

UCD Constitutional Studies Group

UCD School of Law

Conference on “The Irish Constitution: Past, Present and Future”

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Lecture by The Hon. Mrs. Justice Susan Denham, Chief Justice

“Some thoughts on the Constitution of Ireland at 75”

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Introduction

Ladies and Gentlemen,

It is a great pleasure to be with you today.¹

I would like to compliment the UCD Constitutional Studies Group for organising this timely conference on “The Irish Constitution: Past, Present and Future” to mark the 75th anniversary of the enactment of the Constitution.

In the coming days, distinguished speakers from at home and abroad will participate in the conference, and we look forward to hearing their insights into the Constitution and constitutionalism generally.

I am delighted to meet Professor Pettit, the Laurance S. Rockefeller University Professor of Politics and Human Values at Princeton University and a distinguished native of Ballygar, County Galway. We welcome you home and look forward to hearing from you on classical republican theory, and its influence on the Constitution.

Ireland is a constitutional democracy and a republic. Article 6.1 of Bunreacht na hÉireann states in unequivocal terms that all powers of government come from the People. It may not be as old as the Constitution of the United States but it was a long time in the making, considering the many attempts to achieve Irish freedom over the centuries. The role of the United Irishmen in the 1790s, on which Professor Pettit has written and spoken, is a notable example.² Their quest for liberty was pursued by the following generations. The Constitution was the first free constitution on which the Irish People had the opportunity to give their assent, and its enactment in 1937 is an important historical event in the life of the nation.

¹ Grateful thanks are expressed to the staff of UCD Archives for their assistance in facilitating access to the papers of Éamon de Valera and Maurice Moynihan concerning the drafting of the Constitution; and to Professor Fergus Kelly, School of Celtic Studies, Dublin Institute for Advanced Studies for his guidance on Brehon law.

² Pettit “The Tree of Liberty – Republicanism: American, French and Irish” *Field Day Review* 2005 based on a lecture given at The Notre Dame Irish Studies Seminar in 2004.

As our Basic Law there is much to appreciate in the Constitution of Ireland. Three quarters of a century is a milestone to be acknowledged and celebrated.

Outline of Paper

In this paper, I will discuss the following topics, along the lines of the conference theme of Past, Present and Future:

The Past

- Bunreacht na hÉireann – a prescient Constitution
- Acknowledging the Drafters of the Constitution.
- Reasons for a new Constitution.

The Present

- Fundamental rights.
- Dignity of the person.
- Aspects of Brehon Law.
- Judicial review.
- European echoes.
- Constitutional Court.

The Future

- An omission.
- For consideration.
- Conclusion.

The Past

Bunreacht na hÉireann – a prescient Constitution

This coming Sunday will be July 1st. On that day, seventy five years ago, the People of Ireland eligible to vote, made their way to the polling booths for the 1937 General Election and the plebiscite on the Draft Constitution of Ireland. They represented the generation of our parents and grandparents who had witnessed the developing struggle to achieve independence.

At this time an increasing sense of despair descended across continental Europe. Many countries were experiencing suffering and hardship during the Great Depression. The year 1937 witnessed the Spanish Civil War in full flight. The gestapo was arresting people who dared to speak out against the Nazi regime, while Hitler was planning his invasion of neighbouring countries.³ Mussolini's Italy was withdrawn as a member of the League of Nations. Stalin ruled over the Soviet Union. Alignments were being made in advance of World War II. In this political climate human rights were not a priority.

Against this backdrop, our young country, on the edge of Europe, was in the process of enacting a Basic Law which propounded legally enforceable rights, and imposed upon the State the obligation to guarantee and to defend those rights. Instead of dictatorship, the Irish people had the opportunity to cast their ballots for their representatives of choice, and could give their verdict on the Draft Constitution. The late Mr. Justice Walsh, writing extra-judicially, described this as “quite startling” and stated that the Constitution:

“[i]s not simply a composition of exhortations or aspirations which it is hoped will be followed. It is the basic law which distributes powers and imposes

³ See sermon of Martin Niemöller “The oppression is growing” delivered at his church in Dahlem, Berlin on 27th June 1937 published in MacArthur (ed) *Speeches of the Twentieth Century* (London, Penguin Books, 1999) at 164-166.

obligations and guarantees rights and which binds the People together with the strongest of moral and legal chains.”⁴

And a US constitutional law scholar has written that:

“It is, perhaps, an anomaly that a small, relatively poor country off the coast of continental Europe, for centuries subjugated politically by a more powerful neighbour, has become, in a number of respects, a microcosm for assessing the future of constitutionalism around the world.”⁵

When looking backwards to historic events from today’s vantage point there can be a tendency to do so wearing rose tinted glasses. The events of yesteryear cannot necessarily be judged by the standards of today. There is also a risk of sounding perhaps a little self-congratulatory when praising something of Irish origin, even the Constitution. However, I do believe that there is much to admire in the Constitution, to even be “startled” by, when one ponders many of its innovations created in the midst of 1930s Europe. For this reason the document is a prescient Constitution. Before looking at some examples of this prescience, as Chief Justice on this the 75th anniversary of our Constitution, I want to acknowledge the Drafters of the Constitution.

Acknowledging the Drafters of the Constitution

One is struck how in other jurisdictions, such as the United States of America and Australia, that much is known about the Framers of the constitutions and the process which led to the formation of the founding document. This in turn has led to fascinating scholarship of interest to historians and lawyers alike. Until fairly recent times, it was commonly believed that Bunreacht na hÉireann was largely the work of Mr. De Valera. The ground breaking research of historians and legal historians including Professor Dermot Keogh, Dr. Andrew McCarthy and the Hon. Mr. Justice

⁴ Mr. Justice Walsh writing extra-judicially in *Casey Constitutional Law in Ireland* (London, Sweet & Maxwell, 1987) p.vii at pp.vii-viii.

⁵ *Beytagh Constitutionalism in Contemporary Ireland: An American Perspective* (Dublin, Round Hall, Sweet & Maxwell, 1996) at p.x.

Gerard Hogan, has yielded a virtual treasure trove of original documents surrounding the drafting process and has shed light on the reality.⁶

Mr. De Valera handpicked a small group of advisers to be members of the Constitution Committee. The Committee began meeting in May, 1934. They examined the 1922 Constitution article by article and concluded that its final report should take the form of a new Constitution. They were knowledgeable on matters of law and constitutions; they were men of culture, with an internationalist view of the world.⁷ They were public servants of outstanding calibre. Today these men are little known to the public. The main participants were: -

- Mr. John J. Hearne, Legal Advisor, Department of External Affairs.
- Mr. Philip O'Donoghue, Legal Assistant to the Attorney General.
- Mr. Michael McDunphy, Assistant Secretary, Department of the President of the Executive Council.
- Mr. Stephen Anselm Roche, Secretary of the Department of Justice.

⁶ Keogh and McCarthy *The Making of the Irish Constitution 1937* (Cork, Mercier Press, 2007) and Hogan *The Origins of the Irish Constitution, 1928-1941* (Dublin, Royal Irish Academy, 2012).

⁷ As evidenced by the inclusion of Article 29 of the Constitution. On this point see comments of Mr. Justice O'Donnell in *Nottinghamshire County Council v B* [2011] IESC 48 at para 65. Mr. De Valera acted as his own Minister for External Affairs and on being elected to office in 1932 was the Representative of the Irish Free State which held the Presidency of the League of Nations Council in 1932. He was President of the League of Nations Assembly in 1938. One historian has commented that "[t]he League of Nations involvement was not just significant as an exercise in nation-building, but also provided an opportunity to go beyond the constraints (and presumably, sometimes the tedium) of Anglo-Irish relations, or as Deirdre McMahon put it more bluntly, the League of Nations offered an escape from 'the constitutional navel-gazing of the Imperial conferences and more exciting opportunities for a new, small state'". See Ferriter *Judging Dev* (Dublin, Royal Irish Academy, 2007) at 129 and McMahon "Ireland, the Empire and the Commonwealth" in Kenny (ed) *Ireland and the British Empire* (Oxford, Oxford University Press, 2004) at 208-212.

Mr. John J. Hearne (1893-1969)

Mr. Hearne has been described as the “author” of the Constitution. Indeed, I recently read a report in a local newspaper in which one commentator described him as Ireland’s very own Thomas Jefferson.⁸

He was born in 1893 at 8, William Street (now known as Lombard Street) in Waterford City, which is just off “The Mall”, beyond Reginald’s Tower. His father Richard was a boot manufacturer and served twice as Mayor of the City between 1902 and 1903. He attended Waterpark Christian Brothers School and obtained the degrees of BA and LLB from the National University of Ireland in Dublin. He spent some time in St. Patrick’s College, Maynooth training for the priesthood. However, he left to study for the Bar at King’s Inns. He was auditor of the Law Students’ Debating Society of Ireland during 1919-1920. He was called to the Bar in 1919 and served as assistant parliamentary draftsman from 1923 to 1929. In 1926, he was technical adviser to the Irish delegation at the Imperial Conference held in London. He was Legal Adviser to the Department of External Affairs from 1929 to 1939, and played an important role for Ireland at international conferences in the 1930s, such as the International Labour Conference, the Hague Conference on International Law, the Disarmament Conference, and sessions of the League of Nations.

