Codification in the Common Law

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Abstract

Codification is generally thought of as a feature of modern legal systems in the civil law world. However, codification is also used by common law systems, although there is a real question whether the form of 'codification' employed by common law legislators is comparable to the codification employed by civil law legislators. The focus of the discussion here will be on the role of codification in English private law, in particular contract law, where codification has been explored in the modern era, but abandoned. There may, however, still be a role for the intervention of codifying legislation to solve some of the problems faced within the general rules of English contract law.

Key words: codification, common law, English contract law

I. Introduction

Codification is a natural topic of discussion to mark a celebration of the career of Professor Lajos Vékás – although it may seem less obvious to discuss codification in the common law. However, as a common lawyer, I have learnt much about the nature of codification from Professor Vékás. I had the privilege of visiting Budapest as a member of the Hungarian-British Joint Academic Research Programme in the early years of this century when we discussed the form and structure of private law, and in particular the law of contract, in the context of the project that was then underway for the drafting of the new Hungarian Civil Code to replace the Code of 1959. I have particularly fond recollections of the gentle wisdom injected into our discussions by Professor Vékás. I learnt a great deal, not just about comparative contract law, but about the nature and purpose of codification, and the challenges of using a code that had been drafted for another time, and in another political and social context – and the process of rewriting it for a new time, and a new political and social context.

We think of codification as a technique employed by modern legal systems in the civil law world – typically, contrasting 'codified' systems with the 'non-codified' systems of the common law world. However, as comparative lawyers, we know that we need to be wary about drawing hard lines and categories in our taxonomy of legal systems, and we shall see that the technique of codification is also used within the common law, although there is a real question

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about whether the form of 'codification' employed by common law legislators is comparable to the codification employed by civil law legislators. This could be a very broad area of study, and different legal systems and different areas of the law will be mentioned in this article, although the focus within the common law systems will be on the role of codification in English law; and on private law – in particular contract law. The main discussion will be of the modern context, but we need to begin with a historical perspective.

II. The Notion of 'Codification' and 'Codes' in the Common Law: A Historical Perspective

There are very many discussions of codification in the common law world, not just internationally by comparative lawyers comparing the modern civil law codes, but also in purely national contexts.[1] Although references in the English language to a 'code' as a systematic collection or digest of laws date back to the late Middle Ages,[2] according to the Oxford English Dictionary the use of the active noun 'codification' (the making of a code) and the verb 'to codify' in the English language can be dated to the nineteenth century. 'Codification' was first used, chiefly, in the writings of Jeremy Bentham – the earliest cited example is a letter he wrote in 1806;[3] the evidence cited for 'codify' is from 1816, again from a letter written by Bentham.[4] The modern continental European codification movement – and the enactment of the French *Code Civil* in 1804 – predate these references, but it appears that even in the French language the use of the active noun '*codification*' and the verb '*codifier*' are a little later.[5]

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[1] See, e.g., SJ Stoljar (ed), *Problems of Codification* (Dept of Law, Research School of Social Sciences, Australian National University 1977, Canberra); Denis Tallon, 'La Codification dans le Système de *Common Law*' (1998) 27 Droits 39–47; Peter M North, 'Problems of Codification in a Common Law System' (1982) 46 Rabels Zeitschrift für ausländisches und internationales Privatrecht 490–508; Gunther A Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) 25 Yale Law Journal 435–532; Eva Steiner, 'Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge too Far?' (2004) 25 Statute Law Review 209–22; Catherine Skinner, 'Codification and the Common Law' (2009) 11 European Journal of Law Reform 225–58; Mary Keyes and Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate Publishing 2014, Farnham); Paula Giliker, 'Codification, Consolidation, Restatement? How Best to Systematise the Modern Law of Tort' (2021) 70 International and Comparative Law Quarterly 271–305.

[2] *Oxford English Dictionary*, 'code (n.)' December 2024 <https://doi.org/10.1093/OED/1158564901> accessed 19 February 2025.

[3] *Oxford English Dictionary*, 'codification (n.)' July 2023 <https://doi.org/10.1093/OED/1189587696> accessed 19 February 2025; Jeremy Bentham, Letter 20–22 August 1806 in F Rosen and JR Dinwiddy (eds), *The Collected Works of Jeremy Bentham: The Correspondence of Jeremy Bentham,* vol 7: January 1802 to December 1808 (Clarendon Press 1988, Oxford) 366.

[4] *Oxford English Dictionary*, 'codify (v.)' July 2023 <https://doi.org/10.1093/OED/4969576613> accessed 19 February 2025; Jeremy Bentham, Letter 23 February 1816 in F Rosen and Stephen Conway (eds), *The Correspondence of Jeremy Bentham,* vol 8: January 1809 to December 1816 (Clarendon Press 1988, Oxford) 510.

