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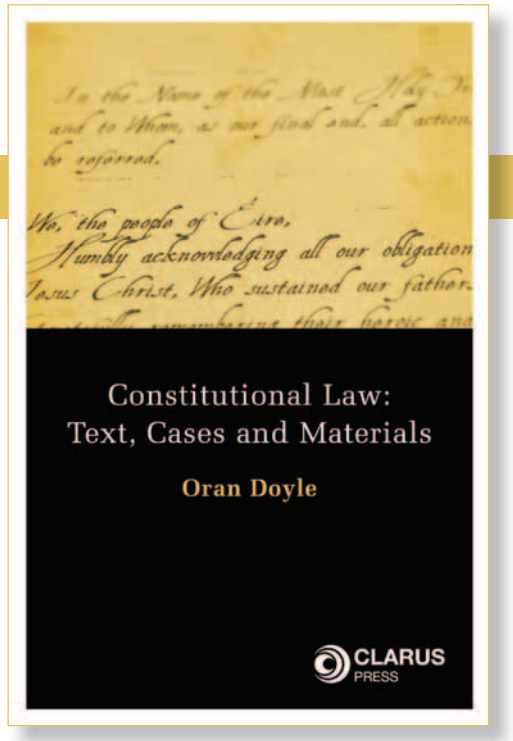
Constitutional Law: Text, Cases and Materials

Dr Oran Doyle



Constitutional Law: Text, Cases and Materials is a new publication by Clarus Press designed to meet the needs of students of this challenging and stimulating subject. Constitutional law is a core subject on all undergraduate law courses, and it must be passed for entrance to professional practice training courses in Ireland.

Adopting the casebook method, this book provides both an introduction to the general principles and themes in constitutional law and offers a critical insight and analysis that will be challenging to student, practitioner and academic alike. In doing so, it recognises that constitutional law is not just a body of abstract rules interpreted and applied by the courts. Instead, constitutional law is placed in its historical, intellectual and social context and presented as an ongoing attempt to determine the values that ought to inform governance in Ireland.

The important role of the courts in this process is recognised by the central space given to extracts from all the leading constitutional law cases. The author places these cases in context, identifying the issues that arose and the principles that emerged from the case law. In addition, there are many extracts from the secondary literature, intended to stimulate the reader to reach her own critically aware understanding of the subject.

Constitutional Law: Text, Cases and Materials provides the core of any undergraduate constitutional law syllabus. It will be invaluable to students, academics and practitioners and will undoubtedly become a leading authority for students who require a comprehensive yet accessible guide to constitutional law.

ABOUT THE AUTHOR

Oran Doyle lectures in constitutional law and jurisprudence in Trinity College, Dublin. He is the author of Constitutional Equality Law and is co-editor of the forthcoming Essays on Irish Constitutional Law. He has published widely on constitutional law, equality law and jurisprudence in Irish and international journals.

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Declaring Irish Law Incompatible with the Law of the ECHR – Where to Now?

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Introduction

On Friday 19th October 2007, Mr Justice Liam McKechnie made legal history when the announced his intention to issue a declaration stating that Irish law is incompatible with the law of the European Convention on Human Rights.[1] This was the first time such a declaration would be made by an Irish court. The case which prompted this revolutionary move was *Foy v An tArd Chlaraitheoir (No 2)* (2007).[2] This article will examine the background to the case, the evolving jurisprudence of the Strasburg court which lead to the present finding and finally will analyse a proposed way forward for the law to ensure this incompatibility is rectified.

Background to the Case

Dr Lydia Foy, the plaintiff in the case, is a male-to-female transsexual. As a child she experienced a strong and persistent gender dysphoria. Marriage and the birth of two children notwithstanding, she continued to feel thus and in 1992, after extensive consultations with various medical professionals, she underwent gender reassignment surgery. Subsequently she applied to the Registrar General to have her birth certificate altered to reflect her preferred gender identity and names. When the application was refused, she brought a judicial review of the Registrar's decision. This was the original decision *Foy v An tArd Chlaraitheoir (No 1)* (2002).[3] At its core, her argument alleged that the refusal of the Register General to alter her birth certificate amounted to a breach of her constitutional rights to equality,[4] dignity[5] and privacy,[6] as well as infringing her constitutionally protected right to marry.[7]

In support of these arguments Dr Foy adduced medical evidence from Professor Goren that male and females brains differ and that the size and shape of the hypothalamus in a male-to-female transsexual is the same as that to be found in 'normal' females and smaller than that found in 'normal' males. Thus Professor Goren concluded that there is a neuro-scientific basis to transsexuality, and therefore it should be considered as a form of intersexuality.[8] This argument did not find favour with the Court. McKechnie J concluded:

> "I am of the opinion that the evidence to date is insufficient to establish the existence of brain differentiation as a marker of sex and accordingly I do not believe that this court in such circumstances could give to it the legal recognition which is sought."[9]

In reaching this decision McKechnie J adopted into Irish law the biological and temporal test outlined by Ormrod J in *Corbett v Corbett* (1970)[10] where it was found that the congruence of the chromosomes, gonads and genitals at birth was determinative of the legal sex of an individual.

Flowing from this conclusion, McKechnie then considered the effect of Article 8 of the ECHR. Given the decision in the instant case was handed down a mere two days before that in *Goodwin v UK* (2002),[11] his Lordship concluded that confining the determining criteria to those which are biological was not inconsistent with the ECHR.[12] Thus in consideration of the medical evidence, the ECHR case law, UK case law and the domestic legislation, McKechnie concluded that when responding to Dr Foy's request, the Registrar General had no alternative but to refuse to issue an amended birth certificate.[13]

On the constitutional issues, the Court found that these rights were not absolute and that a balance had to be reached between the rights of the plaintiff and the rights of anyone else who would be affected by a change in her status, in addition to the rights of society in general.[14] Furthermore, his Lordship found that society had a legitimate interest in maintaining an accurate record of births, deaths and marriages within the State. A person's status as either a male or female determines many rights which s/he subsequently accrues e.g. succession, marriage, rights of motherhood etc. Thus McKechnie found that the recording of an individual's sex was a "vital element" in any system of registration.[15] Such a record forms "*a snap shot*" of matters on a particular day.[16] Furthermore, he found that the system would be "inoperable" if confirmation of a person's sex had to wait until some undefined future date when a person might or might not present as transsexual. The present system was "reasonable in reach and response" which criteria the State has a legitimate expectation of such a system.[17]

On the marriage issue, his Lordship found, that although judicially separated, Dr Foy remained in a valid subsisting marriage and thus could not exercise a right to marry in any meaningful way, therefore the argument was moot.

The Court seems to have been swayed by consideration for Mrs Foy and their children. To issue Dr Foy with an amended birth certificate with retrospective effect would impact hugely on their status. For Mrs Foy, her marriage would be a nullity as a valid marriage cannot exist between two persons of the same gender. In turn this would render their children non marital, and the inalienable and imprescriptible rights, all three currently enjoy as members of a constitutionally protected family would cease to exist.[18]

In his final remarks, the Judge, demonstrating his sympathy for the plaintiff's plight, admitted that "many of the issues raised in this case touch the lives, in a most personal and profound way, of many individuals and also are of deep concern to any caring society."[19] He concluded by calling on the Oireachtas to urgently review these matters.[20]

Two days later the European Court of Human Rights handed down their groundbreaking decision in *Goodwin v UK*.[21] Therefore the case was appealed to the Supreme Court. By the time the case was heard in that Court, the legal landscape had further changed by the introduction of the European Convention of Human Rights Act, 2003 and the Civil Registration Act, 2004 which established a new system of civil

registration and repealed all previous legislation on the issue. Thus the Supreme Court remitted the case back to the High Court to be considered in light of these changes.

Independently, a second application for the amended birth certificate was made to the Registrar in light of the events outlined above. This was again refused. This second refusal was brought to the High Court for judicial review — hence the second set of pleadings. The two cases were heard jointly. Unusually, both sides agreed to have the hearings before the original judge, Mr Justice McKechnie, as he was already familiar with all the facts and the medical evidence.

This article now moves to a consideration of the Strasburg jurisprudence which caused this seismic shift in the legal landscape.

Jurisprudence on Gender Recognition before the ECtHR

There is a significant body of case law from the European Court of Human Rights (ECtHR) on the issue of gender recognition. As in the *Foy* cases before the Irish courts, this has occurred in the context of transsexuals seeking to have their preferred gender identities recognised by the law. Such recognition has been sought as a part of the right to respect for a person's private life as guaranteed by Article 8 of the ECHR. In *Evans v UK* (2007)[22] the Court confirmed that the right to respect for private life is a broad concept and encompasses all aspects of an individual's physical and social identity including the right to personal autonomy and personal development.[23]

The first case to come before the Court on this issue of gender recognition was *Van Oosterwijck v Belgium* (1980).[24] Here a female-to-male transsexual sought to have his birth certificate altered to reflect his acquired gender. At a domestic level his application had been refused on the basis that there was no error in the birth certificate and no legal provision to enable recognition of "artificial changes to an individual's anatomy."[25] The Court upheld a preliminary objection on the part of the Belgian government that the applicant had failed to exhaust domestic remedies. The majority reached this decision by 13 votes to 4, despite the fact that there was no indication that domestic remedies could in any way resolve the problems faced by Van Oosterwijck as was pointed out in the dissenting judgment.[26] In ruling thus the majority of the Court did not engage with the substantive issue: whether the recognition of transsexuality brings ensuing protection for rights violations. In his partly concurring judgment, the Belgian Judge Gansof Van Der Meersch stated that:

> "A man or woman who is unable to obtain recognition of his or her sexual identity, an aspect of status which is inseparable from his or her person will be unable to play his or her full role in society. As has been said, the right to such recognition is a general principle of law."[27]

Here we see a judge acknowledging the importance of gender recognition to an individual's legal status. Secondly, the judge confirms that the right to recognition as a gendered being is a general principle of law.