On winning the 1932 election, Mr. De Valera became President of the Executive Council and decided to act also as Minister for External Affairs. In this role he saw at firsthand the skills of Mr. Hearne. We know that he was assigned the task of drafting a number of constitutionally significant bills, such as that to remove the oath of allegiance.⁹ A fellow civil servant, Mr. Maurice Moynihan, recalled that when Mr. Hearne produced drafts of bills he included notes regarding the constitutional implications of their introduction. Mr. Moynihan was of the view that in this way, Mr. Hearne was “pointing out the need for a new Constitution if these Bills were introduced”.¹⁰

⁸ This description is attributed to Dr. Michael Kennedy, historian and Executive Editor of Royal Irish Academy’s Documents on Irish Foreign Policy cited in “Waterford honours famous diplomat John Hearne”, *Waterford News & Star*, 22nd June 2007.

⁹ Constitution (Removal of Oath) Act 1933.

¹⁰ Moynihan (ed) *Speeches and Statements by Éamon de Valera 1917-73* (Dublin, Gill &

In 1939 he was called to the Inner Bar in recognition of his work on the Constitution. Mr. Hearne went on to serve as a diplomat and represented Ireland in Ottawa and Washington until his retirement in the 1960s. In retirement he provided legislative advice to the governments of Ghana and Nigeria.

On 5th May 2007, a plaque was unveiled in his honour by the Mayor of Waterford, representing the City Council, and the Waterford Civic Trust, at his birthplace, to mark the 70th anniversary of the enactment of the Constitution. It reads in both Irish and English that:

“John J. Hearne 1893-1969 Architect of the 1937 Irish Constitution and first Irish Ambassador to the United States 1950-1960 was born here.”

On 29th December 1937, the date on which the Draft Constitution came into operation or “Constitution Day”, Éamon De Valera dedicated a copy of the Draft Constitution to John Hearne. It reads as follows:

*“To Mr. John Hearne, Barrister at Law
Legal adviser to the Department of
External Affairs Architect in Chief
and Draftsman of this Constitution,
as a Souvenir of the successful
issue of his work and in testimony
of the fundamental part he took
in framing this the first Free
Constitution of the Irish People*

*Éamon de Valéra
Constitution Day 29.XII.37.”*

Mr. (Patrick) Philip O'Donoghue (1896-1987)

Mr. O'Donoghue hailed from Macroom, Co. Cork, where his father was the local dispensary doctor. He was educated at Castleknock College and University College Cork where he was awarded a first class honours degree in legal and political science. He attended King's Inns from 1917 to 1919. He won the Fitzgibbon medal for legal practice in the 1917-1918 session and won the O'Hagan prize in each year he read for the Bar.

At King's Inns he became a lifelong friend of John Hearne. During student days they shared "digs" together and were both called to the Bar in 1919. He began his legal career on the Munster Circuit in 1919. In 1922 he was appointed a District Justice in Limerick. In 1929 he was appointed Legal Assistant to the then Attorney General, John A. Costello. He served twelve attorneys general and retired in 1959. In 1965 he was appointed to the European Commission of Human Rights and became Judge of the Court of Human Rights in Strasbourg in 1971 and served until 1980.

He was also called to the Inner Bar in 1939, with John Hearne, in recognition of his work in drafting the Constitution.

Michael McDunphy (1890-1971)

Mr. McDunphy was educated in North Richmond Street Christian Brothers School, Dublin. He trained as a barrister and joined the public service in 1911. He was dismissed in 1918 for refusing to take the oath of allegiance, which civil servants were required to take at the time. He was Assistant Secretary to the Provisional Government between January and December 1922. He was re-instated in the civil service in 1922 and served as Assistant Secretary in the Department of the President of the Executive Council, and, for two periods, Secretary to the Government until 1937. When the Constitution came into effect in 1937, he was appointed the first Secretary to the President and Clerk to the Council of State. He retired in 1954. He was director of the Bureau of Military History from its inception in 1947 until 1957.

Mr. Stephen Anselm Roche (1890-1949)

Mr. Roche was born in Cahirciveen, Co. Kerry and was educated at Blackrock College, Dublin where he distinguished himself as a gifted student of English. He joined the civil service in 1909 and was awarded the degrees of BA and LLB from Trinity College Dublin in 1914. He served for a short time in Edinburgh and was then transferred to the estate duty office in Dublin. In 1922, he was one of a small group of administrative officers who were chosen to staff the newly created Ministry of Home Affairs under Kevin O'Higgins. He became Acting Secretary in 1930 and then Secretary of the Department of Justice in 1934 until 1949. He was responsible for all the Courts of Justice Acts, with the exception of the 1924 Act, as well as the Juries Act.

Others involved

Apart from this four member Committee, others who were involved in the process by providing legal advice were **Patrick Gregory Lynch** (1866-1947) who was Attorney General at the time, **Arthur Matheson** (1878-1946) who was the first Parliamentary Draftsman of the Irish Free State, **Hugh Kennedy** (1879-1936) who was Chief Justice between 1924 and 1936, and **Maurice Moynihan**.¹¹

Maurice Moynihan (1902-1999)

Mr. Moynihan was appointed Secretary to the Government on 1st March 1937. He became heavily involved in the drafting process in 1937. He had a particular role in drafting the Irish language text of the Constitution. He was born in Tralee and educated by the local Christian Brothers. He earned a first class honours degree in commerce from University College Cork and became a civil servant in 1925, entering the Department of Finance. At just 34 he was appointed Secretary to the Government. He held this post until 1960 and was appointed Governor of the Central Bank. His

¹¹ For more on the work of Arthur Matheson as the first Parliamentary Counsel of Saorstát Éireann see Hunt "The Origins of the Office of the Parliamentary Draftsman in Ireland" *Statute Law Review* (2005) 26(3) at 171 and Mooney "The work of the Office of the Parliamentary Counsel to the Government in Ireland" *Statute Law Review* (2001) 22(3) at 163.

obituary described him as “one of the greatest civil servants in the history of the State”.

His papers held at UCD Archives show the commitment of Mr. Moynihan to his work. The notes of his involvement in the drafting Committee during 1937 are illuminating in terms of the sheer dedication which it took to complete the final version of the Draft Constitution. For example, he noted of his time that:

“worked until end April, without break, some of sittings lasting until midnight or later.”

It is right and proper that we give these men due recognition for their dedication in creating our constitutional text.

Reasons for a new Constitution

In notes written in 1949, Maurice Moynihan stated that “at what stage the idea of a completely new Constitution crystallised in Mr. De Valera’s mind is not clear”. However, it appears that Mr. De Valera viewed the Constitution of the Irish Free State 1922 as having been “forced upon the people”.¹² Mr. Moynihan’s papers include a speech of Mr. De Valera which he delivered at Arbour Hill during Easter Week 1933 where he emphasised the sovereignty of the Irish people and hinted at constitutional change:

“...let it be made clear that we yield no willing assent to any form or symbol that is out of keeping with Ireland’s right as a sovereign nation.

Let us remove these forms one by one so that this State that we control may be a Republic in fact; and that, when the time comes, the proclaiming of a Republic may involve more than a ceremony, the formal confirmation of a status already attained.”¹³

¹² *Dáil Debates*, Vol. 52, Col. 1, 249, 17th May 1934.

¹³ 23rd April 1933. Mr De Valera continued to note that to the leaders of Easter week the Republic meant more than a form of government and more than an independent Ireland. They were concerned for “equal rights and equal opportunities”. He said that “Ireland must mean for us not merely a combination of chemical elements, but the living people of our own country. We must be prepared, in the words of the proclamation to ‘cherish all the children of the nation equally’. We must, too, make ourselves oblivious of the differences carefully

When Fianna Fáil formed a Government in 1932, Mr. De Valera advanced his concept of “external association”. Professor Keogh and Dr. McCarthy describe this concept as:

“an advanced constitutional conceptualisation capable of facilitating a sovereign republic associating voluntarily with the British government.”¹⁴

The external association formula involved:

- removal of the oath of allegiance to the British monarch sworn by members of Dáil Éireann and the Senate.¹⁵
- abolition of the right of appeal to the Judicial Committee of the Privy Council in London.¹⁶
- abolition of all references to the King in the 1922 constitution, particularly in the wake of the abdication crisis of 1936.
- abolition of the post of Governor-General, representative of the British monarch in Ireland.¹⁷

During the course of a Dáil debate in May 1936, Mr. De Valera spoke of his plans for a new constitution. He stated that:

fostered by an alien Government and hearken resolutely to Tone’s exhortation to ‘abolish the memory of all past dissensions’”.

¹⁴ *Supra* n. 6 at 41.

¹⁵ Constitution (Removal of Oath) Act 1933.