[5] 1819 and 1836 respectively: Jean Dubois, Henri Mitterand and Albert Dauzat (eds), *Dictionnaire étymologique* (Larousse 2014, Paris) 176 ('Code').

Bentham seems to have been in tune with the spirit of codification that we know from the French Code of 1804, and it is well known that he was an enthusiast of codification for English law, as well as for other jurisdictions, notably the United States. He wrote a *General View of a Complete Code of Laws* (published posthumously in 1843)[6] which described a structure for a code (including a civil code); and on his death in 1832 he left his unfinished *Constitutional Code*.[7] None of this was enacted, but Bentham was not alone in his promotion of codification; and elsewhere in the common law world there were attempts from the nineteenth century onwards to introduce codes. In the United States some failed, such as a proposed Civil Code in New York,[8] but a few succeeded in the western States, such as the Civil Code of California which took effect on 1 January 1873 and, with amendments made from time to time, is still in force today.[9]

In this same period a range of legislative Acts were passed in India which are commonly referred to (informally) as the Indian Codes.[10] This included the Indian Contract Act 1872, which was enacted 'to define and amend certain parts of the law relating to contracts.' With modern amendments, it is still in force today.[11]

In the later nineteenth and early twentieth centuries, there were also some Acts of the United Kingdom Parliament which are not 'codes' by name, but whose long titles[12] described them as codifying Acts. The Bills of Exchange Act 1882 was 'An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes'; the Sale of Goods Act 1893 was 'An Act for

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[6] John Bowring (ed), *The Works of Jeremy Bentham*, vol 3 (William Tait 1843, Edinburgh) 155.

[7] F Rosen and JH Burns (eds), *The Collected Works of Jeremy Bentham: Constitutional Code*, vol 1 (Clarendon Press 1983, Oxford).

[8] Weiss (n 1) 506–11; Lawrence M Friedman, *A History of American Law* (4th edn, Oxford University Press 2019, New York) 383–85; Charles M Cook, *The American Codification Movement: a Study of Antebellum Legal Reform* (Greenwood Press 1981, Westport, Conn) 185–98.

[9] Weiss (n 1) 512–13. The current text is available on the California Legislative Information website: <https://leginfo.legislature.ca.gov/faces/publicationsTemplate.xhtml> accessed 19 February 2025. However, these codes did not remove the traditional common law role of the courts as lawmakers, and they were, in effect, only partial codifications: Cook (n 8) 198; Friedman (n 8) 385 ('Lawyers and judges had common-law habits and prejudices, and they handled the Codes accordingly. Sometimes code provisions were simply ignored'). Louisiana, with its French and Spanish heritage and its Civil Code, was (and remains) quite different, part of the civil law tradition: K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Tony Weir tr, Clarendon Press 1998, Oxford) 116–17.

[10] Dame Mary Arden, 'Time for an English Commercial Code?' (1997) 56 Cambridge Law Journal 516–36, 522–23; Weiss (n 1) 485 ('Within about twenty years, the following codes were enacted: Civil Procedure Code (1859), Penal Code (1860), Code of Criminal Procedure (1861), Indian Succession Act (1865), Indian Contract Act (1872), Specific Relief Act (1877), Transfer of Property Act (1882), and Indian Trusts Act (1882)').

[11] <https://www.indiacode.nic.in/handle/123456789/2187> accessed 19 February 2025. See also Warren Swain, 'History and Drafting of the Indian Contract Act 1872' in KV Krishnaprasad, Niranjan Venkatesan, Shivprasad Swaminathan and Umakanth Varottil (eds), *Foundations of Indian Contract Law* (Oxford University Press 2024, Oxford) 3–21.

[12] The 'long title' of an Act is not the name by which the Act is usually known but the wording at the start of an Act which begins 'An Act to …' and lists its purposes: Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020, London) [2.5], [16.3].

codifying the Law relating to the Sale of Goods' and the Marine Insurance Act 1906 was 'An Act to codify the Law relating to Marine Insurance'. The Partnership Act 1890 was not described as codification, but as 'An Act to declare and amend the Law of Partnership'. This was a period when it was seen as beneficial to put into legislative form the rules of the common law on these areas of (commercial) contract law – perhaps with amendments, but principally to provide the legal rules in the form of a clear, authoritative text.