In *Rees v UK* (1986)[28] the plaintiff, a female-to-male transsexual, argued that the UK violated his Article 8 rights by firstly refusing to issue him with an amended birth certificate and secondly denying him the right to marry as a result of the *Corbett* precedent. He contended, and in this argument he was supported by the submission of the European Commission on Human Rights,[29] that as he had been socially accepted as a man, it followed from Article 8 that the change in his sexual identity should be given full legal recognition.[30] The Government argued that it was a matter of striking a balance between the competing interests of the individual and society as a whole.[31] The Court noted that several states have introduced various methods by which the legal status of a transsexual is harmonised with their newly-acquired gender; other states, however, have no such legal recognition. Finding that there is little common ground on this point between the states, the Court held that every state has a wide margin of appreciation in this area.[32]

The Court found that the positive obligations under Article 8 did not extend so far as to obligate the UK to introduce a system of official documentation to prove civil status, which would have major administrative consequences and impose new duties on the entire population. Neither could Article 8 extend to the alternative possibility of recording changes in the birth register, and keeping the fact of the change secret, as this would involve the introduction of very detailed legislation as to the effects of the change in various contexts and the circumstance in which such secrecy should yield to a more compelling interest. On this basis the Court held by a majority of twelve to three, that there had been no violation of Article 8.[33]

The dissenting judgment made much of the pain and anguish that Rees had undergone to acquire a male body and that this evidenced "how real and intense was his desire to adopt a new sexual identity as far as possible."[34] Recognising the genuineness of his desire, the dissenting judgment merely calls for the annotation in the register he requested and the issuing of a short birth certificate which would indicate this new sexual identity,[35] and stressed that "there is obviously no question of correcting the registers by concealing the historical truth . . ."[36]

Ten years later these issues were reconsidered in *Cossey v UK* (1990).[37] Cossey was a male-to-female transsexual whose complaints were similar to those in the *Rees* case. She alleged violations of both Article 8 and Article 12. The Court concluded that there was no material difference between her claim and the claim in the *Rees* case, but nonetheless considered whether it should depart from the latter judgment. By the slimmest of margins (ten to eight), the Court ruled there was no violation of Article 8 citing the continuing lack of common ground between states and the wide margin of appreciation states enjoy in this matter.[38]

What make this case particularly interesting are the dissenting judgments. Re-iterating their dissent from *Rees*, Judges Bindschedler-Robert and Russo, argue that it would have been possible to achieve a balance between the public and individual interests at stake without necessarily upsetting the entire system of recording civil status. The fact that such a balance would not necessarily meet all of Ms Cossey's demands should not prevent the Court from giving it due weight in assessing whether Article 8 had been violated.[39] Judges MacDonald and Spielmann opined that there had been there have been clear developments in the law on this issue in Member States since the *Rees* case.

> "We are therefore of the opinion that, although the principle of the States' 'wide margin of appreciation' was at a pinch acceptable in the Rees case, this is no longer true today."[40]

In his separate dissenting judgment, Judge Martens cited approvingly the approach adopted in *MT v JT* (1976).[41] He

criticised the *Rees* case for focusing on technicalities[42] to the detriment of the essentials at issue:

> "The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate."[43]

Discussing the wish of transsexuals to be recognised in their acquired sexes, Martens found that this was a request which the law should refuse only if it had "truly compelling reasons",[44] in the absence of such reasons, as in this case, such a refusal 'can only be qualified as cruel'.[45] Therefore to refuse to recognise the acquired gender of a transsexual is, in the opinion of Martens, inconsistent with the principles of privacy and human dignity.

The following year the Court revisited the issue of recognising transsexuality and found that failure to recognise the acquired sex of a transsexual did indeed violate Article 8 in *B v France* (1992).[46] The applicant in this case was a male-to-female transsexual who had petitioned the courts in France for a declaration that she was of the female sex in order that she might marry. The applicant claimed that French law violated her rights under article 8 for three reasons. Firstly, under French law, a person could not legally assume names other than those on their birth certificate. Secondly, French law provided for the updating of entries in the civil status register by marginal annotation e.g. in the case of adoption, marriage or divorce, access to which was strictly regulated. Thirdly and finally, the first digit of the National Institute for Statistics and Economic Study (INSEE) number denotes sex: "1" is for males and "2" for females. This number is used for social insurance purposes and appears in the national identification register of natural persons. Therefore the number always indicated that the birth sex of B differed to her apparent sex and this was obvious to potential employers and anyone else who needed to use this number.

The Court considered it undeniable that attitudes had changed since the *Rees* and *Cossey* decisions, that science had progressed and increasing importance is attached to the problem of transsexualism.[47] On the basis of the three arguments outlined above it was decided by a majority (15 to six) that there had been a violation of Article 8. Some of the dissenting judgments criticise that of the majority for not outlining specifically of what the violation of Article 8 consisted.[48] The Court merely stated of the above three points "that the inconveniences complained of by the applicant in this field reach a sufficient degree of seriousness to be taken into account for the purposes of Article 8."[49] In other words, her ability to simply live her life was unduly interfered with.

The Court again cited the margin of appreciation afforded to contracting states as its reason for refusing to grant recognition sought by the applicants in *Sheffield and Horsham v UK* (1999).[50] Here the applicants were both male-to-female transsexuals and complained that the law in the UK which necessitated the disclosure of their former sexual identities in certain contexts breached Article 8 of the ECHR, amongst other articles. The applicants alleged that the UK had failed to comply with its positive obligation under that Article by failing to take positive steps to modify the existing system of law.[51] The Court found that the lack of a common approach to the issue of the repercussions of legal recognition of post-operative transsexual persons within the member states of the Council of Europe, did not give rise to positive obligation on the part of the UK to legally recognise the acquired gender of such persons. Thus the Court held by a slim majority (11 to 9) that there had been no violation of Article 8. However, the Court drew attention to its statement in the *Rees* case that this area of the law would have to be kept under review, having regard to scientific and societal developments and noted that the UK had not taken any steps to keeps these issues under review.[52] In his concurring opinion Judge Freeland warned that "continued inaction on the part of the respondent State, taken together with further developments elsewhere, could well tilt the balance in the other direction."[53]

In their joint dissenting opinion Judges Bernhardt, Thor Vilhjalmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu state that in the years since *Rees* was decided there have been many important developments in this area and draw attention to the fact that UK law has remained at a "standstill" in this regard.[54] Referring to the differing solutions proposed by the various member states, the minority found that:

> "the essential point is that in these countries, unlike in the United Kingdom, change has taken place — whatever its precise form is — in an attempt to alleviate the distress and suffering of the post-operative transsexual and that there exists in Europe a general trend which seeks in differing ways to confer recognition on the altered sexual identity."[55]

For Judge Van Dijk, the core of this case involved the issue of the fundamental right to self determination.[56] According to him, this right is not expressly enunciated in the ECHR, but lies at the core of many of the rights contained therein, including the right to respect for private life in Article 8.[57] In considering whether a fair balance had been struck within the meaning of Article 8(2), Van Dijk reiterated that many other countries had in various ways managed to accommodate transsexuals within the law and thus:

> "[i]t is my firm belief that British society, or the English legal system, cannot have such specific features in this respect that these require and justify an interference of such a scope in the private lives of post-operative transsexuals while other European democratic societies apparently feel no need for such an interference."[58]

Through the evolution of this case-law it is evident that the majority of the Court is using the margin of appreciation doctrine to avoid tackling the substantive issue of the legal recognition to be afforded to transsexual persons. Furthermore, in the dissenting opinions a tension is manifest between judges who focus specifically on bodily characteristics and the physical alterations necessitated by gender reassignment surgery, such as in *Rees* and judges who consider the applicant before them as a person trying to get on with life such as Martens in *Cossey* and Van Dijk in *Sheffield and Horsham*. That this conflict ended and that the Court spoke with one voice makes the judgment in *Goodwin v UK* (2002)[59] particularly significant.

The applicant in the case was a male-to-female transsexual and alleged that the continuing refusal of the UK authorities

to recognise her altered gender amounted to a violation of her Article 8 rights, amongst others. The Court found that although it might be desirable in the interests of legal certainty, forseeability, and equality before the law, it was not formally bound to follow its own precedent.[60] Furthermore the Court found that failure to maintain a dynamic and evolutive approach would risk rendering the ECHR a bar to reform or improvement. Thus the Court found unanimously that the failure of the UK to recognise the applicant's acquired gender breached her rights under Article 8:

> "the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 . . . the notion of personal autonomy is an important principle underlying the interpretation of its guarantees . . . In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy . . . In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."[61]

Of particular persuasive importance for the Court was the growing consensus and 'unmistakable trend'[62] among Contracting States towards legal recognition of the acquired gender of transsexuals. Against this background, the UK could no longer claim that the matter fell within their margin of appreciation.[63]

In *Grant v UK* (2006)[64] the ECHR held that once a person's altered gender has been recognised then the law must recognise that new gender in all circumstances. That case involved a recognised male-to-female transsexual who sought a declaration that she was entitled to the State pension at the age of 60 years, the same as any other woman under English law.[65] Whittle sums up the effect of *Goodwin* as follows: that where gender assignment surgery is available and permitted in a State the "new" sex of the post-operative transsexual must be recognised for all legal purposes unless the government can show substantial detriment to the public interest. Where such is shown, the sex may not be recognised in that area only.[66]

Having outlined the how the jurisprudence before the Strasburg court caused the alteration of the legal landscape, this article now moves to a consideration of how these alterations impact on the law in Ireland.

Foy v An tArd Chlaraitheoir (No 2) (2007)

Three arguments were advanced on behalf of the plaintiff in *Foy No 2*: namely, that a mistake had been made in the recording of her birth and that this mistake should be corrected under ss 25, 63, 64 and 65 of the Civil Registration Act, 2004; in the alternative that these sections are incompatible with the applicant's Constitutional rights to equality, privacy, dignity, protection of the person and also her right to marry a male person; and finally, that the legal structure instituted by the Civil Registration Act, 2004, if it does not permit the sought for amendments, infringes her rights under Articles 8, 12 and 14 of the ECHR. Of these arguments, the Court found that the third was the most substantial.[67]

Justice McKechnie began his consideration of the claim on this third or convention point by analysing the current Irish law on gender recognition. He found that there are currently no legal formalities required prior to undergoing gender reassignment surgery.[68] A person can validly change their name by deed poll, but that this does not eliminate the need to produce a birth certificate on occasion.[69] He acknowledged that under Irish law citizens do not need to carry identifying papers or certificates, and that when identification is required a passport or driving certificate will usually suffice.[70] That for marital purposes, it is required by s 2(2)(e) of the Civil Registration Act, 2004 that parties be of opposite biological sex. He re-iterated that legal sex is determined by the biological temporal test outlined in *Corbett v Corbett* (1970), and re-enforced under the 2004 Act.[71] He further stated that the fact that a person's psychological gender may differ from his/her biological sex is not a ground for issuing a corrective birth certificate.[72] Finally, he found that the birth register is a record of historical fact, a snapshot of events on a particular day,

> "It is not intended to and does not record any other major event in a person's existence or even in death. In particular it is not intended to be a document of current identity although in practice this has not always been the case."[73]

Thus legal recognition of a person's gender is determined by the entry on the birth register and no subsequent event, including gender reassignment surgery, can alter the gender recognised by the law.

