Codification of the Criminal Law and the European Convention on Human Rights

Mr. Justice John Hedigan

In the complex area of criminal law the limits of state power and the rights of the individual demand to be explicitly defined and protected in the maintenance of an orderly and just society. The former Chief Justice of Ireland, Mr. Justice Ronan Keane, defined codification as "the setting out in one statute of all the law affecting a particular topic whether it is to be found in statutes or in common law."[1] This concept, however, is far from novel. As a matter of fact, the origins of codification are rooted in Babylonian times and before and have been evolving ever since.

The Code of King Hammurabi dates back to *circa* 1750 B.C. and is the earliest-known[2] example of a ruler proclaiming publicly to his people an entire body of laws so that all might read and know what was required of them. The code was carved upon a black stone monument, eight feet high, and was intended to be displayed in public view.[3] It may now be viewed in the Louvre Musuem in Paris. Hammurabi's Code of 282 laws dealt with a broad range of the requirements of Babylonian society. Two laws offer a tempting look into contemporary Babylonian society;

Law 2-

> "If any one bring an accusation against a man, and the accused go to the river and leap into the river, if he sink in the river his accuser shall take possession of his house. But if the river prove that the accused is not

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[1] Keane, "30 Years of Law Reform 1975 – 2005", Conference Paper, *Thirtieth Anniversary of the Law Reform Commission*, Dublin, 23 June, 2005, p.9.

[2] Legal Historians note that though evidence found of the Code of Hammurabi makes it the earliest known set of laws constructed as a code, it was actually not the earliest act of codification. While laws preceding Hammurabi's Codes have disappeared researchers "have found several traces of them, and Hammurabi's own code clearly implies their existence." Horne notes that Hammurabi "is but reorganizing a legal system long established"; see Horne, *The Code of Hammurabi: Introduction* (1915) as part of the Avalon Project, Yale Law School, at www.yale.edu (last updated 7th September, 2008).

[3] *Id.*

> guilty, and he escape unhurt, then he who had brought the accusation shall be put to death, while he who leaped into the river shall take possession of the house that had belonged to his accuser."[4]

Judges were also expected to be correct in their application of the law or suffer significant consequences. If a mistake were to be found subsequently in a judge's decision, that judge would be expelled from the bench and heavily fined:

Law 5-

> "If a judge try a case, reach a decision, and present his judgment in writing;. if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgment."[5]

Later in 534 A.D. Justinian completed his compilation of the Roman laws, known as the 'Justinian Code'.[6] In 1234, Pope Gregory IX promulgated a code of canon law referred to as the *Liber extra*, "so-called because it was designed as an addition to the corpus of law already contained" in a private compilation, the *Gratian's Decretum.*[7] The modern approach to codification appears to be largely influenced by the codes enacted during a period of historical upheaval and revolution in Europe beginning in the eighteenth century, particularly the *Code Napoléon* enacted in 1804. As one academic commentator puts it:

> "The figure of the code is central, standing in both a historical and theoretical sense at the juncture of law and modernity. Historically, the modern is inaugurated with the enactment of the classical codes in Tuscany (1786), Austria (1787), France (1791 and 1810), and Bavaria

[4] Code of Hammurabi, s.2; see Translation by King, *The Code of Hammurabi* as part of the Avalon Project, Yale Law School, at www.yale.edu (last updated 7th September, 2008).
[5] Code of Hammurabi, s.5; see n.4.
[6] Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Department of Justice, Dublin, 2004), p.10, para.1.07.
[7] Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Department of Justice, Dublin, 2004), p.10, para.1.11. See also on this, Brundage, *Medieval Canon Law* (Longman, London, 1995).

(1813) which limited the use of torture and the death penalty and introduced fixed punishments according to law."[8]

This period has been referred to as "the moment of enlightenment"[9] primarily because codes from this time in history were influenced by the Enlightenment ideas of social equality and legal certainty.[10]

Therefore, the main idea inherent in the codification of the law now is the democratic concept of *res nullius* - that the law belongs "to no one in particular and, therefore, to everyone, common lawyer and civilian alike."[11]

Today, despite the 'codiphobia' expressed by zealot advocates of the common law legal tradition[12], many of the best known criminal codes have been adopted in common law jurisdictions such as the United States[13], Canada[14], New Zealand[15] and Australia.[16]