The driving forces behind these various codification projects in the nineteenth century, in the various jurisdictions, were largely individuals who promoted the value of codification both generally and in particular areas of law. We have seen the significance of Bentham in the early years of the century; in the United States a leading proponent of codification was David Dudley Field;[13] the 'codifying' Acts in the United Kingdom in the sphere of commercial contract law in the later years of the century were drafted by Sir Mackenzie Chalmers – or, in the case of the Partnership Act 1890, Sir Frederick Pollock.[14]

III. 'Codification' Projects in Modern English Law

In the modern English law there has been some revival of the idea that it might be beneficial to codify certain areas of the law. Indeed, codification as a tool for law reform was put firmly on the map by the UK Parliament in enacting the Law Commissions Act 1965, which constituted two Law Commissions for the purpose of promoting the reform of, respectively, the law of England and Wales and the law of Scotland.[15] The Commissions have the duty

> 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 in particular the codification of such law*, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law …[16]

[13] Weiss (n 1) 503–07; Friedman (n 8) 373–75; cf. Cook (n 8) 187–88 ('the American codification movement hardly began with him … [but his] importance as a codifier derives in goods measure from his relentless, but what became his almost solitary, promotion of codification throughout most of his professional career').
[14] Arden (n 10) 518–21. Efforts during this same period to introduce a code of criminal law and procedure into English law, promoted by Sir James Fitzjames Stephen, were unsuccessful: Law Commission, *Codification of the Criminal Law: A Report to the Law Commission* (Law Com No 143, 1985) [3]–[6].
[15] Law Commissions Act 1965 ss 1 and 2.
[16] Ibid s 3(1) (emphasis added).

The first Chairman of the English Law Commission was enthusiastic about its role in promoting codification, whilst noting that – as we shall see further below[17] – the notion of codification envisaged by the 1965 Act is different in character from civil codes such as those found in France and Germany.[18]

Every few years the Law Commission publishes programmes of projects – topics for examination with a view to possible reform. In its very first programme in 1965, the Commission included amongst its 17 topics two codification projects: a full codification of the law of contract (including quasi-contract and other connected topics); and codification of (parts of) the law of landlord and tenant.[19] Two years later, the Commission added a project on the codification of criminal law, and a preliminary research project with a view to the eventual codification of family law.[20]

The Commission's optimism and enthusiasm for codification did not, however, last. The English and Scottish Law Commissions worked together on the project to codify the law of contract until 1972, when the Scottish Law Commission withdrew from the collaboration,[21] and the English Law Commission suspended work on the project even though preliminary drafts of the whole of the general law of contract had already been completed.[22] For our purpose, the point to note is the English Commission's explanation for suspending the project:

> We think that the publication of a draft [contract] code, however fully annotated, is not the best way of directing public attention to particular aspects of the law of contract which may be in need of amendment or of promoting examination and discussion of those aspects in depth. We think, further, that the question whether the general principles of contract law require amendment, and if so in what way, is logically anterior to codification and should be disposed of first. ...

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[17] See section IV.

[18] Mr Justice Scarman, 'Codification and Judge-Made Law: A Problem of Coexistence', a lecture delivered on 20 October 1966 and later published at (1967) 42 Indiana Law Journal 355–68, 358 ('codification not as a panacea but as an instrument of systematic development and reform in those branches of law where reform is thought to be needed, that is to say, a legal world in which there may be many codes but not necessarily a fully codified world').

[19] Law Commission, *First Programme of Law Reform* (Law Com No 1, 1965) 6 and 10.

[20] Law Commission, *Second Programme of Law Reform* (Law Com No 14, 1967) 6 and 7

[21] Scottish Law Commission, *Seventh Annual Report 1971–1972* (Scots Law Com No 28, 1973) [16].

[22] Law Commission, *Seventh Annual Report 1971–1972* (Law Com No 50, 1972) [7]. The drafts were never published officially, but Harvey McGregor, who had been engaged as consultant by the English Commission to draft it, later published his draft code: H McGregor, *Contract Code Drawn up on Behalf of the English Law Commission* (Giuffrè 1993, Milan).

> We have suspended work on the production of a contract code, and we now intend to publish a series of Working Papers on particular aspects of the English law of contract with a view to determining whether and if so what amendments of general principles are required. We expect to publish a number of such papers in the coming year, though the work as a whole will probably extend over several years. When it is complete, it is our intention to consider afresh the production of a contract code.[23]

Codification of the whole of English contract law appears to have been too much of a challenge; while codification remained a long-term aim, piecemeal reform of areas of particular concern were the priority. And although since 1972 the Law Commission has published a significant number of proposals for reform of particular areas of English contract law, many of which have been enacted by Parliament,[24] the question of a general codification has not been reconsidered.