¹⁶ Constitution (Amendment No. 22) Act 1933. It is interesting to note that the Privy Council endorsed the right of the self-governing Dominion states to legislate for the ending of appeals to the Privy Council in the Irish case of *Moore v The Attorney General of the Irish Free State* [1935] 1 IR 472, [1935] AC 484 (PC). The Council held that the Dominions were entitled to do so by virtue of the Statute of Westminster 1931.

¹⁷ Constitution (Amendment No. 27) Act 1936 and the Executive Powers (Consequential Provisions) Act 1937 which completed the abolition of the office of Governor-General. The Executive Authority (External Relations) Act 1936 was further required to give effect to Edward VIII’s abdication as King in Ireland and to regulate Ireland’s diplomatic relationship with other nations and the by now minimal role of the British monarch in Ireland’s external affairs.

“I assure everybody, both here and those outside who may read the report of this debate, that the one desire of the Government is to get for our State a Constitution which will deserve respect and that will get respect. We want the help of everybody who has views on the matter”.¹⁸

Professor John A. Murphy points out that the driving concept behind Bunreacht na hÉireann is that of sovereignty.¹⁹ Indeed, having read the De Valera papers what struck him was “the almost pedantic preoccupation of the architects of the Constitution with the concept of sovereignty”.²⁰ Mr. De Valera as a critic of the Treaty viewed it as a usurpation of the sovereignty of the Irish People. The Treaty negotiators and their supporters saw it as a stepping stone to a Republic, and, as Professor Murphy notes, despite the monarchical trappings, expressed the essential autonomy of the Irish Free State.²¹

The 1937 Constitution clearly recognises the supreme authority of the People, and not the dominance of the State over its citizens.²² Professor Murphy has made the point that amid the fascistic and dictatorial climate of so much of 1930s Europe Mr. De Valera did not carve out an authoritarian power base for himself. Rather it bore witness to his commitment to liberal democratic principles and to British parliamentary heritage.²³

The Dáil approved the draft Constitution by sixty-two votes to forty-eight on 14th June 1937. This was the same day that the Imperial Conference began in London, with

¹⁸ *Dáil Debates*, Vol. 62, Col. 1, 343, 28th May 1936.

¹⁹ Murphy “The 1937 Constitution-Some Historical Reflections” in Murphy and Twomey (eds) *Ireland’s Evolving Constitution 1937-1997* (Oxford, Hart Publishing, 1998) at 12.

²⁰ *Ibid* at 16.

²¹ *Supra* n. 19 at 16, footnote 16. For example the Cumann na nGaedheal Government of the Irish Free State championed the independence of the Dominions at Imperial Conferences between 1926 and 1929. In 1924, despite strong British protest, the Anglo-Irish Agreement 1921 was registered with the Treaty registration bureau of the League of Nations. See also Keogh and McCarthy *The Making of the Irish Constitution* (Mercier Press, Cork, 2007) at 41.

²² Article 6.1 of the Constitution.

²³ *Supra* n. 19 at 13. Professor Murphy states that these principles are exemplified by Articles 15-28 regarding the organs of government and parliament as well as Article 40 regarding personal rights.

Ireland unrepresented. Such a coincidence was described as being designed “to precipitate the fullest surprise from all quarters and create the widest discussion”.²⁴

Following public debate in May and June of 1937, the people were asked the question on 1st July 1937:

“Do you approve of this draft constitution which is the subject of this plebiscite?”

Professor Sinnott notes that there was a turnout of 75% with the plebiscite being carried by 685,105 to 526,945 (57% of voters saying “yes” and 43% “no”) while the spoiled votes amounted to an extraordinary 134,157 (10%).²⁵ The plebiscite was held on the same day as a General Election and the governing party Fianna Fáil who proposed the Constitution won 45% of the vote.

Apparently Mr. De Valera was disappointed by the less than overwhelming endorsement of the Constitution, blaming himself for not ensuring that there was “sufficient opportunity, in the rural districts especially, for its meanings to penetrate into the minds of the average person in Ireland”.²⁶

²⁴ Attributed to Alvin Owsley, US Minister (Ambassador) in Dublin in the “Dixon Memoirs” quoted in Mahon *Republicans and Imperialists: Anglo-Irish Relations in the 1930's* (New Haven Connecticut, Yale University Press, 1984) at 220.

²⁵ Sinnott *Irish Voters Decide: Voting Behaviour in Elections and Referendum since 1918* (Manchester, Manchester University Press, 1995) at 200-201.

²⁶ Mahon *Republicans and Imperialists: Anglo-Irish Relations in the 1930's* (New Haven Connecticut, Yale University Press, 1984) at 221.

The Present

The prescience of the Constitution today is best illustrated by a number of examples.

Fundamental Rights

Five of the fifty articles of the Constitution are devoted to Fundamental Rights. I have stated previously that the Constitution was ahead of its time.

“Many of the principles set out in the Constitution of 1937 were ahead of their time. It was a prescient Constitution. Thus, the Constitution protected fundamental rights, fair procedures, and gave to the Superior Courts the role of guarding the Constitution to the extent of expressly enabling the courts to determine the validity of a law having regard to the provisions of the Constitution. Over the succeeding decades international instruments, such as the United Nations Charter and the Universal Declaration of Human Rights, proclaimed fundamental rights and fair procedures, and it became established that in a democratic state constitutional courts should have the power to protect fundamental rights, including due process, even to the extent of declaring legislation to be inconsistent with the Constitution and to be null and void.”²⁷

What then were the influences on the Drafters of the Constitution in terms of their understanding of rights?

(i) *Sources of inspiration*

The Constitution of Saorstát Éireann 1922 included articles on fundamental rights, which represented a radical break from classical English constitutional doctrine as enunciated by Blackstone and Dicey.²⁸ The Drafters would have been conscious of the *United States Declaration of Independence* (1776), which recognised that mankind is endowed with certain unalienable rights, which include “Life, Liberty and

²⁷ A. v. *Governor of Arbour Hill Prison* [2006] 4 IR 88 at 145-146.

²⁸ See Mr. Justice Keane writing extra-judicially in “Fundamental Rights in Irish Law: A note on the historical background” O’Reilly (ed) *Human Rights and Constitutional Law* (Dublin, The Round Hall Press, 1992) 25 at 27.

the pursuit of Happiness”.²⁹ They would also have been aware of the French revolutionaries and the natural law theory contained in the *Declaration of the Rights of Man and the Citizen* (1789).³⁰ The United States *Bill of Rights* (1791), which amended the US Constitution and guaranteed certain rights, would perhaps also have been an influence.³¹

The French and American revolutions were the catalyst for the rebellion of the United Irishmen in 1798. Independence, tolerance, the unity of people, catholic, protestant and dissenter; liberty, equality and democracy, were the ideals that inspired the United Irishmen. Thereafter the ideals of Theobald Wolfe Tone and Robert Emmet remained in the national zeitgeist.

The contents of certain documents played a central role in the drafting of the Constitution. On the “squared paper draft” of the draft heads of a Constitution, as drawn up by Mr. De Valera, he makes specific reference to the following documents:³²

- *The Proclamation of the Irish Republic* of 24th April 1916, which guaranteed:

“religious and civil liberty, equal rights and equal opportunities to all its citizens, and declares its resolve to pursue the happiness and prosperity of the whole nation and of all its parts, cherishing all of the children of the nation equally.”

- The *Declaration of Independence* issued by the First Dáil Éireann on 21st January 1919, stated:

“And Whereas the Irish People is resolved to secure and maintain its complete independence in order to promote the common weal, to re-establish justice, to provide for future defence, to insure peace at home and goodwill with all nations and to constitute a national polity based upon the people’s will with equal right and equal opportunity for every citizen.”³³

²⁹ See www.archives.gov/exhibits/charters/declaration_transcript.html.

³⁰ See www.hrcr.org/docs/frenchdec.html.

³¹ See www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.

See also the late Mr. Justice Walsh in “200 years of American Constitutionalism-A Foreign Perspective” 48 Ohio St. LJ 757.

³² See Hogan *supra* n.6 at 166.

³³ *Dáil Éireann Debates* Vol. 1, 21st January 1919.

- While the *Democratic Programme* released by the First Dáil Éireann on the same day declared that:

“[w]e desire our country to be ruled in accordance with the principles of Liberty, Equality, and Justice for all, which alone can secure permanence of Government in the willing adhesion of the people.”³⁴

The new Constitution was a visible outward symbol of nation-building, something to set Ireland apart from its colonial past. As one historian has noted, the Constitution was a validation of values established over 15 years of Irish independence.³⁵

(ii) *Rights – enumerated and unenumerated*

The Fundamental Rights provisions in Articles 40 to 44 of the Constitution represented “one of the most conspicuous novelties of the 1937 Constitution” when compared to the 1922 Constitution.³⁶ While Mr. de Valera may have regarded them as merely “headlines for the legislature” from comments he made in the Dáil on the Draft Constitution, unlike Article 45 (the Directive Principles of Social Policy), they were not prefaced by a proviso that they were not cognisable by any Court or that they were for the general guidance of the Oireachtas only.³⁷

There is little in the way of documentation to give us a clear understanding of the Drafters views on Article 40.3.1 and Article 40.3.2. Did they realise that this would become the well-spring from which the constitutional doctrine of unenumerated rights would be sourced by the judiciary? In response to the concerns of the Department of

³⁴ *Dáil Éireann Debates* Vol. 1, 21st January 1919.