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[8] Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45" 18(2) *Law and History Review* (2000) 397, p.399.
[9] *Id.*
[10] Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Department of Justice, Dublin, 2004), pp.11-13.
[11] Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Department of Justice, Dublin, 2004), pp.14, para.1.28.
[12] Please see the section below on 'Codification and the European Convention on Human Rights'.
[13] In the United States, commentators note that there remains "an enormous diversity" among the fifty-two American Penal Codes but note that the American Law Institute's Model Penal Code, promulgated in 1962, is the closest thing to being an American criminal code. In fact, Herbert Wechsler, Chief Reporter of the Model Code, served on the legislative commission that drafted the New York code. Like the task currently being undertaken by the Criminal Law Codification Advisory Committee today, the American law Institute's decision to draft a model penal code was an ambitious undertaking. A distinguished and diverse advisory committee of law professors, judges, lawyers and prison officials, as well as experts from the fields of psychiatry, criminology and even English literature were assembled in the drafting of the code. codes were enacted, all of which were influenced in some form by the Model Penal Code, in Illinois (1962); New Mexico (1963); New York (1967); Georgia (1969); Kansas (1970); Connecticut (1971); Ohio and Texas (1974); Florida and Virginia (1975); Maine and Washington (1976); Arizona and Iowa (1978); New jersey (1979); Alabama and Alaska (1980) and Wyoming (1983); See, Robinson & Dubber, "The American Model Penal Code: A Brief Overview" (July 27th, 2007), *University of Pennsylvania Law School. Scholarship at Penn Law.* Paper 137; Bartlett, "Criminal Law Revision through a Legislative Commission" 18 *Buffalo Law Review* 213 (1968); Packer, "The Model Penal Code and Beyond" 63 *Columbia Law Review* 594 (1963). Wechsler, "The Challenge of a Model Penal Code" 65 *Harvard Law Review* 1097 (1952); Hall, "The Proposal to Prepare a Model Penal Code" 4 *Journal of legal Studies* 91 (1951).
[14] Canadian Criminal Code 1892. See also, Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto, Buffalo, London, 1989).
[15] New Zealand Crimes Act 1961; White, 'The Making of the New Zealand Criminal Code Act of 1893: A Sketch' (1986) 16 *Victoria University of Wellington Law Review* 353.
[16] Queensland Criminal Code 1899; New South Wales Act 1900; Western Australia Criminal Code 1913; Tasmanian Criminal Code 1924; South Australian Criminal Law Consolidation Act 1935;

Today, the codification of the entire body of criminal law is a major undertaking of fundamental importance to the maintenance of law and order in a democratic society.[17] It also provides an opportunity to reassess what the European Convention on Human Rights has contributed thus far to the area of criminal law and what it may contribute in future. It is in this context that the thoughts of Napoléon come to mind when he compared his civil code with all his battles and considered it the greater:

> "My true glory is not that I have won forty battles. Waterloo will erase the memory of these victories; that which nothing will erase, what will live eternally, is my Civil Code."[18]

This paper focuses on the benefits the European Convention on Human Rights may bring to the codification of criminal law in Ireland. The Convention brings several benefits as a framework in the codifying process of the criminal law. One could argue that through drawing upon the Convention in the creation of a criminal code, Ireland is now allowing for, as some academic commentators have put it, a "positive integration" of the Convention within the substantive criminal law.[19] This a step forward from the current relationship between the Convention and the criminal law which seems confined to the prevention of violations of the Convention, otherwise referred to as "negative integration".[20] For example, this is illustrated in the requirement that legislation complies with the Convention.

Victoria Crimes Act 1958; Northern Territory Criminal Code 1983; Commonwealth Criminal Code 1995; Australian Capital Territory Criminal Code 2002; See also, Cadoppi, "The Zanardelli Code and Codification in the Countries of the Common Law' (2000) 7 *James Cook University Law Review* 116.

[17] On the general importance of codifying the criminal law, see Dennis, "The Critical Condition of Criminal Law" (1997) *Current Legal Problems* 213 and Ashworth, "Towards a Theory of Criminal Legislation" (1989) 1 *Criminal Law Forum* 41.