A similar view was eventually taken in relation to the other major codification project on which the Law Commission embarked: the codification of criminal law.[25] This project proceeded to a more advanced stage than the codification of contract law. After substantial work on the project over many years, in 1989 the Law Commission proposed that there should be a Criminal Code for England and Wales, and published a draft Criminal Code Bill, with a detailed commentary, to give effect to their recommendations.[26] However, this was not taken forward for legislation, although the codification of criminal law remained on the Commission's list of active projects until 2008 when they removed it in favour of particular reform projects designed to simplify the criminal law, which they said was a necessary precursor to eventual codification.[27]

The difficulties in achieving the codification of criminal law appear to have led the Commission to reflect more generally on the future of codification within their remit:

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[23] Law Commission, *Eighth Annual Report 1972–1973* (Law Com No 58, 1973) [3]–[4].
[24] E.g. the Unfair Contract Terms Act 1977, implementing the Law Commission Report on *Exemption Clauses: Second Report* (Law Com No 69, 1975); the Contracts (Rights of Third Parties) Act 1999, implementing the Law Commission Report on *Contracts for the Benefit of Third Parties* (Law Com No 242, 1996).
[25] In 1997 the then Chair of the Law Commission, Dame Mary Arden, gave a public lecture (but in her private capacity) raising the question of whether there should be a commercial code in English law, whilst also noting that the Commission might not have the resources to complete such a project, and that (even if the Commission produced a draft Code) there was no guarantee that Parliament would enact it: Arden (n 10) 536. In 1999 the Commission considered the possibility of a commercial code as a future project: Law Commission, *Seventh Programme of Law Reform* (Law Com No 259, 1999) [1.12]–[1.15], but did not pursue it, and decided instead to focus on particular areas of commercial law which might merit reform: Law Commission, *Eighth Programme of Law Reform* (Law Com No 274, 2001) [1.11].
[26] Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989).
[27] Law Commission, *Tenth Programme of Law Reform* (Law Com No 311, 2008) [1.6], [2.24]–[2.25].

> With forty-two years' experience of seeking to codify the law, the Commission has taken the opportunity of the Tenth Programme to reappraise whether projects with codification as their principal outcome are realistic and whether effort and resources should explicitly be given to achieving that outcome. ...
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> The complexity of the common law in 2007 is no less than it was in 1965. Further, the increased pace of legislation, layers of legislation on a topic being placed one on another with bewildering speed, and the influence of European legislation, continue to make codification ever more difficult.
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> The Commission continues to believe that codification is desirable, but considers that it needs to redefine its approach to make codification more achievable. Accordingly the Commission has decided that:
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> (1) It will continue to use the definition of codification used by Gerald Gardiner in *Law Reform Now*,[28] that is, 'reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject.'
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> (2) Consistently with Gardiner's concerns in 1964, the Commission's main priority is first to reform an area of the law sufficiently to enable it to return and codify the law at a subsequent stage. If it can codify at the same time as reforming, it will do so.[29]

There are other examples of legislative enactments which might be described as codifying Acts, both in English law[30] and in other common law jurisdictions.[31] But in English law any general form of codification is still seen as exceptional: piecemeal reform of particular areas of law, or of particular topics within some areas of law, is more usual. This raises broader questions about

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[28] Gerald Gardner and Andrew Martin, 'The Machinery of Law Reform' in Gerald Gardner and Andrew Martin, *Law Reform Now* (V Gollancz 1963, London; second impression, 1964) 11.

[29] *Tenth Programme of Law Reform* (n 27) [1.2], [1.4]–[1.5].

[30] E.g. a range of Acts passed by the UK Parliament in 1925 (in force from 1 January 1926) to embody a new set of rules for various aspects of property law: the Settled Land Act 1925, the Trustee Act 1925, the Law of Property Act 1925, the Land Registration Act 1925, the Land Charges Act 1925 and the Administration of Estates Act 1925. This systematic statement of rules of property law was preceded by legislation in 1922 and 1924 which reformed the law, and the 1925 Acts were therefore described in their long titles (see n 12) not as reforming statutes but as Acts 'to consolidate' the law on the various topics.

[31] E.g. the Uniform Commercial Code, enacted by each of the State legislatures in the United States; E Allan Farnsworth, *Farnsworth on Contracts* (4th edn with updates by Zachary Wolfe, Wolters Kluwer 2019, New York) §1.10. In New Zealand, the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979 were legislative reforms (and, in effect, partial codifications) of areas of the law of contract; indeed, section 5 of the 1977 Act was explicit that that Act was to be a code: see Rick Bigwood, 'The Partial Codification of Contract Law: Lessons from New Zealand' in Keyes and Wilson (n 1) 165–203. These two Acts were replaced and re-enacted by Contract and Commercial Law Act 2017.

whether there is a future for codification (either general or in discrete areas) within the English legal system.