³⁵ Fanning *Independent Ireland* at 116-118 cited in Ferriter *The Transformation of Ireland 1900-2000* (London, Profile Books, 2004) at 359.

³⁶ Hogan & Whyte (eds) *J.M. Kelly's The Irish Constitution* (Dublin, Lexis Nexis Butterworths, 2003, 4th ed) at 1245.

³⁷ *Dáil Éireann Debates* Vol. 68 Col. 216-217 on the Draft Constitution.

Finance over these Articles and the extent of the obligations imposed on the State, Mr. McDunphy minuted tersely that: “The Law Officers are satisfied”.³⁸

Mr. Justice Kenny’s finding in **Ryan v Attorney General**, that Article 40.3 of the Constitution guaranteed other personal rights not explicitly referred to in the text, upheld by the Supreme Court, represented a turning of the tide in constitutional interpretation before the courts.³⁹ These rights provisions have generated a rich source of caselaw from our courts which have infused our common law. There is a fertile foundation for this jurisprudence as Ireland is in a unique position, being a common law country, and a member of the European Union, with a written constitution.⁴⁰ Mr. Justice Hogan’s observation, that outside of the United States the Irish judiciary has probably the longest and most extensive experience of judicial review of legislation in the common law world, is particularly apt.⁴¹

(iii) Directive Principles of Social Policy and influence abroad

The Directive Principles of Social Policy in Article 45 of the Constitution are also innovative. The principles set forth in this Article are directed to the Oireachtas and are explicitly non-justiciable in any court of law. In fact, such provisions were not entirely new as the German (Weimar) Constitution of 1919 contained similar provisions; and the Drafters looked at constitutional texts from other European countries as sources of inspiration, as we shall see later.⁴²

³⁸ Hogan *supra* n. 6 at 356.

³⁹ [1965] IR 294. The plaintiff Mrs. Gladys Ryan successfully argued that the right to bodily integrity was protected by Article 40.3.

⁴⁰ See “Leadership in Human Rights Law, Past and Future” speech to Irish Human Rights Commission and Law Society of Ireland Public Conference, 16th October 2004.

⁴¹ Hogan in Kilkelly (ed) *ECHR and Irish Law* (Dublin, Jordans, 2004) 13 at 14-15.

⁴² O’Connell “From equality before the law to the equal benefit of the law: social and economic rights in the Irish constitution” in Carolan and Doyle (eds) *The Irish Constitution: Governance and Values* (Dublin, Thomson Round Hall, 2008) 327 at 328.

However the Constitution's influence on the constitutions of emerging nations is perhaps best illustrated by the number of written constitutions which now include such provisions. The Directive Principles of Social Policy inspired similar provisions in the Constitution of India (1947) and Burma (1947). Constitutions in other countries have followed a similar path for example; Pakistan (1962), Sri Lanka (1972), Bangladesh (1972), Tanzania (1977), Nigeria (1979), Zanzibar (1984), Ghana (1992), Uganda (1997), Namibia (1990), as well as the constitutions of the Pacific Island states of Papua New Guinea, Tuvalu, Solomon Islands, Kiribati, Vanuatu, Belau, Western Samoa.⁴³

Further evidence of the Constitution's prescience in an international law context is the inclusion of family rights in Article 41, the education rights in Article 42, and the property rights in Article 43 as enforceable rights. These same rights would be recognised in international human rights law in the 1948 Universal Declaration on Human Rights.⁴⁴

(iv) Constitutional interpretation

The interpretation of the rights provisions by the courts in light of prevailing concepts, ideas and mores, illustrates a living Constitution, interpreted in light of contemporary times. Constitutional interpretation which is restrained by rigid adherence to the actual or the presumed intentions of the Drafters might provide a comforting degree of reassurance. But the "People" of 1937 referred to throughout the constitutional text, do not equate with the People of 2012. Therefore the Constitution must, of necessity, be construed in its time to reflect the needs of the People it serves.⁴⁵ A

⁴³ Kabudi "The Directive Principles of State Policy" in Binchy & Finnegan (eds) *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives* (Dublin, Clarus Press, 2006) 21 at 24.

⁴⁴ Article 16 family rights, Article 26 right to education and Article 17 rights to property. See <http://www.un.org/en/documents/udhr/>

⁴⁵ See *A v Governor of Arbour Hill Prison* [2006] 4 IR 88 at 151 where I pointed out that: "...neither the law nor the Constitution is frozen in 1937. The Constitution is a living instrument. Concepts are before the courts today in forms not envisaged in 1937. Principles and rights have developed over the last seventy years, from roots in national society, the European Community and international documents". For discussion on the methods of constitutional interpretation see Hogan "Constitutional Interpretation" in Litton (ed) *The*

useful analogy is that it is like a “living tree” which can grow and develop within its natural limits.⁴⁶ The late Mr. Justice Walsh described the contemporary nature of the Constitution when he wrote in **McGee v Attorney General**:

“According to the Preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time.”⁴⁷

Mr. Justice Walsh also spoke on this issue extra-judicially in a speech delivered in the United States to celebrate 200 years of the American Constitution. In the context of constitutional interpretation by the judiciary he stated that the Constitution is construed in the present tense and is a legal document speaking from the present day.⁴⁸

Constitution of Ireland 1937-1987 (Dublin, Institute of Public Administration, 1988) at 173 and Kelly “The Constitution: Law and Manifesto” at 208.

⁴⁶ This “living tree” analogy comes from Lord Sankey in the Privy Council case of *Edward v Attorney-General of Canada* [1930] AC 124 at 136 in which he describes the Constitution of Canada and its interpretation. See Baroness Hale of Richmond “Beanstalk or Living Instrument? How Tall can the ECHR Grow? Barnard’s Inn Reading 2011 available at www.supremecourt.gov.uk. It should also be noted that Justice Brandeis of the United States Supreme Court once wrote that the US Constitution “is a living organism. As such it is capable of growth - of expansion and of adaptation to new conditions.... Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people” quoted in Bickel *The Least Dangerous Branch* (1962) at 107. This passage was a part, ultimately not published, of Brandeis’ draft dissent in *United States v Moreland* 258 US 433, 441 (1922). See the late Justice William J. Brennan Jr. of the US Supreme Court writing extra-judicially in “The Ninth Amendment and Fundamental Rights” in Curtin and O’Keeffe (eds) *Constitutional Adjudication in European Community and National Law* (Dublin, Butterworth (Ireland) Ltd, 1992) 109 at 121-122.

⁴⁷ *McGee v Attorney General* [1974] IR 284 at 319.

⁴⁸ Walsh “200 Years of American Constitutionalism –A Foreign Perspective” 48 Ohio St. L.J. 757. See also Walsh “The Constitution and Constitutional Rights” in Litton (ed) *The Constitution of Ireland 1937-1987* (Dublin, Institute of Public Administration, 1988) at 86 where he wrote that “As a law, it [the Constitution] speaks always in the present tense and is to be regarded as a contemporary law, even though as a document it may be regarded as being of another generation.”

Thus, the Constitution is a living entity and it must be construed as of its time and not as an historical document. The duty of interpreting, explaining and ultimately guarding the Constitution rests on the judicial branch of government. In particular, it is the judges of the High Court and the Supreme Court who must ensure that “...the Constitution keeps in step with the times rather than the times keep in step with the Constitution”.⁴⁹

Dignity of the person

The Preamble of our Constitution, which was drafted by Mr. Hearne, speaks of the dignity and freedom of the individual.

“And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.”⁵⁰

In the Irish language text of the Preamble, the “dignity” of the individual is described as “uaisleacht” which can be translated as nobility or gentility.⁵¹ In *Bunreacht na hÉireann: A study of the Irish text* Micheál Ó Cearúil referring to Dineen, explains that the Irish word for dignity “dighnit” was “used as far back as 1500” and cites “*fear dighnite móire*, a man of high position” from the *Annals of Ulster*. He notes that the word “dignit” is an English or Romance loanword. TF O’Rahilly includes it in his “English words rooted in Irish before 1580”.⁵²

The English dictionary meaning of “dignity” is the “state or quality of being worthy of honour or respect” and it is thought to originate from Middle English, in turn

⁴⁹ See Mr. Justice McCarthy writing extra-judicially in “Observations on the Protection of Fundamental Rights in the Irish Constitution” Curtin and O’Keeffe (eds) *Constitutional Adjudication in European Community and National Law* (Dublin Butterworth (Ireland) Ltd 1992) 179 at 180.

⁵⁰ Mr. Hearne’s first drafts of the Preamble were secular in contrast to the final version which includes religious components inspired by the Polish Constitution of 1921. See Hogan *supra* n. 6 at 155 and 211.