[18] Cited in Mazeaud *et al*, *Leçons de Droit Civil* (8th ed., Paris, 1991), p.45. See also West *et al*, *The French Legal System* (2nd ed., Butterworths, Dublin, 1998), p.21 who note; "The Civil Code later became known as the Code Napoléon, and rightly so, for Napoleon had been actively involved in seeing through its implementation. He desired to be remembered not just as a general, but as a law-maker, and strongly believed in the virtue of legislative codes as a means of uniting the country by ensuring the uniform application of legal rules throughout the territory ... He also fought successfully for the provisions of the Code to be drafted in language accessible to the ordinary citizen."

[19] Alson & Weiler, "An Ever Closer Union" in Alson *et al* (ed.), *The European Union and Human Rights* (Oxford University Press, Oxford, 1999), p.10.

[20] *Id.*

Specifically, I argue that the Convention may achieve this in three ways:

1. Codification reflects values inherent in the Convention;
2. The Convention has directly impacted upon the substantive provisions of criminal law;
3. The Convention helps to define the limits of criminalisation alongside the framework of the Irish Constitution.

Developments in Ireland

The Director of Public Prosecutions speaking in 1988 stated, "criminal law is in urgent need both of modernisation and codification."[21] The pressing need for codification of the criminal law, he argued, was rooted in the fact that regrettably, the bulk of our laws was made in the Victorian era and had remained almost unaltered since that time.[22] He emphasized the complexity arising from the overuse of statutory instruments;

> "The law, especially the criminal law, should be clear and accessible to all if all are liable for breaches of it. The scourge of legislative amendments, of amendments of amendments, of substitutions, insertions and deletions and of cross-reference definitions has made the task of ascertaining the current status of some offence and penalty sections a nightmare."[23]

As my colleague Mr. Justice Peter Charleton, one of the leading commentators on criminal law in Ireland, has observed, while codification of the criminal law has already taken place in other jurisdictions "Ireland, in contrast, is left floundering among a mass of statutes and decisions when criminal law and evidence should be clear and readily accessible in a single document."[24]

[21] An address by Eamonn Barnes, former Director of Public Prosecutions to The Law Society meeting in Killarney, 4th May, 1988 cited in Charleton *et al*, *Criminal Law* (Butterworths, Dublin, 2000), p.4.
[22] *Id.*
[23] *Id.*
[24] Mr. Justice Peter Charleton *et al*, *Criminal Law* (Butterworths, Dublin, 2000), p.5.

So, what were the stepping stones that directed legal research and opinion in Ireland towards the need for codifying the criminal law? There have been calls for the codification of the criminal law in England and Wales but despite the initiatives that have been put forward for the past 150 years[25]; the entire question of producing such a code in England is surrounded, as one academic commentator puts it, with "an air of fatalism".[26] Here in Ireland, however, there is, I hope, a more positive response and an expectation that the codification process will be successfully concluded.

The Law Reform Act of 1975 expressly charged the Law Reform Commission of Ireland[27] with the codification of the law. The Commission has in fact produced reports on substantive individual areas of the criminal law much of which has been implemented into law.[28]

An Expert Group on the Codification of the Substantive Criminal Law in Ireland was established by the Minister for Justice, Equality and Law Reform in December, 2002 pursuant to a commitment in the Programme for Government to undertake a feasibility study into the possible approaches to codification of all the substantive criminal law into a single Crimes Act in Ireland.[29] The work of the Expert Group culminated in the publication of their recommendations in a Report in 2004.[30] The Expert Group noted the progress made by the Commission in its report in 2004 with regard to codification of specific areas of criminal law.[31] Overall, the report's main recommendation was for the establishment of an Advisory Committee on a statutory

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[25] See, Law Commission, *A Criminal Code for England and Wales Vol.2* (Law Com. No. 177, Her Majesty's Stationary Office, London, 1989).
[26] Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45" 18(2) *Law and History Review* (2000) 397, p.423.
[27] Law Reform Act 1975, s.4(1).
[28] For example, the Criminal Damage Act 1991, the Non-Fatal Offences Against the Person Act 1997 and the Criminal Justice (Theft and Fraud Offences) Act 2001.
[29] Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Department of Justice, Dublin, 2004), pp.vii (introduction) and p.1.
[30] For commentary on this see, Byrne, "Codification of the Criminal Law in Ireland" [2005] 15 (2) *Irish Criminal Law Journal* 15.
[31] Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Department of Justice, Dublin, 2004), pp.22-23. In recent years, under the Commission's Second Programme, the Commission's recommendations for the reform and modernisation of the criminal law have formed the basis of three of the mini-codes discussed in the preceding section: *viz.*, the Criminal Damage Act 1991; the Non-fatal Offences against the Person Act 1997; and the Criminal Justice (Theft and Fraud Offences) Act 2001; see para.1.69.