His lordship then traced the development of the case law on gender recognition before the Strasburg Court. Having done so he then questioned what impact this case law would have on the instant case. He noted that Convention rights were incorporated into Irish law by virtue of the 2003 Act and emphasised that this Act was their source in Irish law not the ECHR.[74] He noted that the 2003 Act compels the Court to interpret every statutory provision and rule of law, insofar as is possible, in a manner compatible with Ireland's obligations under the ECHR.[75] Therefore the case before him raised two questions: do the rights contained in Article 8 include a right to have one's acquired gender legally recognised? If so, has the Irish State provided an effective means for upholding that right?[76]

Answering these questions McKechnie stated that if he was prepared to follow the *Goodwin* case, then unless Dr Foy's case was distinguishable from that case, he would be obliged to find that she had a right to legal recognition of her acquired gender. He then outlined the submissions by the State which aimed to differentiate the two cases. The State submitted that the Strasburg Court had not engaged with the question of balancing the rights of a transsexual and his children in the *Goodwin* case, and that the instant case demanded such a balancing take place. Furthermore, the counsel for the State contended that given the special constitutional protection afforded to the marital family in Ireland that the Irish State continued to enjoy a "margin of appreciation" in this context. Finally they submitted that the exposure of the plaintiff in *Goodwin* to offensive situations was far greater than that experienced by Dr Foy. On the basis of these three points, counsel for the State argued that the instant case was distinguishable from *Goodwin*.[77]

In responding to these submissions, McKechnie concluded:

> "With respect to these submissions I cannot see how individually or collectively it can be said that these constitute such distinguishing features as would either justify or compel this Court to leave *Goodwin* aside and preserve the previous status quo."[78]

He based this conclusion on the fact that, at the time, the legal situation in the UK was "virtually identical" to the present Irish position.[79] He considered that the position as regards the ameliorating administrative measures such as changing name by deed poll, etc., were likewise effectively comparable.[80] While his Lordship accepted that there had not been a detailed debate on the need to accommodate conflicting rights in the judgment, he considered the suggestion that the Strasburg Court had ignored the position of affected third parties incorrect. Referring to paragraph 91 of the *Goodwin* judgment, McKechnie pointed out that it "expressly referred to these difficulties but nonetheless was quite convinced that these problems were 'far from insuperable'."[81] Therefore the Strasburg Court did consider the necessary balancing of rights. Thus McKechnie concluded that as the two domestic legal frameworks were so "strikingly similar" that the *Goodwin* decision should be considered highly influential in the Irish context, and subject to the margin of appreciation doctrine, reflects the law in Ireland.[82]

His Lordship commented on the differing reaction of the UK and Irish authorities to the *Goodwin* decision. In the UK, two years after the decision, the Gender Recognition Act, 2004 was passed. This legislation sets up a scheme whereby those who have been diagnosed with Gender Identity Dysphoria and intend to live forever in the gender opposite to that in which they were born can have that preferred gender legally recognised. The legislation concerns not only those personally affected by transsexualism, but all those who might be affected by that person's change of gender. Furthermore, from a judicial perspective, in 2003 the House of Lords issued a declaration that s 11(c) of the Matrimonial Causes Act, 1973 was incompatible with Articles 8 and 12 of the Convention in *Bellinger v Bellinger* (2003)[83] thus giving practical effect to the *Goodwin* decision. Therefore with two years of the decision the UK had responded both legislatively and judicially to the *Goodwin* case.[84]

By contrast Ireland has failed to respond at any level, even the most exploratory, to the issue of gender recognition. McKechnie noted that the silence from the Government on the issue indicates that it has taken no significant steps to addressing the difficulties which continue to exist. He considered that the Civil Registration Act, 2004 would have been a most suitable legislative vehicle for this purpose and that the failure to include any consideration of these issues in that legislation, must cause one to question whether the State is deliberately refraining from addressing these problems. Concluding that Ireland was 'disconnected from mainstream thinking' he stated[85]:

> "Indeed it could be legitimately argued that Ireland's right to stand on the margin of appreciation, is as of today, significantly more tenuous than the position of the United Kingdom was, at the time of the *Goodwin* decision."[86]

Referring to his earlier 2002 decision in *Foy (No 1)*, his Lordship reiterated his call on the Oireachtas to urgently review these matters.[87]

Quite apart from the legislative solutions, McKechnie noted the independent obligation on a court to consider these issues in a manner which reflects the law. He found that:

> "it is very difficult to see how this [C]ourt, even still allowing for some 'margin of appreciation' in this sensitive and difficult area, could now exercise further restraint, grant even more indulgence, and afford yet even more tolerance to this State, some five years after both the decision in *Goodwin* and the July, 2002 judgment. In fact in my humble opinion this Court cannot, with any degree of integrity, so do."[88]

Thus he concluded that the failure to provide a mechanism, by which the acquired gender of Dr Foy could be recognised, breached her rights under Article 8 of the Convention. He further found that the State's margin of appreciation had been "thoroughly exhausted", except as regards the methods by which Dr Foy's Article 8 rights could be vindicated.[89]

Given the finding that the current legislative regime breaches the plaintiff's right to recognition under Article 8 of the Convention, and given that there was no other relief available to her from the Court, McKechnie proposed to issue a declaration of incompatibility with the Convention under s 5 of the 2003 Act. He noted that this remedy ensures that the State can decide the most appropriate method by which to vindicate the rights of Dr Foy, and other people who may wish an alternative gender from that noted on the birth register recognised. The Gender Recognition Act, 2004 was the model by which the UK sought to ensure a balance between the rights of transsexuals and other persons. However, the precise model to be adopted in Ireland was, he acknowledged, "very much a matter for the Oireachtas and not this court."[90]

On 14th February 2008, Justice McKechnie formally issued the order declaring that sections of the Civil Registration Act, 2004 were incompatible with the European Convention on Human Rights because they do not make any provision for recognising the new gender identity of transgendered persons.

Where to Now?

Now that the first ever declaration of incompatibility has been issued, what happens next? A stay of two months was put on the implementation of the order to allow the Government time to decide whether to appeal the decision in the case. If no appeal is lodged the Taoiseach must, in accordance with s 5(3) of the 2003 Act, read the order into the record of each House of the Oireachtas with 21 working days. Effectively this means that the Taoiseach has an additional seven weeks to bring the order to the attention of TDs and Senators, as the Dàil only sits on Tuesdays, Wednesdays and Thursdays. The 2003 Act does not mandate any other action on the part of the Government. Neither will the Taoiseach be obliged to outline, clarify or explain how the Government intends to respond to the declaration or to rectify the incompatibility. While this, of course, courts the possibility that the Government may never address the Gordian knot that is gender recognition, it also allows the Government the time necessary to ensure that any legislation produced is carefully considered and not another knee-jerk reactionary legislative attempt such as occurred in the aftermath of the *CC* (2005) and *A* (2006) cases.[91]

As McKechnie made clear in his judgment, the exact method by which recognition rights under Article 8 would be vindicated in the Irish context is a decision for the Oireachtas. Nonetheless, he mentioned the Gender Recognition Act, 2004[92] from the UK, as "a significant piece of social reform."[93]

Generally speaking, the GRA has been welcomed in Britain. According to Sandland, it "interrupts the orthodoxies of gender that the law has peddled to a greater extent than any other development in recent times."[94] Trans activists have commended the GRA for going further than the requirements laid down by the Strasburg Court, in that it will recognise a person's preferred gender without insisting that the individual

in question has undergone sexual reassignment surgery or indeed any other form of treatment.[95] Sharpe comments that this legislation relocates the UK from the back of the bunch among European States resistant to recognition to "pole position among progressive States willing to legally recognise transgender people."[96] However, the Act is not without its problems and serious consideration of a number of issues it raises is required. It is not sufficient that the Oireachtas simply "cut and paste" it into Irish law.

To be recognised the applicant must meet the criteria set down in the GRA as pre-requisite for recognition. Firstly, the applicant must be at least 18 years of age.[97] Secondly the applicant must adduce medical evidence that he has or has had gender dysphoria,[98] has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,[99] and intends to continue to live in the acquired gender until death.[100] The Gender Recognition Panel is the body set up to determine whether these criteria have been met. In addition to the above requirements the applicant must furnish the Panel with a statutory declaration as to the marital status of the applicant.[101] Should the applicant be in a valid subsisting marriage at the time the application is made, the Act prohibits the Panel from issuing a full Gender Recognition Certificate.[102] Married applicants can only receive Interim Gender Recognition Certificates, which recognise that the applicants have changed their genders but grant them no legal rights as a members of the acquired gender. This is but one of the many difficulties with the Act. Given that the Irish courts have consistently reiterated the importance of the constitutionally protected rights of the marital family, a provision such as this, which mandates divorce, needs special analysis prior to incorporation into Irish law. The question needs to be asked whether it is only some kinds of marital families which are protected or whether Irish law can ensure that the rights of all marital families are safeguarded while simultaneously vindicating the recognition rights of trans people.

The main reason for the almost universal acclaim for this Act is the apparent dispensing with the need for any medical or surgical intervention to ground a claim for recognition. Section 3 of the GRA sets out the medical evidence which must be produced before the panel. Such evidence consists of either (a) a report by a registered medical practitioner practising in the field of gender dysphoria and a report made by another registered medical practitioner, or (b) a report made by a chartered psychologist practising in that field and a report made by a registered medical practitioner.[103] Therefore all that is required is a diagnosis of gender dysphoria. There is no mention of treatment, whether surgical or medical, as pre-requisite to recognition. Rather, according to s 3(3) any applicant who has undergone some form of treatment, where that is not mentioned in the required reports, is not eligible for recognition. This severing of recognition from necessary bodily modification can ensure that those who, for whatever reason, are unable to undergo surgery will not be frustrated in their attempts to exercise this right to recognition.

Recognition under the GRA depends on diagnosis of gender dysphoria. According to the Diagnostic and Statistical Manual of Mental Disorders,[104] gender identity disorder is a registered mental disorder evidenced by the congruence of five criteria. These are:

1. There must be evidence of a strong and persistent cross-gender identification;
2. This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex;
3. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex;
4. The individual must not have a concurrent physical inter-sex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia);
5. There must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning.