⁵¹ *Foclóir Póca* (Baile Átha Cliath, An Gúm, 1992) at 504.

⁵² (Dublin, The Stationery Office, 1999) at 695-696.

derived from the Old French word “dignete”, as well as from the Latin word “dignitas” from “dignus” meaning worthy.⁵³

Dignity is an example of an unenumerated right protected by the Constitution. In **Re a Ward of Court** it was held that one of the unspecified rights of the person guaranteed under Article 40.3 of the Constitution is the right to be treated with dignity.⁵⁴ Prior to this case and in the context of the rights of children, the late O’Higgins CJ held in **G v An Bord Uchtála** that the child has the right to realise his or her full personality and dignity as a human being.⁵⁵

Dignity, whether as a moral value or a human right, is the very foundation upon which respect for all human rights is based. Such respect is not dependent on social status. It is deserved because each person is a unique human being and shares a common humanity with their fellow citizens of the world.

References to human dignity were not included in the US Constitution. In the *Declaration of the Rights of Man and the Citizen*, the concept of dignity was linked to superiority.⁵⁶ Eleven years after the enactment of Bunreacht na hÉireann, the aspirational *Universal Declaration of Human Rights 1948* articulated the right to dignity of the human person in its Preamble and other articles.⁵⁷ Many post-World War II constitution builders made express provision for the right to dignity in their new constitutions.⁵⁸ There is great truth in the words of United Kingdom Supreme Court Justice, Baroness Hale of Richmond, where she points out that:

⁵³ *Concise Oxford Dictionary* (10th ed, Oxford University Press, 2001) at 401.

⁵⁴ (*No.2*) [1996] 2 IR 79 at 163 (judgment of Denham J.)

⁵⁵ [1980] IR 32 at 56.

⁵⁶ “All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.” See www.hrcr.org/docs/frenchdec.html.

⁵⁷ See Articles 1, 22 and 23 available at www.hrcr.org/docs/universal_decl.html. As does the Preamble to the *United Nations Charter 1945*, see www.un.org/en/documents/charter/index.shtml, the International Covenant on Civil and Political Rights, see <http://www2.ohchr.org/english/law/ccpr.htm> and the International Covenant on Economic, Social and Cultural Rights, see <http://www2.ohchr.org/english/law/cescr.htm>.

⁵⁸ The Preamble to the French Constitution of 1946 required protection of the dignity of the

“It does not take much imagination to understand why those countries, recently emerged from regimes which did not respect the equal dignity of all human beings, should entrench such concepts in their laws.”⁵⁹

From a regional European perspective, the *European Convention on Human Rights and Fundamental Freedoms 1950* does not expressly acknowledge the right. The Court of Human Rights has interpreted the document as including a respect for the equal dignity of all human beings.⁶⁰ The first Chapter of the *Charter of Fundamental Rights of the European Union 2009* is dedicated to “Dignity”. Article 1 concerns human dignity and proclaims that:

“Human dignity is inviolable. It must be respected and protected.”

This appears to be the first occasion that dignity is a free standing right in European law. The subsequent Articles concern the right to life in Article 2, the right to respect for physical and mental integrity in Article 3, the prohibition of torture and inhuman or degrading treatment or punishment in Article 4 and the prohibition of slavery and forced labour in Article 5.

A recently published report examined references to dignity in 701 constitutional texts in force around the globe since 1789, including more than 90% of constitutions written since World War II. In the 1930’s less than 10% of constitutions made any

human person from all forms of degradation. Article 1(1) of the German Basic Law of 1949 provides that: “The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority”. Article 2 of Israel’s Basic Law on Human Dignity and Liberty, passed in 1992, states that “There shall be no violation of the life, body or dignity of any persons as such”. Section 10 of the Constitution of the Republic of South Africa of 1996 on “Human Dignity” provides that “Everyone has inherent dignity and the right to have their dignity respected and protected”. See Hale “Dignity”, The Ethel Benjamin Commemorative Address 2010, delivered at Dunedin Public Art Gallery, Dunedin, New Zealand on 7th May 2010 available at www.supremecourt.gov.uk.

⁵⁹ *Ibid.*

⁶⁰ *Gündüz v Turkey* App no 35071/97, Judgment of 4 December 2003, at paragraph 40 where the Court noted that “Having regard to the relevant international instruments (see paragraphs 22-24 above) and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society.” In *Pretty v United Kingdom* (2002) 35 EHRR 1 at para 65 the Court stated that “The very essence of the Convention is respect for human dignity and human freedom.”

reference to human dignity.⁶¹ Ireland is a notable exception to this trend and our Preamble is mentioned as such in the report. In 2000, about 70% of constitutions referred to dignity. As Professor Binchy has remarked:

“Constitutions throughout the world have been rushing to embrace respect for dignity.”⁶²

The embrace of dignity as a concept in international and European law since World War II further illustrates how far-sighted the Constitution of Ireland was in 1937. Of course the concept of dignity is common to many faiths.⁶³ Perhaps, the Constitution owes some of its originality and respect for rights to the fact that the Drafters had lived through a traumatic period in the history of our country. Irish people had witnessed the events of 1916, the War of Independence 1919-1921 and the Civil War 1922-1923. Irish history also includes the tragedy of the Great Famine, sickness and death, mass evictions and forced emigration. One can only speculate whether first-hand experience and an acute sense of history played a part in the inclusion of Fundamental Rights in the Constitution.

Aspects of Brehon Law

While we are celebrating seventy five years of our Constitution, it is appropriate to recall the indigenous legal system based on the Brehon laws which existed in this island for 1,000s of years. In recognising the dignity of the person, perhaps the Constitution is displaying a folk memory of the Irish people. Under the Brehon law it was an offence to shame a person.

Professor Fergus Kelly explains that under Brehon law verbal assaults on a person are regarded with the utmost seriousness. In old Irish, the words for “to satirise” (áerad and rindad) mean “to strike” and “to cut”, clever words which vividly describe the sting felt by those at the wrong end of satire. There was a wide range of such assaults

⁶¹ *Report on Human Dignity* 27th January 2011 available at <http://constitutionmaking.org>.

⁶² Binchy “Dignity as a constitutional concept” in Carolan and Doyle (eds) *The Irish Constitution: Governance and Values* (Dublin, Thomson Round Hall, 2008) at 307.

⁶³ The papal encyclical *Rerum Novarum* of 1891 was concerned with the dignity of work and the papal encyclical of 1931 *Quadragesimo Anno* had human dignity as a central theme.

recognised in Brehon law, for example mocking a person's appearance, publicising a physical blemish, coining a nickname which sticks, composing a satire, and repeating a satire composed by a poet in a distant place. A person could be guilty of satire even by mocking through gesture another's physical defect or peculiarity. The Bretha Nemed Déidenach adds the offences of taunting, wrongfully accusing another of theft, and publicising an untrue story which causes shame, as requiring payment of the victim's honour-price.⁶⁴ According to commentary, a heavy fine is levied on anyone who mocks the disability of an epileptic, a leper, a lame man, a blind man or a deaf man.⁶⁵ Thus, respect for one's fellow human beings and their dignity was a significant aspect of the law on this island more than a 1,000 years ago.

Judicial Review

Another innovative aspect of the Constitution may be found in Article 34.3.2, which expressly confers upon the High Court and the Supreme Court the power to review the constitutionality of legislation. This was a novel measure, to explicitly entrust to the judiciary, especially as the British tradition of parliamentary sovereignty dominated Ireland until the enactment of the Constitution. Even the United States Constitution of 1788, a product of the American Revolution, did not explicitly provide for this jurisdiction.⁶⁶ The power of constitutional review of Acts of Congress was not asserted until the case of **Marbury v. Madison** by Chief Justice Marshall of the United States Supreme Court. He wrote that:

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”⁶⁷

⁶⁴ Kelly *A Guide to Early Irish Law* (Dublin, Dublin Institute for Advanced Studies, 1988) at 137-138.

⁶⁵ *Ibid* at 95.

⁶⁶ See Mr. Justice Walsh writing extra-judicially in “The Judicial Power, Justice and the Constitution of Ireland” Curtin and O’Keeffe (eds) *Constitutional Adjudication in European Community and National Law* (Dublin, Butterworth (Ireland) Ltd, 1992) 145 at 155 and Beytagh *Constitutionalism in Contemporary Ireland: An American Perspective* (Dublin, Round Hall, Sweet & Maxwell, 1996) at p.14.

⁶⁷ (1803) 5 US 137. See also Chief Justice Marshall’s statement that a written constitution was “...the greatest improvement on political institutions....”

The **Marbury** decision was the subject of much criticism and, in so far as condemning a statute is involved, it was not operated until 1857, in the infamous decision in **Scott v. Sandford** which struck down as unconstitutional a law condemning slavery.⁶⁸

As I have said previously:

“Ireland led the common law world in 1937 by expressly stating in the Constitution that the jurisdiction of the Superior Courts shall extend to the question of the validity of any law having regard to the provisions of the Constitution. This, perhaps more than any other aspect of the Constitution, signalled the nature of the State, its divergence from the system of government in the United Kingdom, and the parallels which may be drawn with the Constitution of the United States of America.