footing charged with ultimately producing a single codifying instrument setting out the entire criminal law.[32]

It was one of the Expert Group's main recommendations that the task of codification be carried out by a body known as the 'Criminal Law Codification Advisory Committee'. This was approved by cabinet in December, 2004.[33]

It is necessary to consider the implications of the act of codification of the criminal law itself initially before discussing what the Convention may add to this process.

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> "On a map of the law executed upon such a plan there are no *terrae incognitae*, no blank spaces: nothing is at least omitted, nothing unprovided for: the vast and hitherto shapeless expanse of jurisprudence is collected and condensed into a compact sphere which the eye at the moment's warning can traverse in all imaginable directions."[34]

There are those who view the idea of 'codification' as something alien to the common law tradition[35] even with the vast increase of criminal legislation in the last fifty years both in Ireland and in the United Kingdom. A former English law commissioner describes the resistance of those opposed to codification of criminal law within a common law system as "codiphobia", a fear of those from the continental system that

[32]Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Department of Justice, Dublin, 2004), p.70, para.3.34.

[33] Provision for such a committee was made under Part 14 of the Criminal Justice Act 2006, ss.167 – 172. That Act was signed into law by the President on 16th July, 2006, and the relevant provision has been commenced. The Criminal Law Codification Advisory Committee was recently launched at University College Dublin. It was announced by Sean Aylward, the Secretary General of the Department of Justice, that the exercise of codification will be a collaborative one between, primarily, the UCD School of Law and the Department of Justice, Equality and Law Reform.

[34] Bentham, *Of Laws in General*, p.246.

[35] See Goodrich, *Reading the Law: A Critical Introduction to Legal Methods and Technique* (Blackwell, Oxford, 1986), p.24 who defines codification as representing a rupture or break with the past, thus it is something that completely antithetical to a common law tradition founded on the idea of precedent.

have codified their laws.[36] Despite the apparent resistance of our common law neighbours to the codification, there have been several attempts made in the past to endear this notion to the greater majority. Take, for the example, the Law Commission's commentary and drafting on a criminal code for England and Wales in 1989.[37] The Irish Department of Justice even recommended, with the availability of the necessary resources, that "one way to proceed would be to initiate a scoping study along the lines of that undertaken in England and Wales to ascertain the requirements for a full codification of our criminal law".[38]

I would adopt Professor Farmer's four headings regarding the main issues surrounding codification and would comment as follows;

Objections to codification –

1. The common law is uncodifiable.

   Surely the experience of many other common law jurisdictions that have codified would seem to gainsay this;

2. Such a code would sacrifice the flexibility of the common law, trapping its reasoning within rigid conceptual confines.

   In any code, there must still be the requirement for interpretation by a judge so as to apply it to unforeseen circumstances.

3. Judge-made law is better than law made by the legislator.

[36] Amos, Professor of Law at University College London, *Ruins of Times, exemplified in Sir Matthew Hale's Pleas of the Crown* (Stevens and Norton, London, , 1859), p.xvii.
[37] See, Law Commission, *A Criminal Code for England and Wales Vol.2* (Law Com. No. 177, Her Majesty's Stationary Office, London, 1989).
[38] The Irish Department of Justice initially considered the codifying of the criminal law unfeasible, while "certainly a desirable and worthwhile objective, would not be easily achieved" principally as a result of a lack of resources; See, Department of Justice, *Tackling Crime, A Discussion Paper* (Department of Justice, Dublin, 1997), p.63, para. 8.25.

This of course depends on the judge or the legislator and perhaps the eye of the beholder.