It is interesting to note that this diagnosis without treatment paradigm is vastly different from that which was previously proposed in s 11 of the Passports Bill 2007, which fell with the dissolution of the last Dàil. That section proposed to permit a person who "has undergone or is undergoing, treatment or procedures to alter the applicant's sexual characteristics and physical appearance to those of the opposite sex", to carry a passport reflecting his/her preferred gender identity. This proposed position differs significantly from that under the British legislation.

Finally, as is evident from point 4 in the diagnostic definition above, a diagnosis of gender dysphoria is not available to a person who has a concurrent physical intersex condition. Intersex is an umbrella term for a variety of medical conditions where a person's body combines traits of both biological males and females. Experts estimate the rate of intersexuality among the population at 1.7 percent.[105] Intersexuality is not always obvious at birth, and where it is, usually due to ambiguous genitalia, it is not always immediately apparent to which sex an intersexed baby should be assigned. Nor is it certain that an intersexed child will grow up to have a gender identity which conforms to that initial assignment. Under the GRA, intersexuals who were assigned a sex at birth which does not conform to their subsequent preferred gender identity have no meaningful access to their recognition rights as they are excluded from the ambit of the Act. Further more, as is evident from the requirement that person must wish to be of the "other sex",[106] the GRA perpetuates the binary gender paradigm: the notion that male and female are discrete oppositional categories. The very existence of intersexuals proves this is not so. Some adult intersexuals have campaigned to be recognised outside the binary gender paradigm altogether and claim identities as intersex. When drafting legislation on gender recognition, the Oireachtas should also be mindful of the need to consider the recognition rights of intersexuals.

Potential Impediment

On Friday, 28th March 2008 the State filed a notice of appeal in *Foy (No 2)*. The appeal is based on seventeen grounds, including *inter alia* that the Trial Judge failed to take any adequate account of the rights of Mrs Foy and her children; that he failed to take into account those factors which distinguished the *Goodwin* case from the instant case; that he erred in applying the decision in *Goodwin* to this case; that he erred in failing to hold that a margin of appreciation continues to apply in Ireland where there are Constitutional rights underpinning the institution of marriage and the family based on marriage; that he erred in granting a declaration of incompatibility based on the State's failure to enact appropriate legislation and that he

erred in granting such a declaration where it is of no significant value to Dr Foy as it does not affect the validity of the contested sections of the Civil Registration Act, 2004.

As *Foy (No 2)* will now be appealed to the Supreme Court, the Declaration of Incompatibility will not be read into the Dáil and Seanad records until the conclusion of that hearing, if the validity of the order is upheld. What effect will this have on the development of a law of gender recognition? It may suspend all action on the issue pending the outcome of the Supreme Court hearing.

However, it is important to remember that the enacting of legislation is not contingent upon the work of the courts. The Oireachtas, if it so wishes, can enact legislation on any issue, including gender recognition, without consideration of the activities of the Supreme Court.[107] As outlined above, s11 of the Passports Bill, 2007 had included a provision to recognise those who had undergone some surgical or medical procedures to alter their sex to carry a passport reflecting their preferred gender identities. Likewise, under the proposed Civil Partnerships Bill, 2008 it will be possible for unmarried couples, one of whom is trans or intersexed to have their union officially recognised by the State, if they meet the requirements set down in that bill.[108] Building on such foundations, it is not inconceivable that the Oireachtas might progress to drafting legislation on gender recognition, without requiring further nudging from the courts.

Conclusion

At present Ireland and Lithuania are the only EU states where the law will not recognise altered gender identities. In responding to the declaration of incompatibility, the Government and Oireachtas need to consider all the issues at stake: the rights of transsexual, transgendered and intersexed people together with the rights of all those who will be affected by recognising altered genders. These issues raise many challenges, complexities and difficulties. Properly responding to them will necessarily take much time, effort and commitment. Yet such is required in order to ensure, enshrine and vindicate the recognition rights of all as guaranteed under Article 8 of the ECHR.

Endnotes

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1. Hereinafter ECHR.
2. *Foy v An tArd Chlaraithreoir & Ors (No 2)* unrept. High Court, 10 Oct 2007, McKechnie J.
3. *Foy v An tArd Chlaraitheoir & Ors* [2002] IEHC 116.
4. Article 40.1, Irish Constitution.
5. Preamble, Irish Constitution.
6. Article 40.3.1, Irish Constitution.
7. Article 41.3.1, Irish Constitution.
8. *Supra* n3, at para 52–54. Intersexuality is an umbrella term for a variety of medical conditions where a person's biology is neither male nor female.
9. *Supra* n3, at para 121.
10. *Corbett v Corbett* [1970] 2 All ER 33.
11. *Goodwin v UK* [2002] ECHR 583. Here the ECtHR held that the legal position in the UK which refused recognition to post-operative transsexuals was 'unsatisfactory', particularly in the light of the 'unmistakable trend' among Contracting States towards legal recognition of the acquired gender of transsexuals. See in depth discussion below.
12. *Supra* n3, at para 122.
13. *Supra* n3, at para 125.
14. *Supra* n3, at para 169.
15. *Supra* n3, at para 170.
16. *Supra* n3, at para 170.
17. *Supra* n3, at para 171.
18. *Supra* n3, at para 172.
19. *Supra* n3, at para 177.
20. *Supra* n3, at para 177.
21. *Supra* n11.
22. *Evans v UK* Grand Chamber of ECHR on 10th April 2007.
23. *Supra* n22, at para 71.
24. *Van Oosterwijck v Belguim* (1980) 3 EHRR 557.
25. Quoted *supra* n24, at para 13 of the majority judgment.
26. *Supra* n24.
27. *Supra* n24, at para 22 of his partly concurring judgment.
28. *Rees v UK* (1986) 9 EHRR 56 available online at www.echr.coe.int.
29. Hereinafter "the Commission".
30. *Supra* n28, at para 36.
31. *Supra* n28, at para 36.
32. *Supra* n28, at para 37.
33. *Supra* n28, at para 42–44.
34. *Supra* n28, at dissenting judgment para 2.
35. *Supra* n28, at dissenting judgment para 3.
36. *Supra* n28, at dissenting judgment para 5.
37. *Cossey v UK* [1990] 13 EHRR 622.
38. *Supra* n37, majority decision para 40.
39. *Supra* n37, dissenting judgment Bindschedler-Roberts and Russo.
40. *Supra* n37, dissenting judgment of MacDonald and Spielmann, at para 2.
41. *Supra* n37, dissenting judgment of Martens, at para 2.6. In *MT v JT* [1976] 140 NJ Super 77, the Superior Court of New Jersey held that if the biological and psychological sex of an individual can be brought into harmony, through gender reassignment surgery if necessary, then this "harmonised sex" would be determined to be the legal sex of the individual.
42. *Supra* n37, dissenting judgment of Martens, at section 3.
43. *Supra* n37, dissenting judgment of Martens, at para 2.7.
44. *Supra* n37, dissenting judgment of Martens, at para 2.7
45. *Supra* n37, at para 2.7.
46. *B v France* [1992] 16 EHRR 1.
47. *Supra* n46, majority decision, at para 48.
48. See further *supra* n46, dissenting judgment of Matscher.
49. *Supra* n46, majority decision, at para 62.
50. *Sheffield & Horsham v UK* [1999] 27 EHRR 163.
51. *Supra* n50, majority decision, at para 45.
52. *Supra* n50, majority decision, at para 60.
53. *Supra* n50, concurring opinion of Freeland, at para 3.
54. *Supra* n50, dissenting opinion, Bernhardt, Thor Vilhjalmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu.
55. *Supra* n54.
56. *Supra* n50, dissenting opinion of Van Dijk, at para 5.
57. *Supra* n56.
58. *Supra* n56, dissenting opinion of Van Dijk, at para 6.
59. *Goodwin v UK* [2002] ECHR 583.
60. *Supra* n59, at para 74.
61. *Supra* n59, at para 90.
62. *Supra* n59, at para 55
63. *Supra* n59, at para 93.
64 *Grant v UK* [2006] ECHR 548.
65. Under English law women receive the pension at 60 years of age and men receive it a 65 years of age.
66. Whittle, S. *Respect and Equality. Transsexual and Transgender Rights.* Cavendish Publishing, London (2002), at 155.
67. *Supra* n2, at para 62.
68. *Supra* n2, at para 64 (1).
69. *Supra* n2, at para 64 (2).
70. *Supra* n2, at para 64 (3).
71. *Supra* n2, at para 64 (4, 5).
72. *Supra* n2, at para 64 (6).
73. *Supra* n2, at para 64 (8).
74. *Supra* n2, at para 93.
75. *Supra* n2, at para 93.
76. *Supra* n2, at para 94.
77. *Supra* n2, at para 95.
78. *Supra* n2, at para 96.
79. *Supra* n2, at para 96.

80. *Supra* n2, at para 96.
81. *Supra* n2, at para 96.
82. *Supra* n2, at para 96.
83. *Bellinger v Bellinger* [2003] UKHL 21.
84. *Supra* n2, at para 99.
85. *Supra* n2, at para 100.
86. *Supra* n2, at para 100.
87. *Supra* n2, at para 101.
88. *Supra* n2, at para 102.
89. *Supra* n2, at para 102.
90. *Supra* n2, at para 115.
91. *CC v Ireland and* ORS [2005] IESC 48. *A v Governor of Arbour Hill Prison* [2006] IESC 45. In the CC case the Supreme Court declared unconstitutional, the law on statutory rape which denied to an accused the defence of reasonable mistake and thereby created a legislative crisis resulting in a convicted paedophile (A) being released from prison. As a result of these cases the Criminal Law (Sexual Offences) Act 2006 was rushed through the D·il and signed into law within two days of Mr A's release. Due to the speed with which the Bill was passed it subsequently became necessary to introduce amending legislation to correct errors in the first version: the Criminal Law (Sexual Offences) (Amendment) Act 2007.
92. Hereinafter the GRA.
93. *Supra* n2, at para 98.
94. Sandland, R. *'Feminism and the Gender Recognition Act 2004.'* (2005) 13 Feminist Legal Studies 43, at 44.
95. Press for Change, *'Transsexual Leaders Welcome Draft Bill to Allow Legal Change of Gender'* Press Release available online at http://www.pfc.org.uk/ node/546 .
96. Sharpe, A. *'A Critique of the Gender Recognition Act 2004'* (2007) 4 Bioethical Inquiry 33.
97. s 1(1) GRA.
98. s 2(1)(a) GRA.
99. s 2(1)(b) GRA.
100. s 2(1)(c) GRA.
101. s 3(6)(a) GRA.
102. s 4(3) GRA.
103. s 3(1) GRA.
104. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed) (Text Revision) (Arlington VA: American Psychiatric Publishing, 2000).
105. Blackless, M., Charuvastra, A., Derryck, A., Fausto-Sterling, A., Lauzanne, K., and Lee, E. *'How Sexually Diamorphic Are We? Review and Synthesis.* (2000) 12 American Journal of Human Biology 151.
106. Point 2 in the definition of Gender Dyshporia in DSM IV.
107. Article 15.2.1 of the Constitution.
108. O'Brien, C. "Same-Sex Unions to Get Many Benefits of Marriage" *Irish Times*, 1st April 2008.