The power to review the constitutionality of legislation expressly given by the Constitution to the Superior Courts was a novel aspect of the Constitution in 1937. No such power existed expressly elsewhere in common law jurisdictions, such as the United Kingdom, Australia, or Canada.... Consequently, Ireland, in 1937, led the common law countries by giving such a power expressly to the Superior Courts.”⁶⁹

It is clear from the documents now available from the archives that the Drafters understood the power structure being established. It was a visionary approach to a democracy with three organs of State, where the Superior Courts were entrusted with judicial review of legislation.⁷⁰

⁶⁸ (1857) 60 US 393. See discussion by McCarthy J in *Norris v Attorney General* [1984] IR 36 at 89.

⁶⁹ *A. v Governor of Arbour Hill Prison* [2006] 4 IR 88 at 146.

⁷⁰ “Leadership in Human Rights Law, Past and Future” speech to the Irish Human Rights Commission and Law Society of Ireland Public Conference, 16th October 2004.

European Echoes

I would like to reflect upon some European echoes which may be found in the Constitution. For example, Article 40.5 of the Constitution provides that:

“The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.”

It is very similar to Article 7 of the Constitution of the Irish Free State which provided that:

“The dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law.”

Dr. Leo Kohn, writing of this Article, stated that:

“The provision of the Irish Constitution guaranteeing the security of the dwelling against administrative interference is drawn up on the model of the Continental declarations, though more cryptically worded than most of the latter”.⁷¹

Its succinctness belies its significance as one of the most important, clear and unqualified protections given by the Constitution to the citizen. Perhaps it has echoes also of the bitter Irish race memory of evictions.

Article 40.5 was strongly influenced by constitutional texts of European civil law countries. We know that Mr. Hearne and the drafters studied an array of European constitutions during the drafting process. The Hon. Mr. Justice Hogan has recently illustrated how Article 40.5 of the Constitution is quite similar to Article 115 of the German (Weimar) Constitution of 1919.⁷² The German Basic Law “GrundGesetz” of 1949 has a similar provision in Article 13. This provides in the relevant part that:

⁷¹ Kohn *The Constitution of the Irish Free State* (London, George Allen & Unwin Ltd, 1932) at 160.

⁷² The Binchy Memorial Lecture, Burren Law School, “Some thoughts on the origins of the Constitution”, 5th May 2012 delivered by Mr. Justice Gerard Hogan of the High Court.

“(1) The home is inviolable.

(2) Searches can only be ordered by a judge, or in the case of imminent danger also by other organs determined by statute; they may only be performed in the form prescribed by the law.”

Echoes also reverberate between the cases of the courts of Europe. For example, a decision of the German Constitutional Court (Bundesverfassungsgericht) of 20th February 2001 (BVerfG, 2 BvR 1444/00) has striking similarities to that in the case of **Damache v Director of Public Prosecutions** decided earlier this year where the Supreme Court held that section 29 (1) of the Offences against the State Act 1939 as inserted by section 5 of the Criminal Law Act 1976 was repugnant to the Constitution in light of Article 40.5.⁷³

The reasoning of the German Constitutional Court has many similarities to the reasoning in the **Damache** case. An English translation of that decision shows that the German Constitutional Court underlined “the importance of the reservation of competence to a judge in the matter of investigative measures” for the issue of search warrants in accordance with the Criminal Procedural Code. This “aims at ensuring a preventative scrutiny of the [search] through an independent and neutral authority. The Basic Law assumes that judges on the basis of their personal and professional independence and their strict subordination to law can best and most securely uphold the rights of those individually affected”. The judge “has the duty, by means of an appropriate formulation of the search warrant within the bounds of what is possible and reasonable, to ensure that the invasion of fundamental rights remain measurable and controllable”. The Court reiterated that “the wording and scheme of Article 13.2 of the Basic Law affirm that the judicial warrant authorising a search is to be regarded as the rule, a non-judicial warrant the exception” where there are urgent circumstances based on factual circumstances.

In the **Damache** case, the Supreme Court had similar reasoning and noted that the issuing of a search warrant is an administrative act and must be exercised judicially. Outlining the principles to be followed, it was explained at paragraph 51 that:

⁷³ *Damache v Director of Public Prosecutions* [2012] IESC 12.

“For the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of search.”

The Supreme Court also noted at paragraph 58 that it is best practice to keep a record of the basis upon which a search warrant is granted. In its decision, the German Constitutional Court stated that a note should have been made in the file recording the circumstances supporting the issue of the warrant and that the note made by the police on the file had contained no statement concerning those circumstances.

The Court of Criminal Appeal recently recalled that the essence of the constitutional guarantee in Article 40.5 being the “inviolability” of the dwelling is one with very deep roots in the European constitutional tradition.⁷⁴ For example, Article 3 of the short lived republican Constitution of France of 1848 had provided that the residence of every person dwelling in French territory was “inviolable”. This same phrase is to be found in relation to the protection afforded to the dwelling in Article 15 of the Belgian Constitution, Article 72 of the Danish Constitution and Article 14(1) of the Italian Constitution. Article 115 of the German (Weimar) Constitution of 1919 provided that the dwelling was a “sanctuary and is inviolable”, save that exceptions might “be permitted by authority of law.”

Thus, we see strong links between the Constitution and that of our European neighbours. Also, the recent Supreme Court case and the case of the German Constitutional Court discussed above illustrate a very similar reasoning process of the two European courts, arrived at without reference to each other, in upholding the constitutional right of inviolability of the dwelling.

It is significant that our Constitution’s development was influenced by such a diversity of comparative constitutional law materials, which were carefully examined by the Drafters and incorporated in the text. They were men deeply interested in world affairs and the legal systems of other countries. John Hearne was a

⁷⁴ *DPP v Timothy (Ted) Cunningham* [2012] IECCA.

comparative constitutional lawyer and so it is not surprising that such careful international comparative research was undertaken by the Drafters.⁷⁵

Constitutional Court

I would like to say a few words about a Constitutional Court, regret its absence from our Constitution, and the missed opportunity which was under discussion in the 1930s.

Article 34 of the Constitution establishes the High Court as a Court of First Instance and the Supreme Court as the Court of Final Appeal. However, it is fascinating to remember that a specific Constitutional Court was also considered as being part of the courts structure by the Drafters and Mr. De Valera. The notion of a Constitutional Court was first raised in the Report of the Constitution Committee dated 3rd July 1934 in its review of the Constitution of Saorstát Éireann. It considered that the power of deciding the validity of laws having regard to the Constitution should be vested in one of three possible institutions:-

- the Supreme Court alone, or
- in a special “Constitution” Court appointed or designated for that purpose, e.g. a combination of the Supreme and High Courts, or
- in the High Court with a right of appeal to the Supreme Court as at present.⁷⁶

Mr. Justice Hogan has written that the circumstantial evidence suggests that that proposal for such a Court, which is synonymous with the civil law tradition, came from Mr. Hearne.⁷⁷ Mr. Hearne wrote a memorandum dated 10th December 1935 “on

⁷⁵ Keogh has written of Hearne and Moynihan that they “transcended the limitations of their own times. Both helped to infuse the document with a balance and basic humanism which stood in marked contrast to the legal positivism of the decade in continental Europe... The broad-based culture of these men prevented the triumph of extremism”. See Keogh “The Irish Constitutional Revolution: An Analysis of the Making of the Constitution” in Litton (ed) *The Constitution of Ireland 1937-1987* (Dublin, Institute of Public Administration, 1988) at 65 cited by Hogan “De Valera, the Constitution and the Historians” (2005) 40(1) *Irish Jurist* at 293 fn 87.

⁷⁶ See Hogan *supra* n.6 at 84.

⁷⁷ Hogan “John Hearne and the Plan for a Constitutional Court” (2011) 18(1) *Dublin University*

the methods for ensuring the constitutionality of legislation in other nations” and made reference to the Constitutional Courts established in some jurisdictions, such as Czechoslovakia.

The original copy of this memorandum in UCD Archives shows that Seán Murphy, Assistant Secretary to Mr. De Valera, made the following handwritten note:-

“President, Herewith memorandum on Constitutional Courts in other countries which you asked for this morning.”

This suggests that a keen interest was being taken in the development of such a court.

There is a very interesting undated memorandum prepared by Mr. Hearne for Mr. De Valera entitled “Article on the Courts and a Constitutional Court”. Mr. Hearne prepared a draft section for the Constitution whereby:-

“The Courts shall comprise Courts of First Instance, a Court of Final Appeal, and a Constitutional Court.”⁷⁸

In this draft, the Courts of First Instance were to include a High Court with full original jurisdiction to determine all matters of questions whether of law or fact, civil or criminal. The High Court was not to have jurisdiction to entertain or determine the question of the validity of any law but could refer a question to the Constitutional Court. The Court of Final Appeal was to be the Supreme Court. The Constitutional Court was to have exclusive jurisdiction to determine the question of the validity of any law having regard to the provisions of the Constitution and its decision on every such question was to be final and conclusive.