IV. The Role of Codification

A legal system does not need 'a code' or 'codes' – as evidenced by the classical system of Roman private law, set out in the writings of Gaius (even if it was later taken up by Justinian's legislative enactment of the law in the sixth century);[32] the legal systems in continental Europe in the centuries before the modern codification movement;[33] and – of course – the common law systems which still continue their tradition of judge-made law, as well as other modern systems which have not engaged in general projects of codification of the law, but may still be seen as belonging to (or at least are very close in spirit to) the 'civil law' (codified) jurisdictions, such as the Nordic legal systems.[34] All these systems have legislation as a primary source of law alongside such law as may recognised as being based in, and developed through, non-legislative sources. But legislation is not in itself codification. Although different definitions of a 'code' may be used,[35] within the topic we are discussing here it carries at least the sense of a legislative enactment[36] which constitutes the whole of the law within its scope of operation.

The scope of operation of a legislative code may be more or less broad. A whole system may depend on codification in the sense that substantially the whole of the law is embodied in a set of legislative texts; codification is used as a mechanism for the definition of the system. General codification of this kind provides the authority of the legislator for the totality of the legal rules of the system; and it may require a network of separate but complementary codes for separate areas of law. A code within such a generally codified system may be a first codification of its area of law, replacing a hitherto uncodified system,[37] or a new codification replacing the whole or part of an existing code and thereby providing a new start, and even a new structure, for historical or political reasons.[38] A whole system may not, however, depend in this way on codification, but codes may be used within the system as partial codification, giving a set of rules which are complete authority for their limited area, replacing rules that

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[32] Barry Nicholas, *An Introduction to Roman Law* (Clarendon Press 1962, Oxford) ch 1.
[33] Zweigert and Kötz (n 9) 75–80 (France), 133–41 (Germany).
[34] Zweigert and Kötz (n 9) 277–85.
[35] *Oxford English Dictionary*, 'code (n.)' (n 2).
[36] Non-legislative instruments, such as a soft-law 'code' or a 'Restatement' of the law, may have a certain persuasive authority but are not themselves sources of legal rules in the sense discussed here.
[37] E.g. the codification of French private law, beginning with the *Code Civil* of 1804.
[38] E.g. the new Hungarian Civil Code passed by the Hungarian Parliament in 2009; the new Dutch Civil Code brought into force from 1970 onwards (1992, in the case of the new Books 3, 5, 6 and 7, dealing with property and obligations); and the new Belgian Civil Code, still being finalised and brought into force (book 5, dealing with obligations, came into force on 1 January 2023).

were hitherto uncodified but leaving other rules uncodified outside the scope of the newly codified area.

Codification in English law is of this last kind. The Law Commission's remit in 1965[39] was not to turn the English common law system into a fully codified system on the continental European ('civil law') model. The English common law system is here to stay. But we have seen that some projects of (partial) 'codification' have been undertaken since the later nineteenth century,[40] designed to replace particular areas of law – of greater or lesser scope – with legislative texts.

Even amongst English Law Commissioners there have been debates about the merits of codification. In her lecture in 1997 raising the question of whether there should be a commercial code in English law,[41] Dame Mary Arden, then Chair of the Commission, cited the views of one of her fellow Commissioners, Professor Burrows, as an expression of the 'deep-seated fears of common lawyers about the effect of codification'. Professor Burrows had written[42] that he was 'not a great fan of legislative reform of the non-criminal common law. I have too much faith in the judiciary and too much love of the deductive technique of common law development to wish to see the law frozen by widespread legislative intervention', preferring to limit legislative reform to areas of the law which are already contained in legislation or to remedy particular defects in the common law which need speedier action than waiting for intervention by the courts in new cases. Dame Mary Arden, by contrast, expressed herself in favour of codification, at least of areas where the general principles have already been settled by the courts. Whilst recognising the practical limitations of the process of codification, and in particular the challenges of finding human and financial resources for work on such a project, and of persuading Parliament to enact it,[43] Dame Mary set out a list of advantages of codification:[44] it makes the law more accessible; it is quicker and easier to find the answer to a legal problem in a code; the process of codification enables the law to be updated and modernised as part of the process; revision and development of the law through codification avoids the need to wait for an uncertain point to come before the courts; it can resolve uncertainties from conflict or absence of authority; and a code constitutes a clean break

[39] Above, n 16. See also Scarman (n 18).
[40] Above, sections II and III.
[41] Arden (n 10) 531–32.
[42] Andrew Burrows, 'Legislative Reform of Remedies for Breach of Contract: The English Perspective' (1997) 1 Edinburgh Law Review 155, 156.
[43] Arden (n 10) 536.
[44] Arden (n 10) 532–34.

from the past, superseding the existing excessive case law, whilst also providing in the text of the code a springboard for further judicial development.