Irish Emergency Law: The Pressing Need for Reform

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Introduction

Emergency provisions have been an almost permanent feature of life in Ireland since the foundation of the State. Much of the period of the Civil War and its aftermath was regulated by public safety acts and martial law. The most recent State of Emergency came into being on 1st September 1976 and only ended in February 1995 after the declaration of the IRA ceasefire. Until that time the nation had been in a constant State of Emergency since the outbreak of the Second World War. What is surprising and perhaps alarming about this is that for much of this period the threat to the State was arguably minimal if almost non-existent at times. Coupled with this is the fact that Article 28.3[1] of the Constitution which contains the emergency provision gives the Oireachtas sweeping powers to effectively override the Constitution.

The purpose of this paper is to critically examine Irish emergency provisions focusing primarily on Article 28.3.3.[2] It is contended that Irish emergency legislation is unsatisfactory on a number of grounds. The current Article provides very few safeguards as to when the Oireachtas can declare and deactivate an emergency. In addition, the protection of the citizen's rights during a state of emergency remains unaddressed with one important exception.

It is not suggested that emergency provisions are inherently flawed. The machinery of civil government can not always function in a crisis and emergency legislation may be necessary to enable the State to restore and maintain order. However, emergency powers which are misused can be as dangerous as the emergencies they are designed to combat. The use of emergency powers is, after all, a balancing-act between liberty and security and it is this tension between the two that lies at the heart of every discussion on emergency law.

Lack of Protection for Fundamental Rights

It has been suggested that there are a number of legal models which States use to respond to emergency situations. In most democratic countries this response is governed by what may be called "models of accommodation".[3] In essence this means that when a state is faced with an emergency its legal and Constitutional structures are relaxed, and may even be suspended in part. At the same time, normal legal principles and rules are maintained as much as possible.[4] While the operation of Irish emergency law has broadly followed this model to date i.e. emergency law and peacetime law have operated side by side, a more in-depth reading of the emergency provision demonstrates the extent of the government's power to suspend the Constitution. Article 28.3.2 states that "in the case of actual invasion . . . the government may 'take whatever steps are necessary' for the protection of the State".[5]

In the *State (Walsh) v Lennon*[6] Gavin Duffy J stated:

> "The Constitution here envisages a crisis during which the normal rule of law is, at least to a considerable extent, superseded by the rule of the Executive in the domain of emergency law . . . subject only to the control of the legislature".[7]

In effect Gavin Duffy J asserted that the government was given a "carte blanch"[8] to rewrite the Constitution.

The Emergency Powers (No. 65) Order is a prime example of how the Government intended to use the emergency provision to protect the State with all possible means. The Order, which was drawn up in 1941, conferred both specific and general powers on the army in the event that the country was invaded. Although the Attorney General had concluded, in March 1941, that martial law was contrary to the Constitution, he stated that the Constitution did not require to be amended as the Government was entitled to take whatever steps it considered necessary to protect the State.[9] The powers that would have been conferred on the army under this Order were indeed broad. Military tribunals would have been established with jurisdiction over both military and civilian personnel. If a defendant were found guilty of an offence before these special tribunals he was to be executed as quickly as possible. Although these military courts never had to be activated, similar tribunals sanctioned under s 3 of the *Emergency Powers (Amendment Act)* (No. 2) Act 1940[10] would eventually order the execution of six men by firing squad.[11]

Challenging Emergency Provisions

Not only does Article 28.3.3 give the Executive the power to rewrite the Constitution, it goes even further by stating that:

> "Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas"

Thus, Article 28.3.3 immunizes not only legislation but "acts done or purporting to be done",[12] in a time of violent crisis, from any Constitutional challenge. This provision further augments the already formidable powers the Government may call upon in a time of crisis.

It is well recognised that the main problem facing drafters of emergency provisions is the need to balance the Government's duty to fight crises effectively and the need to protect the citizen from abuses of power by the Government or its agents. One possible option to this end is to provide for judicial review of emergency measures. Although the Irish Constitution prohibits this, emergency legislation has been challenged on a number of occasions, though never successfully.[13] These cases seem to confirm the contention that when faced with a national emergency, the Courts tend to assume a deferential attitude to Government actions and decisions.[14]

Article 15.5.2 and the Prohibition Against the Death Penalty

As previously noted, Article 28.3.3 gives the Government very broad powers to act without regard for the provisions of the Constitution. There are no safeguards in place to protect the rights of the citizen apart form one notable exception. In his article on emergency powers and fundamental rights[15] D.M. Clarke points out that while the Irish Constitution puts certain fundamental rights outside the reach of the legislature, the effect of Article 28.3.3 would allow these rights to be derogated from and revoked in a time of emergency. Consequentially, the fundamental constitutional rights of the citizen could be overridden during a declared emergency if it was deemed necessary by the State. In an extreme example, a citizen's right to bodily integrity, freedom from torture or even their right to life could be forfeited if it was considered essential for the protection of the State.

This position has been altered somewhat with the passing of the twenty-first amendment to the Constitution, which introduced a constitutional ban on the death penalty and removed all references to capital punishment from the text of the Constitution. This new amendment to the Constitution in Article 15.5.2 states that:

> "The Oireachtas shall not enact any law providing for the imposition of the death penalty".[16]

Article 28.3.3 was also amended to reflect the ban on capital punishment. The first sentence of Article 28.3.3 now reads as follows:

> "Nothing in this Constitution other than Article 15.5.2 shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing public safety and the preservation of the State in time of war or armed rebellion, or nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law".

Though Article 15.5.2 goes some way to protecting the citizens rights during an emergency it still leaves many other fundamental rights open to being overridden. Torture, for example, could still be sanctioned by the Constitution. This may be contrasted with the Spanish Constitution of 1978; Article 58 clearly spells out the only rights and liberties that may be suspended in the event of an emergency. This is a far more satisfactory position than that of the Irish Constitution which leaves every constitutional right except the right to life open to violation.

The Constitutional Law Review Group has also recognised the fact that Article 28.3 provides no protection for human rights during an emergency. To this end it has recommended that the Constitution make clear that certain rights may not be derogated from in any way. The rights to be protected include the right to life, right not to be tortured or subject to degrading or inhumane treatment, the right not to be held in slavery or servitude, the prohibition on retrospective penal sanctions, the right not to be imprisoned on the grounds of not being able to fulfil a contractual obligation, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion.[17]

Re Article 26 and the Emergency Powers Bill 1976

As an aside to this, it is interesting to note the case of *Re Article 26 and the Emergency Powers Bill 1976.*[18] In this instance the Emergency Powers Bill 1976 was subject to a presidential reference under Article 26. This was the first time that a measure covered by Article 28.3.3 had been subject to such a reference.[19] The section in question, s 2, provided for the arrest and detention of a suspect for a maximum of seven days. Although the Court declined to examine the constitutionality of the Bill on the basis of the exemption granted by Article 28.3.3, it did make an important pronouncement in regard to section two:

> ". . . it is important to point out that when law is saved from invalidity by Article 28.3.3, the prohibition against invoking the Constitution in reference to it is for the purpose of invalidating it. For every other purpose the Constitution may be invoked. Thus, a person detained under s.2 of the Bill may not only question the legality of his detention if there has been non compliance with the express requirements of s.2, but may also rely on provisions of the Constitution for the purpose of constructing that section and of testing the legality of what has been done in purported operation of it."[20]

> "[T]he section is not to be read as an abrogation of the arrested persons' rights of communication, the right to legal and medical assistance, and the right of access to the Courts. If the section were used in breach of such rights the High Court order might grant a release under the provisions of habeas corpus contained in the Constitution".

This approach is certainly welcome and further highlights the importance of protecting rights even in the case of an emergency. The above ruling was later applied in *State (Hoey)* v *Garvey*[21] by Finlay P. In this case a suspect had been detained twice, under s 2[22] arising out of a suspicion of involvement in the same offence. On that basis, the Court found the detention to be illegal and granted an order of *habeas corpus*.

Different States of Emergency

The concept of an emergency is not an easy one to define. Although the Constitution contemplates a number of different emergency scenarios, albeit all based around armed conflict, it effectively recognises only one kind of state of emergency.[23] The Oireachtas is free to decide the gravity of the emergency facing the State and to respond accordingly. Though this method may not be inherently inadequate it is still interesting to look at the approach other Constitutions have taken. The Dutch Constitution recognises two distinct states of exception i.e. "a state of war" and a "state of emergency". The German Basic Law distinguishes between an "internal emergency" a "state of tension" and a "state of defence". In addition to this, the Basic Law also recognises situations of "natural disaster or a particularly serious accident" under which police units as well as the Federal Border Guard service and armed forces may be called in to combat a threat.[24]

This multilevel approach to classifying emergencies has both its strengths and weaknesses. It can deny the State the flexibility to deal with emergencies effectively as there is a substantial degree of vagueness and overlap between different classes of emergency. Emergencies are also very

un-predictable which can make them even more difficult to categorise as the situation develops. However, the Multilevel approach can also act to constrain State power by limiting its authority to dealing with the emergency at hand rather then declaring a general emergency.