What is interesting about this draft is that Mr. De Valera made a handwritten note about the High Court:-

“but it may refer question to Constitutional Court”.

In this context, he also wrote the words “State Case”.

Law Journal 75.

⁷⁸ Section 1, Article XVI “The Courts”.

Another early draft included a section on the Courts. It provided for “Courts to be organised and to exercise jurisdiction as heretofore”.⁷⁹ In response to this Mr. De Valera made a handwritten note about the possibility of establishing:-

“Special Tribunals: administrative etc?”

Thus we can see that the Drafters were actively considering the establishment of other courts, other than those established under the 1922 Constitution.

While Mr. Hearne’s idea of a constitutional court did not in the end see the light of day, the most advanced plan for such a Court can be found in his 14th October 1936 draft, for what was later to become Article 34 of the Constitution. Ultimately, the draft of 11th January 1937 provided that the constitutional jurisdiction would be vested exclusively in the Supreme Court. A constitutional court such as in civil law countries would have been a major change for a common law jurisdiction.⁸⁰

Following the Oireachtas debates on the Draft Constitution, Mr. De Valera changed his mind thereby giving the High Court at first instance constitutional jurisdiction, with an appeal to the Supreme Court.

All of the documentary evidence shows that the Drafters were live to the issue of establishing other courts, such as administrative tribunals and a constitutional court. To have such additional courts today would be of considerable assistance in determining the very large number of cases that come before the courts. Indeed, the debate on courts structure and organisation continues today.

⁷⁹ Part V (The Courts), Article 55.

⁸⁰ See Hogan *supra* n.6 and *supra* n.75.

The Future

An Omission

The passage of time has highlighted some weaknesses in regard to the structure and organisation of the Superior Courts.

Article 34 of the Constitution establishes the High Court as a Court of First Instance and the Supreme Court as the Court of Final Appeal. Article 34.3.4 provides for courts of local and limited jurisdiction. There is no express provision enabling the Oireachtas to establish other courts. This is in stark contrast to the situation in other common law jurisdictions.

(i) Comparative Perspectives

Australia

Courts

The Commonwealth of Australia Constitution of 1901, Chapter III entitled “The Judicature”, sections 71 to 80 outlines the federal courts structure.

Section 71 provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. Thus while the High Court cannot be abolished by Parliament, other federal courts may be established or disestablished as the case may be.

The so called “Chapter III Courts” which have been established by Parliament at a federal level include the Federal Court of Australia, the Family Court of Australia, and the Federal Magistrates’ Court of Australia. The power of amendment to the

federal courts structure, which might include the creation of new federal courts, is vested solely in Parliament.⁸¹

United States of America

Courts

The Constitution of the United States 1788, Article III section 1 establishes the Supreme Court of the United States and refers to the power of Congress to create other “inferior courts”. Article III courts include the United States Courts of Appeals, which Congress established with the enactment of the Judiciary Act of 1891. Interestingly this was designed to relieve the caseload burden in the Supreme Court.⁸²

Other federal courts established were the United States District Courts and the US Court of International Trade. Thus Congress is responsible for amendment to the superior courts structure of the United States at a federal level.

South Africa

Courts

The Constitution of the Republic of South Africa 1996 establishes the courts in Chapter 8.⁸³ Section 166 establishes the courts which are the Constitutional Court (the highest court in constitutional matters), the Supreme Court of Appeal (the highest court in all other matters), the High Courts including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts, the Magistrates’ Courts and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts. Therefore, while certain courts are specifically established, Parliament is granted the power to create other courts by legislation.

⁸¹ See www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution.

⁸² See www.fjc.gov/history/home.nsf/page/courts_of_appeals.html.

⁸³ See www.info.gov.za/documents/constitution/1996/index.htm.

India

Courts

The Constitution of India establishes the Supreme Court (Part IV, Article 124) and the High Courts for States (Part V, Article 214) and subordinate courts (Part VI).⁸⁴ The Indian Constitution is the longest written constitution in the world and since 1950 it has been amended by the federal parliament twice per year, on average. Part XX, Article 368 of the Constitution, provides that an amendment must be approved by a two thirds majority of members of each house of the Parliament of India and half the total members should be present during voting. Certain amendments must also be ratified by the legislatures of at least one half of the states. Thus Parliament may amend the Constitution, and this includes the court structure.

Canada

Courts

The Constitution Act 1867 divides authority for the judicial system in Canada between the federal government and the ten provincial governments.⁸⁵ Section 101 of the Act gives the federal government authority to establish a general court of appeal for Canada and “any additional courts for the better administration of the laws of Canada”. This has paved the way for the creation of the Federal Court of Appeal, the Federal Court and the Tax Court of Canada as well as the Supreme Court, which is the General Court of Appeal for Canada.

⁸⁴ See http://india.gov.in/govt/constitutions_india.php.

⁸⁵ See http://laws.justice.gc.ca/eng/Const/Const_index.html.

United Kingdom and New Zealand

Courts

The United Kingdom and New Zealand are examples of common law jurisdictions that do not have a written constitution. Therefore, change to the unwritten constitution is brought about by Parliament. Recent examples of how this applied to the superior courts structures are Part 3 of the Constitutional Reform Act 2005, which established the Supreme Court of the United Kingdom in place of the Judicial Committee of the House of Lords, and the New Zealand Supreme Court Act 2003, which established the Supreme Court of New Zealand.⁸⁶

For consideration

Our Constitution rigidly provides for a Supreme Court and a High Court and establishes the essential constitutional responsibilities of these courts. For a number of years, I have advocated the establishment of a Court of Appeal set between the High Court and the Supreme Court. This would transform Ireland's courts structure and bring about tangible benefits, including a decrease in waiting times for litigants, improve conditions for commerce, which in turn would aid economic growth and development.⁸⁷ Our Supreme Court, as in every other common law jurisdiction, could then focus on cases relating to constitutional law or to cases of exceptional importance.

(i) The Current situation

The current situation of the Supreme Court is unsustainable.

The following table shows the Supreme Court appeals trend over the period 2007 to 2011:

⁸⁶ See <http://www.legislation.gov.uk/ukpga/2005/4/contents> and <http://www.legislation.govt.nz/act/public/2003/0053/latest/DLM214028.html>.

⁸⁷ See speech to the Institute of Directors, 2nd March 2012.

Year	Appeals Received	Appeals disposed of
2011	499	258
2010	466	309
2009	499	341
2008	443	334
2007	373	276

To date in 2012 a total of 255 new appeals have been filed, which confirms that this trend continues and that in the region of 500 new appeals will likely be lodged again this year.⁸⁸

There are 486 appeals in the general list ready for hearing, and the average waiting time for individual appeals in this list is now in excess of 40 months. The time estimated by appellants to hear these appeals is 455 court hearing days. Accepting this estimate at face value, and assuming that the list stood still, it would still take the Court three and a half years to hear and decide all of the appeals now lodged.

There are currently 40 appeals in the Priority List (included in the 486 figure mentioned above). The average waiting time for appeals in the Priority List is 9 months.

The waiting periods are increasing, given the increase in the complexity of issues for determination by the Court, the development of new areas of litigation, and the sustained level at which appeals continue to be filed.

There is effectively an automatic right of appeal to the Supreme Court from the High Court in most civil cases. A troubling feature recently has been that in addition to the usual interlocutory and substantive appeals being filed, there is evidence that High Court case management directions are now being appealed in some of the very complex and lengthy commercial and fiscal cases before the High Court.

⁸⁸ 12th June 2012.

There were 8 judges of the Supreme Court available in 1998⁸⁹ to hear appeals from 24 High Court judges⁹⁰ and the present position is that there are still 8 judges available to hear appeals from an increased total of 36 High Court judges (a 50% increase in High Court capacity). The Supreme Court does not have the capacity to process expeditiously the accumulating scale of the output from the High Court.

There is a fundamental or structural issue at the heart of the problem faced by the Court, legal practitioners and the public. The Court cannot hope to hear and decide all of the appeals in its current waiting list, and also maintain the waiting time in its general list at anything approaching a reasonable level. The list will continue to be proactively managed, and new initiatives are being introduced, to optimise the use of court time, but the stark reality is that the fundamental problem will remain until a structural solution is implemented.

In 2009 the Working Group on a Court of Appeal concluded, *inter alia*:-

- The present Superior Court structure was appropriate for Ireland in the 20th century.
- While the infrastructure of the High Court has been developed to meet the growth in litigation, no similar development has occurred in the Court of Criminal Appeal or the Supreme Court.
- The High Court has grown from seven judges in 1971 to 36 (in 2012). There has not been a proportionate development in the Supreme Court, which in 1961 consisted of five judges and today consists of eight. Yet the Supreme Court is receiving all civil appeals from an expanded High Court.
- The establishment of a Court of Appeal is a necessary infrastructural reform which would have a transformative effect on the efficiency and effectiveness of the Irish court system.