A debate in this form is perhaps natural amongst common lawyers. On the one side, there is the argument that we do not need codification. The structure of the common law system, with its balance between the role of the courts and the role of the legislator, is well established. The general principles of private law, at least, do not depend on legislative authority, but the intervention by the legislator to address particular problems as they arise – and to implement matters of policy which are properly within the domain of the legislator rather than the judges[45] – is appropriate and well understood. In areas of the law which have been developed historically by the common law, codification is not how we do things; the time and cost of codification is of doubtful benefit, and would produce a new set of legal norms, apparently dissociated from the preexisting common law, and giving rise to uncertainties over their interpretation and future development.

On the other side, however, there are practical arguments – such as those set out by Dame Mary Arden in her lecture[46] – in favour of legislative texts which do not merely intervene to solve particular problems within an area of law, but take the whole of an area of law and replace the general common law (case-law) with a new and definitive text, albeit a text which can then be developed by judicial interpretation.

There is inevitably a question of principle about the relationship between the courts and the legislator in the interpretation and development of a code. Andrew Burrows referred to the deductive technique of common law development, and his concern that legislation tends to freeze the law.[47] One point of concern may be how to adapt to a code the well-established rules of statutory interpretation in English law, where the general rule is to start from the objective meaning of the legislative text, read in the general context of the statute.[48] The more extensive the scope of operation of the code, the more likely it will need to be drafted in broad terms, stating rules and principles in a looser form than the traditional English style of legislative drafting, and increasing uncertainty over how the courts might interpret it. Set against this, however, is the fact that the courts already take a different approach in relation to those (limited)

[45] E.g. to define and implement the appropriate scope of protection for weaker parties, including a regime for consumer protection. In English law, there is extensive legislation providing special rules for consumer contracts and other transactions; the courts do not see it as their role to regulate inequality of bargaining power: *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* [2021] UKSC 40, [2023] AC 101 [26].
[46] Arden (n 44).
[47] Burrows (n 42).
[48] Bailey and Norbury (n 12) ch 11; John Bell and Sir George Engle, *Cross: Statutory Interpretation* (3rd edn, Butterworths 1995, London) ch 3.

'codes' in English law which place into statute rules that were originally developed by the courts themselves. The objective meaning of the text remains the starting point, but in case of doubt or ambiguity, the courts may refer to relevant case law which was itself codified into the legislative text.[49] For example, in interpreting the 'codifying' legislation of particular topics within commercial law in the late nineteenth century, such as the Sale of Goods Act 1893,[50] the courts continued to cite cases pre-dating the legislation to interpret the text of rules which were now in a new (legislative) form.[51] A statute which takes over an area of law from the common law might even state explicitly that the authorities already developed by the common law should continue to apply.[52]

There is also a significant question of judicial attitude to the development of the law contained in the text of the code, particularly where it is expressed in broad terms. Neither in the common law nor in the interpretation and application of legislation do the English courts normally reason from general principle. The common law is applied and developed by inductive reasoning from the body of relevant existing, particular cases, which may (where necessary) be extended by analogy;[53] statutes are applied textually, with a rather restrictive palette of tools of interpretation – and although there are cases where the courts have developed the common law by analogy with statute[54] the emphasis is on interpretation of the text, [55] not on its expansion and development by analogy.[56]

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[49] Bailey and Norbury (n 12) [24.8].
[50] Above, section II.
[51] Michael G Bridge (ed), *Benjamin's Sale of Goods* (12th edn, Sweet & Maxwell 2023, London) [1-002].
[52] E.g. Companies Act 2006 s 170: the general duties of a director, set out in the Act, 'are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director. … The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.'
[53] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 378 (Lord Goff: 'In the course of deciding the case before him [the judge] may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this "only interstitially," to use the expression of OW Holmes J in *Southern Pacific Co v Jensen* (1917) 244 US 205, 221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole'). See also Lord Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (2000) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 211–27.
[54] See J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 Law Quarterly Review 247–72; Andrew Burrows, *Thinking About Statutes* (Cambridge University Press 2018, Cambridge) 48–56; Bailey and Norbury (n 12) [25.17].
[55] See text to n 48, above.
[56] Bell and Engle (n 48) 46 ('Overall, judges are wary of treating statutes as generating principles which can be applied generally within the law').