4. Essentially, the common law's finest asset is its adaptability.

This is undoubtedly correct but I think one may expect that the common law system in its interpretation of the code will benefit from its traditional adaptability.[39]

Arguments in favour -

1. The fundamental constitutional argument. As noted by the English Law Commission, "since the criminal law is arguable the most direct expression of the relationship between a State and its citizens, it is right as a matter of constitutional principle that the relationship should be clearly stated in a criminal code the terms of which have been deliberated upon by a democratically elected legislature"[40] Thus, such a code enjoys democratic legitimacy which can only strengthen it.;
2. The law of the legislator is better made than judge-made law – as it provides "a theory of adjudication binding judges to the code."[41] This of course cuts both ways since it also may fetter the ability of courts to deal with the ever changing problems that come before them.;
3. Codification offers accessibility where common law is only accessible to those trained in the artificial reasoning of the law and the sufficiently learned in the law who know where to find it;
4. Essentially, codification offers "system". It may be said that it offers both a restraint and a guide to judges.[42]

[39] Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45" 18(2) *Law and History Review* (2000) 397, p.398.
[40] Law Commission, *A Criminal Code for England and Wales Vol.2* (Law Com. No. 177, Her Majesty's Stationary Office, London, 1989), p.5, para.2.2.
[41] Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Department of Justice, Dublin, 2004), p.14, para.1.28.
[42] *Id.*

It seems to me that the arguments in favour outweigh those against. Moreover, codification of the common law is democratic in nature insofar as it brings transparency to the public private divide between the state and the individual. The principal factor in the codifying of the criminal law is to ensure that this transparency will assist in the efficient operation of due process and subsequently the defendant's right to a fair trial as provided under Article 38 of the Irish Constitution and Article 6 of the Convention. Again, to quote my colleague Mr. Justice Peter Charleton on the current status of the law and the overall profound benefit which codifying the law will bring:

> "Even the most professional lawyer has to constantly refer to multiple pieces of legislation from multiple areas and even there all of us are left with the sinking feeling of 'have I got it right?' Sooner or later, the piecemeal nature of our legislation is going to cause a serious injustice."[43]

Also, a complete catalogue of offences will lead to a more complete understanding of the law for the public, legal scholars, the legal profession and the judiciary. Such clarity is essential to the effective application of the rules established by criminal law. As one leading U.S. academic commentator puts it:

> "Readability, accessibility, simplicity, and clarity are the central virtues if the code is effectively to articulate and announce the criminal law's rules of conduct."[44]

Finally, as Professor Herbert Wechsler, principal draftsman of the American Law Institute's Model Penal Code puts it, a code shows that, "when so much is at stake for the community and the individual, care has been taken to make law as rational and as just as law can be".[45]

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[43] Mr. Justice Peter Charleton, "Homicide: Murder and Manslaughter", *Conference Paper at the Law Reform Commission Launch of their Report on Homicide*, Dublin, January 29th, 2008, pp.5-6.

[44] Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford, 1997), p.183.

[45] Wechsler, "The Challenge of a Model Penal Code" [1986] *Criminal Law Review* 285, pp.289-290.

Status of the European Convention on Human Rights

Ireland signed the European Convention on Human Rights in 1953 and along with other signatories, we are required to secure to all persons within our jurisdiction the rights contained in the Convention by ensuring *inter alia* that our laws are compatible with the Convention as interpreted in the judgments of the European Court of Human Rights which was established under the Convention with the power to determine compliance with the Convention and just satisfaction were appropriate.

The Convention has been a part of domestic law in Ireland since 2003.[46] As one Irish academic commentator puts it, this represents "a huge legal milestone".[47] Provisions of the Convention are in some respects both narrower and broader than provisions under the Irish Constitution governing criminal law. Thus, the Convention is now a domestic source of Irish criminal law. The significance of the incorporation of the Convention into the common law tradition was noted by the English House of Lords in 2000:

> "[It is] plain that the incorporation of the European Convention of Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary."[48]

Impact of the Convention

Since 2003, the State, including the judiciary, must consider matters of criminal law in the light of the Convention and the jurisprudence of the European Court of Human Rights.[49] As in England[50], the Convention has not as of yet had the kind of impact upon substantive criminal law as it has had upon criminal procedure and evidence but the Convention has already been playing a significant role in the development of certain criminal law doctrines.

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[46] European Convention on Human Rights Act 2003.

[47] Hogan, "Incorporation of the European Convention on Human Rights" in Kilkelly (ed.), *European Convention on Human Rights and Irish Law* (Jordans, Bristol, 2004), p.15, para.2.6.

[48] *R. (Kebilene) v. Director of Public Prosecutions* [2000] 2 A.C. 326, pp.374-375 (*per* Lord Craig of Hopehead).

[49] European Convention on Human Rights Act 2003, s.3.