The emergency provision in the Irish Constitution is certainly a product of its time. No doubt the framers of the Constitution were very conscious of the worsening political situation in Europe and the likelihood of war when they drafted Article 28.3. However the Constitution can not be read in the permafrost of 1937. Violent conflict is, after-all, only one of a number of different crises that a State can be forced to come to terms with. A serious accident at a nuclear facility in the United Kingdom was surely never in the contemplation of the drafters of the Constitution yet it is something which now poses a credible and very dangerous threat to the wellbeing of the State. It is also interesting to observe that the Constitutional Review Group in its report on Article 28.3.2 noted that the words "actual invasion" were no longer relevant in light of the technological developments made in long-range warfare such as guided missiles and ICBM's.[25]

It is not suggested that the failure to identify a particular kind of emergency precludes effective response to such a calamity but it is the legal response to emergencies, rather than crisis management, that this Article is concerned with. For example, in the event of an accident at a foreign nuclear facility the National Emergency Plan would be activated in order to cope with this urgent situation. Legally speaking the Oireachtas would not be in a position to declare an emergency as the emergency in question would not have arisen out of armed conflict. Though this may seem like a minor point it is important that democracies act within the boundaries of the law. Straying outside these boundaries is dangerous and particularly unnecessary if a threat can recognised and provided for before the event rather then after.

The Never Ending Emergency

Any discussion of emergency powers supposes that two separate and distinct phenomena exist, i.e. normality and crisis.[26] Normality exists prior to the declaration of emergency, ceases for the duration of the emergency and is then re-instituted once the emergency is over. Normality is therefore considered to be the ordinary state of affairs while emergencies are considered to be the exception. During an emergency it is expected that a person's rights and liberties will be restricted to whatever extent is reasonably necessary to combat the crisis. Once the crisis has passed it is then expected that whatever emergency provisions were in operation are repealed and all rights that were previously restricted are now fully restored. This is the ideal situation but unfortunately the reality may be somewhat more complex.

Once a state of emergency has been declared it is often difficult to deactivate it. Emergency powers place fewer restrictions on governments. Once they have experienced the freedom of operating with less limitation on their power it is often difficult to relinquish that freedom.[27] In many countries, including Ireland, emergency legislation has continued to operate long after the emergency that brought it into being has passed. In effect, the exception now becomes the norm with emergency legislation becoming "normalised" and used in circumstances it was originally not designed to deal with. The end result is that freedom is restricted for the sake of convenience and, because what was once considered an emergency has now become accepted as the new "norm", it is very difficult, if not impossible, to return to the position prior to the original emergency.

The Results of "Normalisation"

In Ireland the results of this "normalisation" have been well documented. From the foundation of the State until the declaration of the IRA cease-fire Ireland had been in a constant state of emergency. This permanent condition was used to justify the introduction of draconian legislation into ordinary Irish law. In the post civil war period the Executive Council used the Treasonable Offences Act 1925[28] and a number of Public Safety Bills to tackle the remnants of the Anti-Treaty IRA. A special tribunal, similar to the current Special Criminal Court, was also established under Article 2A of the Free State Constitution. The Gardai were also given wide powers to stop, search and detain suspects. A suspect could be detained for a maximum period of 72 hours and while in detention could be asked to account for their movements or any items or documents they may have had on their person at the time of their arrest.[29]

The current Special Criminal Court is a prime example of the normalisation of emergency law in the Irish legal system. The Court was created by part V of the Offences against the State Act 1939[30] and sat for the duration of the Second World War. The Court was reactivated in 1972 to tackle political crime resulting from the conflict in Northern Ireland. It has outlived the 1994 Provisional IRA ceasefire and now hears cases of "ordinary crime" or non-subversive offences. To this end, charges such as the unlawful taking of a motorcar, theft of cigarettes and £150 from a small shop and the receipt a stolen caravan have all been heard before the Special Criminal Court.[31] The Irish Council of Civil Liberties has noted that over one third of the Special Criminal Court's time was now consumed in dealing with non-subversive offences.[32] This figure is quite striking when the original purpose of the Special Criminal Court is considered.

There have been calls to deactivate the Court by organisations such as the above mentioned Irish Council of Civil Liberties[33] and Amnesty International.[34] It seems unlikely that this will happen in the near future. The Special Criminal Court now looks likely to become a permanent feature of the Irish legal landscape. In a sense, Ireland now operates a dual criminal justice system where certain criminals are tried before a jury while others are not. In the original Dáil debates over the Offences against the State Bill the dangers of the Court being used against citizens who were not involved in subversive activities was discussed. This danger has for the most part been realised.

The Criminal Justice Act 1984[35] is a further example of the shift that has taken place in Irish criminal law. Like the Special Criminal Court, it is another product of the normalisation of emergency legislation. The significance of the Criminal Justice Act 1984 is that it shifted the criminal justice system from a "due process" model, which emphasised the defendant's rights, to a crime-control model, giving the police significantly increased powers.[36] Like the Special Criminal Court the *raison d' etre* of the Criminal Justice Act 1984 was to combat terrorist threats while operating side by side with ordinary criminal law and procedure.[37] Under the Offences against the State Act 1939 the Gardai were given the power under s 30 of that Act to detain an individual on suspicion of committing a crime for a period of up to forty-eight hours without bringing any charge

against him. This power was considered to be an emergency provision, only to be used against those who were actively undermining the State. The use of this emergency power was later extended to use against non-subversive criminals and was finally incorporated into the ordinary criminal justice system with the passing of the Criminal Justice Act 1984. In light of recent developments in the United States it is interesting to note the USA Patriot Act[38] and how its application has followed a similar pattern. Much like the Offences against the State Act or the Special Criminal Court, the Act was originally enacted to fight terrorism but because the definition of "domestic terrorism" is so broad the Act is now being used to investigate drug dealers, spies and even child pornographers.[39]

Was there an Emergency?

The question of when an emergency is deemed to exist has always been contentious. Emergency provisions are a necessary evil if an emergency exists but should always be deactivated once the crisis has passed. Officially, the nation has spent the vast majority of its existence in a state of emergency. It would seem then that the Government were perfectly justified in maintaining emergency provisions at least until February 1995. Furthermore, the existence of an official state of emergency would suggest that the subsistence and wellbeing of the State was threatened to a significant degree for all of this time. It is debateable as to whether this state of affairs existed for much of this period. Even a cursory look at Irish history shows that there are lengthy intervals where the threat to the State was minimal at best.

With the cessation of hostilities after the Second World War the only significant danger to threaten the State was the IRA.[40] By July 1947 the Department of Justice reported that "the IRA has disintegrated . . . it can no longer be regarded as a serious menace to peace and good order".[41] Though much of the emergency legislation that was introduced with the outbreak of war was repealed, the state of emergency that had been declared was not deactivated. Many of the provisions of the Offences against the State Act also remained in force. With the outbreak of the IRA border campaign in 1956 Part II of the Offences Against the State 1940 was reactivated, allowing for the reintroduction of internment without trial. Part V of the Offences against the State Act 1939 which provides for the operation of the Special Criminal Court was re-introduced in 1961. However unacceptable the violence of that period, it could not be said that the IRA constituted a fundamental threat to the State. Its capacity was limited to a few random and isolated attacks, the most spectacular of which was a failed ambush on a police barracks.[42] The reintroduction of such draconian measures was hardly necessary in the circumstances. The campaign had petered out by the late 1950s and was officially ended in February 1962. The organisation would fade into obscurity and almost cease to operate for the next ten years until the reinsurgance of violence in Northern Ireland in the late sixties.

Lawless v Ireland

In the case of *Lawless v Ireland*[43] the European Court of Human Rights was called upon to consider the validity of the derogation entered by the Irish Government. In this case Gerard Lawless had been arrested on 11th July 1957 on suspicion of being a member of an unlawful organisation (the IRA). Lawless was held in a military detention camp for five months without trial. The Court found that the detention of Lawless was in violation of Articles 5 and 6[44] of the European Convention on Human Rights and so it became necessary to examine whether the derogation entered by Ireland was justified in the circumstances. In order to determine whether the derogation was valid, the Court had to establish whether a public emergency existed at the material time. Although the Court concluded that a public emergency existed in the Republic of Ireland, this conclusion was later questioned.[45] It was noted in the case itself that the IRA's activity was mostly confined to the territory of Northern Ireland rather than in the Republic and that the impact of the IRA's activity on the life of the ordinary citizen was minimal.[46] Furthermore, Commission member Susterhenn, dissenting, effectively stated that even in the putative case of a genuine public emergency, the threat to the State was remote at best and that the life of the Republic could not be said to be in imminent danger.

The final judgment of the Court and Commission, in deciding that a public emergency did in fact exist, reflects a strong deference to the Government's assessment of crisis. In these situations the Court and Commission are willing to give national governments a wide margin of appreciation on the basis that a national government is in a better position than either the Court or Commission to asses whether a national emergency exists or not.

The "Troubles"

Certainly from the outbreak of violence in the late 1960s until the Provisional IRA ceasefire in August 1994, there is little doubt that a serious national emergency existed and that appropriate measures were needed to contain the conflict that ensued. Although the vast majority of the violence was confined to the territory of Northern Ireland it was of an intensity and ferocity that had not been seen in Ireland since the 1920s. The fighting was now being conducted by well armed and professional paramilitaries with support from a sizable section of the population. This is in stark contrast with the Official IRA which had operated since the civil war with little public support or success. In fact, so demoralised had the Official IRA become, that by the end of the 1960s it rejected sectarian violence and became increasingly influenced by Marxist ideology.

The Special Criminal Court which had been deactivated after the IRA ceasefire in February 1962 was now reintroduced. The Court was now staffed by civilian judges rather than army officers. A new national state of emergency was declared on 1st September 1976 replacing the state of emergency that had existed since the outbreak of the Second World War in 1939.

The Post Cease Fire Period

With the end of the conflict in sight in 1994 the Fine Gael-led rainbow coalition promised a review of "all legislation and Court arrangements associated with the management of the conflict in Northern Ireland over the last twenty five years".[47] This new commitment was required to take into account Ireland's obligations under International law. The meeting of the Conference on Security and Co-operation in Europe (CSCE) in Moscow in 1991 concluded that states of emergency must be "lifted as soon as it is possible and will not remain in force longer than strictly required by the exigencies of the situation".[48] Though Ireland subscribed to the conclusions of this meeting it failed to implement these measures in any meaningful way. The rescinding of the 1976 declaration of emergency in 1995 was merely cosmetic. The emergency provisions that were used to combat paramilitary activity during the thirty year conflict are still in operation today. The prime example of this is the

continued use of the Special Criminal Court. Since the 1998 Good Friday Agreement major progress has been made in bringing peace and stability to Northern Ireland. Majority verdicts were introduced in 1984, making jury intimidation much more difficult. Paramilitary violence has dwindled and now comes from small splinter groups which enjoy virtually no popular support and are themselves little more than criminal gangs. When the Special Criminal Court was established on foot of a proclamation issued in 1972 it was made clear that the Court was only to be directed against violent crime connected with the Northern Ireland conflict.[49] This point was reiterated by the Government in the case *Eccles, McPhillips and McShane v Ireland*[50] and by the Attorney General in a submission to the UN Human Rights Committee in 1993.