V. Is there a Future for Codification in English Law? The Example of Contract Law[57]

As we have seen,[58] the production of a Contract Code was the first project proposed by the Law Commission when it began its work in 1965, although it was suspended in 1972 and has never been resurrected. The Commission preferred to focus instead on individual projects of reform within the law of contract. The question still remains, however, whether there would be benefit in returning to a project of codification of contract law.

The general debate for and against codification in English law, discussed in section IV above, applies equally to the particular context of contract law. Critics of codification would say that contract law is a classical topic within the English common law. The structure and general rules of English contract law are well settled through lines of cases which can largely be traced back to original decisions in the mid-nineteenth century or earlier,[59] and although Parliament has intervened with legislation to address particular issues, it has left the common law rules of the general law of contract broadly unchanged. The place of contract law within private law, and its relationship to other areas – notably tort, unjust enrichment and property law – have also been determined by the common law. Taking away the common law of contract and replacing it by a new code would disturb the complex ecosystem of English private law – to which can be added the uncertainties that would flow from the fact that the legal rules of the law of contract would become statute-based, raising questions which we have already seen about how judges should interpret the text, and their powers in developing the law beyond the text.[60]

These arguments against codification of the law of contract are strong, unless there is a convincing counter-argument that a greater benefit can be obtained through codification: are there defects in the law of contract that cannot (or, at least, cannot better) be remedied through the operation of the existing mechanisms of the law – development through judicial decisions in later cases or through particular (rather than general, codifying) legislation.

The English law of contract is generally settled, and well recognised. But there are some significant points on which reform is called for – and, indeed, where the courts themselves have called for clarification or reform. To take just one area by way of illustration: the law on pre-contractual misrepresentation is based in the common law, with some amendment by legislation

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[57] Some of the points discussed in this section were discussed by the author in an earlier publication: John Cartwright, 'The English Law of Contract: Time for Review?' (2009) 17 European Review of Private Law 155–75.
[58] Above, text to nn 19–23.
[59] David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999, Oxford) chs 11, 12.
[60] Above, text to nn 47–56.

over the years – a history which has left the law 'fragmented, complex and unclear', according to the Law Commission,[61] although when the Commission itself considered undertaking a broader review of this area with a view to simplification, it pulled back and added new provisions which only served to add a new level of complexity.[62] There are very significant questions in the law of misrepresentation, both in relation to the interpretation of existing legislation[63] and within the common law,[64] which the courts have not yet settled – and, indeed, the Court of Appeal has recently said of some such issues that the case law authorities are in such a state of disarray that only the Supreme Court can reconcile them.[65]

It might appear that, in a common law system, it should be for the courts to address such issues themselves – judicial, rather than legislative – reform. However, there are significant practical and legal hurdles to the effective remedying of perceived defects by judicial reform.

The practical hurdle is that an appropriate case must be brought to a court which has the power to develop the relevant rule of law, typically the Court of Appeal or the Supreme Court; and this depends on the parties being willing to spend the time and money to obtain the judicial decision. The parties' interest is not in improving the law, but on resolving their dispute – and the very legal uncertainty involved in a case might encourage the parties to reach a settlement rather than prolong the litigation. Even where a higher court has given permission to bring an appeal on a point of law, the parties may settle their dispute before the hearing, depriving the appeal court of the opportunity to address it.[66]

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[61] Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Com No 332, 2012) [S.12].

[62] Ibid. [S.38]–[S.39]. Since the Commission's terms of reference from the Government limited their project to contracts between businesses and consumers, they declined to undertake a broader simplification of the general law of misrepresentation: ibid [1.10], [1.11].

[63] E.g. the measure of damages under Misrepresentation Act 1967 s 2(1): *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 (CA), heavily criticised by authors and by later cases but to be followed unless overruled by the Supreme Court: John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (7th edn, Sweet & Maxwell 2025, London) [7-35]; the measure of damages under Misrepresentation Act 1967 s 2(2): *William Sindall Plc v Cambridgeshire CC* [1994] 1 WLR 1016 (CA), on which no case has yet reached the Supreme Court: Cartwright [4-76]; the applicability of the statutory limitation period under the Limitation Act 1980 s 36 to claims for rescission of a contract for fraudulent misrepresentation: *IGE USA Investments Ltd v Revenue and Customs Commissioners* [2021] EWCA Civ 534, [2021] Ch 423; Cartwright [4-54]–[4-55].