[50] See Ashworth, *Principles of Criminal Law* (5th ed., Oxford University Press, 2006), p.7, para.1.3.

The main source of Irish criminal law has been identical to that of English criminal law, i.e. the common law tradition. Law developed through the courts and the seminal work of commentaries on early common law. The most notable of these institutional writers being, for example, Coke's *Third Institute* from the 17th Century, Hale's *History of the Pleas of the Crown* and Blackstone's *Commentaries (*Book IV of which deals with the criminal law*)* from the 18th Century.

Some of the principal offences, such as manslaughter, are still governed by common law as are some of the criminal defences. Judges therefore retain "a central place in the development of the criminal law."[51] In addition, the European Convention on Human Rights Act 2003 places further powers and duties upon the judiciary. When interpreting and applying any statutory provision or rule of law the Irish courts are required to do so in a manner compatible with the State's obligations under the provisions of the Convention.[52]

It is thus imperative to ground the Code firmly in not only the existing legislation of the Convention but also the jurisprudence of the European Court of Human Rights. The Court's jurisprudence is a rich fusion of the provisions established under the Convention and of legal principles and doctrines drawn from both common law and civil law traditions across 47 countries.

European Convention on Human Rights Act 2003

The legislation also provides that the domestic courts here are to be guided by the jurisprudence of the European Court of Human Rights in their interpretation and applications of provisions of the Convention. Judgments of the superior courts will not be able to strike down legislation on the basis that it conflicts with provisions of the Convention or with the jurisprudence of the European Court of Human Rights. Where the Court finds, however, such a conflict under domestic law or procedure, section 5 of the 2003 Act allows them to make a declaration of incompatibility.

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[51] *Id.*

[52] European Convention on Human Rights Act, s.2(1).

A Reflection of Values

The Convention extols the general principles of clarity and autonomy in its provisions. This seems in accord with the process of codification of the criminal law. Article 6 and 7 of the Convention provide protection to the individual when being prosecuted for a criminal offence. As the Court in Strasbourg has stated:

> "The Court points out that Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[53]

In addition, it has been argued that other articles under the Convention, such as the right to life under Article 2 and the protection of privacy under Article 8, are significant factors in the protection of the values of clarity and autonomy that require protection when an individual is involved in criminal proceedings.[54]

The European Convention on Human Rights and its Impact on Irish Criminal Law

The most significant impact that the Convention has had upon the criminal law is in the area of sexual offences and in the recently reformed legislative framework

[53] *Kokkinakis v. Greece* [1993] 17 E.H.R.R. 397, para. 52.
[54] See, Emmerson, Ashworth & MacDonald, *Human Rights and Criminal Justice* (2nd ed., London, Sweet & Maxwell, 2001), chap.8.

governing the defence of insanity. It has been stated in this respect that the Irish State has been "careful to anticipate to obvious areas of Convention challenge by enacting legislation before such proceedings were brought into the courts."[55] I am not sure if Norris v Ireland or Croke v Ireland would support that proposition. It is however an expression of how things ought to be and I hope of how things stand.

Norris v. Ireland

The applicant in *Norris v Ireland*[56] challenged several provisions under nineteenth century legislation which criminalized particular homosexual acts even those which occurred in private between consenting males. Both the High Court and Supreme Court of Ireland[57] rejected the challenge.

The Court in Strasbourg followed its earlier decision in *Dudgeon v. U.K* which concerned the same legislation passed while Ireland was part of the United Kingdom[58] and held that the applicant's right to privacy under Article 8 of the Convention had been violated.[59] The Court rejected the government's argument in *Dudgeon* that the abolition of the offence "would be seriously damaging to the moral fabric of society" and stated:

> "The Convention right affected by the impugned legislation protects an essentially private manifestation of the human personality. As compared with the era when the legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member states of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be

[55] Ní Raifeartaigh, "The European Convention on Human Rights: the Perspective from the Bar", Conference Paper, *University College Cork Annual Criminal Law Conference – Rebalancing Criminal Justice in Ireland: a Question of Rights*, 29th June, 2007, p.3.
[56] *Norris v Ireland* [1989] 13 E.H.R.R. 185.
[57] *Norris v. Attorney General* [1984] I.R. 36.
[58] Offences Against the Person Act 1861.
[59] [1982] 4 E.H.R.R. 149.