It is the view of the Irish Council for Civil liberties that the perceived need for the Special Criminal Court no longer exists.[51] Though organised crime is considered a major problem in modern Ireland it has not approached a level requiring the introduction of a state of emergency. There is no current threat from organised crime that can not be dealt with by using ordinary law.[52]

In the Questiaux report,[53] which was undertaken at the behest the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities and concerned the general risks to human rights that emanated from emergencies, it was noted that permanent emergencies have three distinct common features:

1. Less account is taken of the imminence of the danger facing the State,
2. The longer the emergency lasts the less important the principle of proportionality becomes,
3. As the emergency entrenches time limits are ignored.[54]

These three features are very evident in Irish law today. The Republic of Ireland exists in a state of permanent emergency though it is not officially recognised as such. Only the most severe and draconian laws have been permanently repealed while the rest remain on the statute book and in full use today. The exception has now very much become the norm.

The Solution

The primary problem with Article 28.3 is that it does not provide any temporal limitations on its use. In Ireland a state of emergency is effectively deemed to exist for as long as the Government deems the emergency to be extant. While this may seem reasonable in theory, recent history has shown that governments enjoy increased freedom from restriction that public emergencies provide and are unwilling to forfeit that freedom once the emergency has passed. The imposition of constitutional time limits on states of emergency can be an effective tool in combating the dangerous slide into permanent emergency. Thus a positive duty is placed on a Government either to declare a state of emergency at an end or decide that the exigencies of the situation require that emergency remain in place. It follows that the state of emergency remains fresh in the minds of the Government as they would have to re-examine it regularly.

Although the Irish Constitution does not place any time limits on the duration of public emergencies, many others such as the Spanish Constitution do assert such limitations. Article 116.2 of the Spanish Constitution requires prior parliamentary authority for the proclamation of a state of emergency and places strict time limits on its duration[55]. The Irish Constitutional Law Review Group has recommended that Article 28.3.3 should have a duration of not more than three years.[56] To date, this recommendation has not been implemented.

Conclusion

The debate over emergency powers has always been one between liberty and security. Proponents of the security argument will point out that despite the harshness of Ireland's emergency laws they have undoubtedly been successful. Stern action after the immediate end of the civil war prevented much of the country lapsing into lawlessness and provided a firm base on which the ordinary rule of law could prevail. The Offences against the State Act 1939, despite its criticisms, was very effective in tackling the IRA. Between 1939 and 1946 the Special Criminal Court convicted 914 of the 1,013 persons it tried – a conviction rate of over 90 percent.[57] By the end of the Second World War the IRA had almost ceased to function and would not operate effectively again until the early seventies. Even then, tough action by the Irish government could be credited with preventing the worst aspects of the troubles from spilling over into the South.

Although a time of crisis may demand more stringent government regulations and policies, any revocation of human rights must be tempered by the knowledge that to do so must only ever be in the ultimate interest of the citizen. The axiom *Salus Populi Suprema Lex* (safety of the people is the highest law) may be the cornerstone of a government's duty to its people; yet in maintaining national integrity it may be injurious to lose sight of what one is defending — namely the democracy for which the State was founded and through which it maintains itself. Suspension of civil liberties is a critical compromise of this fabric and must only be considered in the absence of alternatives. Although there may be no current appreciable risk to the State, open debate on the subject will hopefully encourage a more enlightened consideration of emergency law and its ramifications.

Endnotes

1. Article 28.3 *Bunreacht na hEireann,* 1937.
2. Article 28.3.3 *Bunreacht na hEireann,* 1937.
3. Oren Gross and Fionnuala Ni Aolain *Law in Times of Crisis, Emergency Powers in Theory and Practise* (1st ed) (Cambridge University Press, 2006) p 17.
4. *ibid* p17.
5. 28.3.2 *Bunreacht na hEireann* 1937.
6. *State (Walsh)* v *Lennon* [1941] IR 112.
7. *State (Walsh)* v *Lennon* [1941] IR 112 at 120.
8. James Casey, *The Irish Constitution* (3rd ed) (Round Hall Sweet and Maxwell, Dublin, 2000) p 181.
9. Seosamh Ó Longaigh, *Emergency Law in Independent Ireland 1922–1948* (1st ed) (Four Courts Press, Dublin, 2006) p 258.
10. *Emergency Powers (Amendment act)* 1940 (No1 of 1940).
11. Ó Longaigh, *supra* note 8, at 284.
12. Gross and Ni Aolain *supra* note 3, at 62.
13. See *Re:McGrath and Harte* [1941] IR 68 and *State (Walsh) v Lennon* and *Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159.
14. Gross and Ni Aolain *supra* note 3, at 77.
15. D.M. Clark, "Emergency Legislation, Fundamental Rights, and Article 28.3.3 of the Irish Constitution" (1977) 12 *Irish Jurist* 283.
16. Article 15.2.2 *Bunreacht na hEireann* 1937.
17. All Party Oireachtas Committee on the Constitution, Eight Progress Report (Stationary Office, Dublin, 2003) p 18.
18. *Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159.
19. Casey, *supra* note 8, p 185.
20. *Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159, at 173.

21. *State (Hoey)* v *Garvey* [1978] IR 1.
22. *Emergency Powers Act* 1976 (No 33 of 1976).
23. It should be noted that in Re *Article 26 and the Emergency Powers Bill 1976*, the court recognised that in times of war or armed rebellion no resolution had to be passed to enact emergency legislation while resolutions would be required to activate emergency law where an external armed conflict was taking place — *Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159, at 175.
24. Gross and Ni Aolain, *supra* note 3, p 43.
25. Report of the Committee of the Constitution (Stationary office, Dublin Pr. 9871), paras 102–106
26. Gross and Ni Aolain, *supra* note 3, at 173.
27. *ibid* p 230.
28. *Treasonable Offences Act* 1925 (No. 18 of 1925).
29. Ó Longaigh *supra,* note , at 128.
30. *Offences Against the State* Act 1939 (No. 13 of 1939).
31. Julie-Anne Sweeney, "Why do we still have The Special Criminal Court" *Law Society Gazette*, July 2001, p 11.
32. Irish Council of Civil Liberties, "Submissions to the Committee to Review the Offences Against the State Act and related matters". http://www.iccl.ie/DB_Data/publications/ICCL%20SUBMISSION%20TO%20THE%20COMMITTEE%20TO%20REVIEW%20THE%20OFFENCES%20AGAINST%20THE%20STATE%20ACTS.pdf, accessed on 29th July 2007.
33. Irish Council of Civil Liberties, *supra,* note 30.
34. Amnesty International, "Submissions to the Committee to Review the Offences Against the State Act and other matters" http://web.amnesty.org/library/Index/ENGEUR290011999?open&of=ENG-IRL, accessed on 31 July 2007.
35. *Criminal Justice Act* 1984 (No. 22 of 1984).
36. Gross and Ni Aolain, *supra* note 3, p 230.
37. *ibid* p 231.
38. *USA PATRIOT ACT* 115 Stat. 272 (2001).
39. United States Department of Justice, "Preserving Life and Liberty" http://www.lifeandliberty.gov/subs/u_myths.htm.
40. With the onset of the Cold war Ireland faced a remote but existent threat from the consequences of a possible war between the superpowers. Though it is unconfirmed it is likely that the Republic would have been subject to direct Russian air attack. Even if the South of Ireland was not directly hit, the results of such a war abroad would in all likelihood have put the existence of the State in extreme jeopardy.
41. Ó Longaigh *supra* note 9, at 273.
42. On New Years Day a column of 14 IRA militants attacked a Royal Ulster Constabulary barracks in Brookeborough, County Fermanagh, Northern Ireland. The attack was a total failure and resulted in two of the attackers being killed.
43. *Lawless* v *Ireland* 1 EUR. CT. HR (1960–1961).
44. According to the European Convention on Human Rights Article 5 provides that everyone has the right to liberty and security of person and Article 6 provides a right to a fair trial.
45. Oren Gross "Once More Into the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies" (1998) 23 *Yale Journal of International Law* 437 at 462–64.
46. *Lawless* (Commission), para 90, at 97–98; *Lawless* (court) para 36, at 57–58.
47. Irish Council of Civil Liberties, *supra,* note 32.
48. Para 28.3, Document of the Moscow meeting of the conference on the Human dimension of the CSCE, October 1991.
49. Irish Council of Civil Liberties, *supra* note 32.
50. *McPhillips and McShane v Ireland* [1985] IR 545.
51. Irish Council of Civil Liberties, *supra* note 32.
52. *Ibid.*
53. Nicole Questiaux, "Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency", United Nations Commission on Human Rights, ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1982/ 15, 27 July 1982.
54. *ibid,* at para. 117.
55. Article 116.2 *Constitucion Espanola* 1977.
56. All Party Oireachtas Committee on the Constitution, Eight Progress Report (Dublin, Stationary Office 2003) p 17.
57. Ó Longaigh *supra* note 9, p 282.

The Incoherence of Historicism and Originalism in Irish Constitutional Interpretation[1]

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"We must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[2]

1: Introduction, Themes and Argument

This article purports to deal with the doctrine of historical interpretation and the allied United States doctrine of "original intent" to assess whether it is a valid mechanism for assessing Irish Constitutional cases.[3] The article will thus be jurisprudential and constitutional in orientation and will seek to marry jurisprudential arguments about interpretation to the practical matter of constitutional law. It is designed to sharpen and focus on judicial usages of historical interpretation and "original intent" and to clarify what set of assumptions underpin the usage of the doctrine and whether and to what extent it is an acceptable form of constitutional construction.

In essence structurally the article will probe the usage of historical interpretation by the Irish Courts and in particular the recent recrudescence of historicism as a mechanism of historical interpretation. The article will then examine the philosophical underpinnings underlying historicism and "original intent" and critically evaluate both doctrines with particular reference to the vibrant recent discussion in The United States. The article will then examine the philosophical basis for historical interpretation and "original intent" and assess whether it is a valid method of constitutional interpretation.

