended: on eISB, linked to www.lawreform.ie (similar to, for example, the UK Legislation Database and other eLegislation databases)

Slide 17: Classified List of In-Force Legislation

When I say that Codifying is our future present, I mean that we should be thinking about what codifying means now, and the future: a present and future that is, for most people,

digital and online. In this context, the Commission has published the Classified List of In-Force Legislation on its website, at http://revisedacts.lawreform.ie/classlist. This contains:

- Over 2,000 post-1922 Public Acts
- Over 100 pre-1922 Public Acts (we are working on adding more over time)
- Over 15,000 in-force post-1922 Statutory Instruments

The Classified List is organised under 36 subject headings, modelled on the US federal and state Codes.[18]

The Classified List of In-Force Legislation is, in part, a searchable database, in that it is searchable across the more than 500 sub-headings in the List. It is also a full text database, which brings you to the full text of all the Acts and statutory instruments in it.

The Classified List is clearly not quite a comprehensive Code of Irish Legislation, but it indicates that we're making significant progress towards that goal, by compiling most of the existing in-force legislative stock into a subject-based online collection.

Slide 18: And finally, how an individual can influence legislation in Ireland
Here's the story behind why we have victim impact statements and prosecution appeals against unduly lenient sentences.

On 6th July 1992, Lavinia Kerwick, who was 18 at the time, decided to waive the right to anonymity that usually applies in a rape trial. The defendant in her case had pleaded guilty to rape.

When the case came before the Central Criminal Court on 5th July 1992, the trial judge (Flood J) indicated that this might be an exceptional case where a suspended sentence could be imposed. He adjourned the sentencing decision for a year to allow probation reports to be prepared.[19]

On the morning after the adjournment, Lavinia Kerwick heard Gerry Ryan on his RTÉ 2FM radio programme doing his newspaper review, which included a report of the case.[20] She later recalled that he then said something along the lines of "Well, if it was me, he wouldn't have walked out of that court".

This was when Lavinia decided to go public. She rang RTÉ and gave a live interview to Gerry Ryan soon after the 10 o'clock news. When Gerry Ryan asked her what name she wanted to give, she said "Lavinia."

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[18] On the background to the Classified List, see the Commission's *Consultation Paper on a Classified List of Legislatioin in Ireland* (LRC CP 62-2010), available at https://publications.lawreform.ie/Portal/DownloadImageFile.ashx?objectId=638.

[19] A year later, the judge imposed a 9 year sentence of imprisonment, suspended in its entirely: see *The People (DPP) v WC* [1994] 1 ILRM 321.

[20] The discussion here is largely derived from Wayman, "Lavinia Kerwick: 'My life in my 20s and 30s was absolutely destroyed, taken away'", *The Irish Times*, 15 December 2018.

In the interview, she said: “I just couldn’t believe it – he might as well have raped me again yesterday.” By the 11 o’clock news she was the lead story.

This coverage prompted the Minister for Justice to meet Lavinia and promise her to introduce legislation to allow victims make victim impact statements, and to allow for the first time the prosecution to appeal against unduly lenient sentences: both of these were enacted in *the Criminal Justice Act 1993*.

Many years later, after a recovery from serious health problems, she participated in an RTÉ television documentary *No Country for Women* (first broadcast on 19th and 20th June 2018). She said that this was the first time she had really heard herself being thanked for what she had done, in particular by the chief executive of the Dublin Rape Crisis Centre, Noeline Blackwell. Lavinia said this gave her strength to re-emerge as a campaigning voice.

I wanted to finish on that note, how an important part of our criminal justice legislation came from the initiative of a young woman who is now widely recognised as what Noeline Blackwell calls an experiential expert. This is an important example of why talking about legislation can not only be interesting, but inspiring. The other part of what I wanted to say, that codification in the 21st Century is a big project but perfectly doable, should take inspiration from that kind of story. Codifying can be hard work, but quite a lot of it has already been done, and it is important that we continue the work.

Thank you very much for your attention this evening.