[64] E.g. the test for reliance/inducement: *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm), [2021] QB 1027; Cartwright (n 63) [3-53]; and whether the remedy of rescission requires a court order: *IGE USA Investments Ltd* (n 63); Cartwright (n 63) [4-19].

[65] *IGE USA Investments Ltd* (n 63) [91] (Henderson LJ).

[66] E.g. in *IGE USA Investments Ltd* (n 63) the Supreme Court gave permission to appeal, but the appeal was settled by the parties without a hearing. Similarly, in *Leeds City Council* (n 64) the trial judge gave permission to appeal against her own decision, and the appeal was listed to be heard by the Court of Appeal but was settled.

A major legal hurdle to the remedying of defects by the courts is the strength of the doctrine of precedent in English law.[67] Judges will follow precedents through deference to their binding authority, whilst making clear that they regard the law as defective and urge review and reform by a higher court.[68] And even the Supreme Court, which has the power to change the common law and to depart from its own previous decisions, is reluctant – in the interests of certainty and predictability in the law – to change well-settled rules,[69] and will do so only in a case on which the relevant point is a necessary part of its decision.[70] Significant changes – and certainly changes which affect fundamental principles of the law of contract, or which involve broader matters of policy – are better made by legislation.[71]

There appears to be a good case for significant legislative intervention to address recognised defects within the English law of contract. The question is whether this should take the form of *codifying* legislation – not just legislation addressing a particular rule or a narrow area of the law, but which reforms the law within its context, restating in legislative form the whole set of relevant rules.[72] If not a full Contract Code (for which a case could be made, but which might be too challenging given the fate of the earlier attempts to codify whole areas, including the law of contract)[73] then it could be at least partial codification of sections of the law of contract in which there are a sufficient number of uncertainties to merit a broader (codifying) Act. There are precedents for this in the partial codifications of the law of mistake and misrepresentation, and contractual remedies, in New Zealand,[74] and in the late nineteenth and early twentieth century codifications of areas of English commercial law.[75] And in

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[67] See John Cartwright, 'Precedent in English and Welsh Private Law' in Christina Ramberg (ed), *The Role of Legal Precedent in Private Law: A Comparative Study* (Intersentia 2024, Cambridge) 67–88.
[68] E.g. *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep 128 [108] (Colman J: 'But for the fact that *Williams v Roffey Bros Ltd* [1991] 1 QB 1 … was a decision of the Court of Appeal, I would not have followed it').
[69] *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172 [36] (Lord Neuberger and Lord Sumption: 'We rather doubt that the courts would have invented the rule [against contractual penalty clauses] today if their predecessors had not done so three centuries ago. But this is not the way in which English law develops, and we do not consider that judicial abolition would be a proper course for this court to take').
[70] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119 [18] ('if [*Williams v Roffey Bros Ltd* (n 68)] is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum').
[71] One of the most significant reforms of the general law of contract in recent years was to the doctrine of privity of contract, which the Courts had found unsatisfactory but had resisted reforming themselves: *Beswick v Beswick* [1968] AC 58 (HL) 72 (Lord Reid: 'if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter. But if legislation is probable at any early date I would not deal with it in a case where that is not essential'). Following a project undertaken by the Law Commission, the law was eventually reformed by the Contracts (Rights of Third Parties) Act 1999 (n 24).
[72] Cf. Gardner and Martin (n 28) ('reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject').
[73] Above, section III.
[74] Bigwood (n 31).
[75] Above, section II.

Scotland, the Scottish Law Commission began in 2010 a general review of Scots contract law in light of the Draft Common Frame of Reference,[76] which led to their recommending in 2018 that there should be a statutory statement on the Scots law on formation of contract, and certain particular reforms within the law on remedies for breach of contract.[77] This has not yet been implemented, but it is still a live project and in 2024 the Scottish Government issued a consultation paper seeking views on the proposals.[78]

However, any codification of the English law of contract, whether a general Contract Code or partial codifications of sections of contract law, would not be 'codification' as it is generally understood by legal systems such as those in continental Europe which have adopted a fully codified system. In England, the common law system remains the background and context within which such partial 'codes' take effect, a system which is based on a characteristic relationship between the legislator and the courts, significantly different from the relationship between the legislator and the courts in a codified civil law system.

[76] Scottish Law Commission, *Eighth Programme of Law Reform* (Scots Law Com No 220, 2010) [2.16]–[2.21].
[77] Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scots Law Com No 252, 2018).
[78] <https://www.gov.scot/publications/scottish-government-consultation-scottish-law-commission-report-review-contract-law/> accessed 19 February 2025.