⁸⁹ Section 6 Court and Court Officers Act 1995.

⁹⁰ Section 2 Courts (No 2) Act 1997.

- The best option for Ireland in the 21st Century is to have a Court of Appeal amalgamating the Court of Criminal Appeal into a new Court, which would hear both civil and criminal appeals.
- The new Court of Appeal should be established in law and provided for in the Constitution.

The Working Group concluded that the primary role of the Supreme Court is not to engage in error correction. Its main role is to engage in explaining the Constitution to the People. This process of dialogue which occurs in the Supreme Court must be brought to as many of the people as possible and explained as thoroughly as possible. The Working Group stated that if we really believe in a Constitution where the People gave the law to themselves then we must allow the Court in which the Constitution is interpreted to function as well as it possibly can. We must ensure that the Constitution remains vital, engaged, and well understood.⁹¹

The current structure of the courts is unsustainable. A Court of Appeal for both civil and criminal cases is needed.

The Government has committed to the establishment of a Court of Appeal in its *Programme for Government 2011-2016*.⁹²

As the survey of comparative constitutions shows, Ireland would appear to be unique in terms of amending the superior Courts structure.

An amendment to the Constitution to establish a Court of Appeal as advised by the Working Group on a Court of Appeal, would meet the need for a Court of Appeal.

⁹¹ Report and Executive Summary of the Working Group on a Court of Appeal (May 2009). available at www.courts.ie. See “Publications” and click on “Reports and Strategic Plans” section.

⁹² “We will take the necessary steps to create a permanent Civil Court of Appeal” – Programme for Government 2011 – 2016.

(ii) Wider context

However, this matter may be viewed in a wider context, taking into consideration the possibility and benefit of other courts also. We need to look into the future and beyond the establishment only of a Court of Appeal.

The Drafters of the Constitution could never have anticipated the growth in the volume of litigation, its complexity and diversity, throughout the legal system. Litigation reflects the radical changes in society which have occurred in Ireland in the last seventy five years, especially in the last twenty five years. The court structure required in 2012 is different to that of 1937.

Thus, there is merit in looking at the needs of the court structure in a wider context, and bearing in mind future potential needs. Therefore, rather than a specific amendment for a specific court, perhaps consideration should be given to an amendment giving to the Oireachtas the power to establish courts other than those of limited and local jurisdiction. Such an amendment to the Constitution could ask the People in a referendum the fundamental question: Do you approve that the Oireachtas be given the power to establish additional courts, including courts of superior jurisdiction, for the administration of the laws of Ireland?

(iii) An example - Family Law Courts

Over the last twenty years there has been, and there continues to be, a growth in the volume and complexity of family law cases. These cases require specialist knowledge and skill in a specialist family court structure, whereby issues arising in family law cases could be addressed in a holistic manner, as appropriate, including access to mediation and to other forms of support.

The Australian Federal Family Court is an example of a specialist superior court of record established under Chapter 3 of the Australian Constitution, with the enactment of the Family Law Act 1975. It is a federal court covering all States and Territories, save Western Australia which has a separate Family Court. The Family Court has its own Chief Justice and is comprised of specialist judges with a background in family

law. The Court has its own appellate division and separate funding.⁹³ It deals with more complex family law matters, such as Hague Convention on child abduction cases, international relocation cases and complicated financial cases arising on the break up of marriage. Support services such as counselling and mediation are available to litigants.

The Federal Magistrates Court was established by the Federal Magistrates Act 1999 as a lower level federal court of record that provides a simple and accessible alternative to litigation in the superior federal courts. It deals with less complex family law matters which are likely to be decided quickly and is presided over by a Chief Magistrate.⁹⁴

At present family law cases in this State are dealt with, for the most part, by the District Court and the Circuit Court. The Circuit Court and the High Court have concurrent jurisdiction in family law matters, with a right of appeal from the Circuit Court to the High Court. The Circuit Court jurisdiction in family law is wide including judicial separation, divorce, nullity and appeals from the District Court. The statistics for family law matters in the courts show year on year increases. The Courts Service Annual Report 2010, and soon to be released figures for 2011, shows that there has been a very significant increase across the board in family law cases.

The Australian model of a holistic family court system is beginning to emerge in the pioneering work being undertaken at Dolphin's House in Dublin, where together with the District Courts mediation and counselling is available on site to parties contemplating litigation.

⁹³ See www.familycourt.gov.au and www.familylawcourts.gov.au. See also Alastair Nicholson CJ and Margaret Harrison, "Family Law and the Family Court of Australia: Experiences of the First 25 Years" [2000] MelbULawRw 30; (2000) 24(3) Melbourne University Law Review 756 available at www.austlii.edu.au/au/journals/MULR/2000/30.html. See speech by Diana Bryant CJ, "Walrus and the changing shape of family law in Australia", November 2008 available at www.familycourt.gov.au and Martin "The Denham Reports: A critical analysis" [1999] *Irish Journal of Family Law* at 18.

⁹⁴ See www.fmc.gov.au and www.familylawcourts.gov.au.

There is no doubt that the law relating to children and families is one of the most important areas of the law. The Honourable Justice Rosalie Silberman Abella of the Supreme Court of Canada once said that:

“Family law is the legal system’s metaphor, the crucible with which so much else in law intersects. It offers some of the most dynamic layers through which to examine the role of law generally, and the role of those professionals who function on its behalf. It is also, because it is the area of law by means of which most people will come into contact with it, the area by which the legal system will be judged by most people.”⁹⁵

Judicial decisions on children and families have profound effects lasting down through the generations. So it is vital that these decisions are made with the greatest of expertise and the best possible multidisciplinary resources at the court’s disposal.

For many years it has been suggested that there be reform of the family courts system.⁹⁶ The *Programme for Government 2011-2016* commits to the introduction of a constitutional amendment to allow for the establishment of a distinct and separate system of family courts to streamline family law court processes and make them more efficient and less costly, as soon as resources as permit.

(iv) For consideration

Thus, I see merit in considering an amendment to the Constitution as discussed earlier empowering the Oireachtas to enable this reform. Also, other new courts could then be established, as in other jurisdictions, to administer law in specific areas.

⁹⁵ Keynote address at the 1994 National Family Law Programme on 18th July, Victoria, British Columbia.

⁹⁶ The 1985 Report of the Joint Oireachtas Committee on Marriage Breakdown recommended the establishment of a Family Tribunal with its own separate and unique structure at 106. See Martin *supra* n.93. The 1996 Law Reform Commission Report on Family Courts (see www.lawreform.ie), the 1998 6th Report of the Working Group on a Courts Commission (see www.courts.ie), the 2007 Family Law Reporting Pilot Project and 2009 Report of the Family Law Reporting Project Committee (see www.courts.ie) were notable in calling for reform of the family courts system.

(v) An example – Environmental Courts

Another example is in relation to environmental law. This is a complex area of law and technology. Thus, in some jurisdictions there are specific courts, where judges sit with the benefit of technical assessors. For example, in New South Wales, Australia, there is a specialist Land and Environment Court which was established by the Land and Environment Court Act 1979. This Act vests power in the Court to determine environmental, development, building and planning disputes. The Court is highly specialised, with the same status as the Supreme Court of New South Wales, and is subject to the supervision of the New South Wales Court of Appeal. It consists of 6 judges including a Chief Judge and 9 Commissioners who are appointed on the basis of their qualifications, special knowledge or experience in one or more of the following areas:

- Administration of local government or town planning.
- Environmental, town or country planning.
- Environmental science, or protection of the environment and environmental assessment.
- Law and land valuation.
- Architecture, engineering, surveying or building construction.
- Natural resources management or administration and management of Crown lands.
- Aboriginal Commissioners also assist the Court in disputes arising under the Aboriginal Land Rights Act 1983.⁹⁷

⁹⁷ See www.lawlink.nsw.gov.au/lec. There are similar courts in Queensland, South Australia and Tasmania. For a topical discussion of environmental law and the role of judges see article by UK Supreme Court Justice, Lord Carnwath of Notting Hill “Judges for the environment: we have a crucial role to play” 25th June 2012 available at www.supremecourt.gov.uk.

Conclusion

We meet to mark an important anniversary in the life of our Constitution, the “Charter of the Irish People”, which orders the social, legal and political structure of the State.⁹⁸

The Constitution has provided the basic legal framework to the Irish People. However, time does not stand still and its inexorable passage undoubtedly raises new challenges. It is the People who will ultimately decide on how best to confront such challenges. A present day challenge, which I have outlined this evening, is the structure of our superior courts, which the Government has indicated will be considered by the People.

We owe a debt of gratitude to the Drafters of the Constitution, for this living instrument, which is at the core of our society.

⁹⁸ As per Gavan Duffy J in *The State (Burke) v Lennon* [1940] IR 136 at 155. See also Walsh “The Constitution and Constitutional Rights” in Litton (ed) *The Constitution of Ireland 1937-1987* (Dublin, Institute of Public Administration, 1988) at 86.