In substance the nuanced conclusion will be reached that historicism and original intent are neither coherent nor useful in assessing what the scope of a given constitutional right means today and the use of such doctrine leads to rule by the dead hand of history but guidance derived from the original principles of the Constitution, as interpreted by successive generations of judges, is acceptable in determining the nature and extent of rights available and in stipulating specific provisions which provide for constitutionally certitude. The text is after all the legacy of our forefathers through successive amendments to which we should be broadly faithful. Thus it follows that the original text, the gift of our forefathers, as amended, should be followed where it is specific and clear textually but that language must be adapted and interpreted in the light of ever shifting contemporary meanings as to what the plasticity of language entails in different social contexts. In this respect given that they are non textual a difficult question remains on the status of unspecified non-textual rights.

2: The Historical Approach In Irish Constitutional Law: A Brief Survey

An initial early reference to historicism in Irish constitutional interpretation is the construction of the Constitution in accordance with the state of affairs, legal and other at the time of its enactment. This was first asserted in *re Article 26 and the Offences against the State (Amendment) Bill, 1940*[4] by the Supreme Court. The court said that at the time of the enactment of the Constitution several Acts permitting the detention of persons were in force. The framers of the Constitution, who chose not to prohibit such legislation, knew their existence and effect. The court was therefore bound to give this considerable weight in view of the fact that many Articles of the Constitution unambiguously prohibit the Oireachtas from passing certain laws.

The admissibility of this cannon of construction was again asserted in *Melling v. Ó Mathghamhna*[5] by the Supreme Court in the context of the definition of what constitutes a *"minor offence"* in the context of Article 38. O' Dalaigh CJ indicated that one should look at the statute roll of Saorstat Eireann for what is a minor offence. However, in *Conroy v. The Att. Gen.*[6] the Supreme Court when considering the same issue said while it proposed to consider *"the state of the law when the Constitution was enacted and public opinion at the time of that enactment"* these were but *"secondary considerations"*.

Thus even early on there were dissenters from the wholesale usage of the historical method of interpretation of the constitution.

The state of public opinion and mores in 1937 have also been admitted by the courts as relevant in construing the Constitution (albeit to very uncertain effect) to determine whether a pre 1937 law was carried over by Article 50. In *McGee v. The Att. Gen.*[7] O'Keefe J in the High Court upheld s.17 of the Criminal Law (Amendment) Act 1935, which prohibited the importation of contraceptives, even for the importer's own personal use. He considered public opinion as mirrored (he assumed) in the Oireachtas debates on the Act where the section was adopted without a division, showed, he contended, that the public was not in favour of a right to privacy, which allowed such an importation.

A certain scepticism is evident to historicism in subsequent cases. In *McMahon v AG*[8] Pringle J pointed out that the historical approach might not be sufficient where the case involves a fundamental right of the citizen under the constitution and in *The State (Robinson) v. Kelly*[9] which again dealt with the nature of a minor offence, Henchy J said in the Supreme Court that he didn't consider the state of the law when the Constitution was enacted or public opinion at the time of that enactment to be crucial considerations. Further, as Barrington J noted in *Brennan v. The Att. Gen.*[10] many systems well established in 1937 such as jury service and taxation of married couples have subsequently been found unconstitutional.

In *McGee*[11] the Supreme Court explicitly rejected historicism and said that it was the public mores of today and not of 1937, which were relevant. As Walsh J, opined referring to the values declared in the Preamble:

> "It is but natural that from time to time the prevailing ideas of [prudence, justice and charity] may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time"[12]

It must be stressed that *McGee* institutes the concepts of justice, prudence and charity, derived from the preamble, as a counterpoint to historical interpretation.[13]

Finally, McCarthy J in *Norris v. Attorney General*[14] did point out a central weakness in ascertaining public opinion where he remarked that it would be difficult to identify with any degree of accuracy the standards and mores of the Irish People in 1937. Jurist Ronald Dworkin (of whom more later) also points out how difficult if not impossible it is to quantify or identify the "framers intent" in his writings.

In summary, historically the judicial practice with regard to the relevance to the intention of the framers or ratifiers or the state of affairs or public opinion at the enactment of the Constitution has been uneven and contradictory at best.

However, there has been a recent revival of the historical method of constitutional interpretation evidenced in particular in *Sinott v. Minister for Education*.[15] Murray J quotes the literal rule and also mentions the fact that prevailing concepts of justice, prudence and charity evolve as society changes and develops. However, the learned judge indicates that the Constitution cannot be divorced from its historical context. The Judge argues that primary education in the pre-1922 and post-1922 educational system was understood as ordinarily and naturally referring to the education of children and reasons that the State's obligations to provide for free primary education pursuant to Article 42.4 extends to children only. In Hardiman J's judgment the learned judge endorses the historical method of constitutional interpretation and states that it was beyond dispute that the concept that primary education was something that might extend throughout life was entirely outside the contemplation of the framers of the Constitution in 1937.

Kelly has discovered, it is submitted correctly, an ambivalence of approach in *Sinott* between the historical approach and the need to update the Constitution in accordance with changing values of Justice, Prudence and Charity[16] and the recent *Curtin*[17] decision seems to endorse the inconsistent doctrine of using the historical approach when the judges feel it suits them.

In the important *Curtin v. Dáil Eireann*[18] the Supreme Court opined in netting their approach on historicism that:

> "The historical context of particular language may, in certain cases, be helpful, as explained by O'Higgins C.J. in the passage quoted above. Geoghegan J, when considering the meaning of the term "primary education" in Article 42.4 of the Constitution in his judgment in Sinnott v Minister for Education, cited above, said, at page 718, that it was "important in interpreting any provision of the Constitution to consider what it was intended to mean as of the date that the people approved it." Hardiman J, at page 688, thought that it was "beyond dispute that the concept of primary education as something which might extend throughout life was entirely outside the contemplation of the framers of the Constitution."
>
> This is not to say that taking into account the historical context of certain provisions of the Constitution excludes its interpretation in the context of contemporary circumstances. O'Higgins C.J. in The State (Healy) –v- Donoghue [1976] I.R. 325 observed that ". . . rights given by the Constitution must be considered in accordance with the concepts of prudence justice and charity which may gradually change and develop as society changes and develops and which falls to be interpreted from time to time in accordance with prevailing ideas". Again in the Sinnott case Murray J. stated "Agreeing as I do with the view that the Constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been suggested, that it can be divorced from its historical context".

Thus, in essence, the historical approach is useful but the judges should also realise that the Constitution has to be adapted to changing social circumstances.

It should be added that in substance this dictum outlining the contemporary approach of the Court really tells us very little about which of these two discordant approaches of historicism and justice, prudence and charity should be adopted and amounts to a kind of pick and mix or a la carte constitutional interpretation.[19]

Even more recently in *Zappone and Gilligan v. Revenue Commissioners*[20] Dunne J. in deciding that the right to marry did not encompass a same sex union patently rejected a living approach to constitutional interpretation in favour of a framer's intention approach.[21] She pointed out that the *McGee living instrument* approach concerned the determination of unenumerated rights and "*natural rights antecedent to positive law*" as opposed to rights not otherwise identified in the Constitution.[22] The process of considering the Constitution as a living instrument is not one which is available to the interpretation of the Constitution itself, the learned judge contended, as opposed to the interpretation of legislation.

The learned judge then in effect utilised the historical approach to interpretation which she had referenced earlier and concluded:

> "Marriage was understood under the 1937 Constitution to be confined to persons of the opposite sex. Changes in relation to capacity in respect of the marriage age have been made and the most fundamental change of all has been the change in relation to the indissolubility of marriage. . . . .
>
> I accept that the Constitution is a living instrument as referred to in the passage from the judgment of Walsh J. relied on by counsel for the plaintiffs but I also accept the arguments of Mr. O'Donnell to the effect that there is a difference between an examination of the Constitution in the context of ascertaining unenumerated rights and redefining a right which is implicit in the Constitution and which is clearly understood. In this case the court is being asked to redefine marriage to mean something which it has never done to date.
>
> If I were to take the words used by Walsh J. in the McGee case, "No interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts", one would have to ask the question on what basis is the court to interpret or ascertain the prevailing ideas and concepts."

The problem with this analysis is the historical approach is surely less not more apt for textual existing provisions of the Constitution. If we accept the view, which will be developed in detail later, that we should show respect to the language of the text as developed by subsequent generations then historicism is not applicable. The obligation should be to develop the meaning of the text in light of the way language changes and adapts to specific social circumstances. In contrast where the rights are unspecified there is arguably an obligation to defer to "framers intent" and that by their non inclusion in the rights (as amended) the unspecified rights are in effect non justiciable or should never have been developed. In this context it is worth noting the sentiments of Keane CJ in *T.D v. Minister for Justice*[23] where The Chief Justice doubted in a remarkable passage the source and continued existence of unspecified rights. Referring to *Ryan v. AG*[24] the learned judge opined that:

> "In the High Court in that case, Kenny J stated that there were many personal rights of the citizen which flow from "the Christian and democratic nature of the state" which are not mentioned in Article 40. There was no explicit endorsement of that view in this court, perhaps because the rights under discussion in that case was conceded on behalf of the Attorney General to be such unennumerated right. Whether the formulation adopted by Kenny J is an altogether satisfactory guide to the identification of such rights is at least debatable. Secondly, there was no discussion in the judgement of this court as to whether the duty of declaring the unennumerated rights, assuming them to exist, should be the function of the courts, rather than the Oireachtas."

Kelly has an interesting disquisition on "original intent" and makes the following points with respect to the inapplicability of original intent in and Irish context and which to some extent endorses the thesis of this paper. Unlike the US practice the drafting of the Irish Constitution took place in private and subsequent Dáil Debates marred by squabbling do not reveal the intention of the drafters. The intentionalist approach, the authors indicate, is at odds with a legal tradition which focuses on the words of the text rather than the supposed intention of the drafters. The fact that the constitution was enacted by plebiscite and subsequently amended through a series of referenda strongly suggest it is the objective meaning of the text rather than the supposed intention of the drafters which should carry more weight. Kelly quotes Carroll J in *Maher v Minister for Agriculture*[25] to the effect that as the people are legislators their intention is best evinced through the actual words used rather than any pronouncement in an Oireachtas debates.[26]

Kelly, in short, can be brought in to support the idea, argued for in this paper, that it is the objective meaning and words of the text rather than the intention of the drafters that is important. It might be added that this textual meaning is plastic and evolves as society changes and evolves.

Finally, it might be mentioned that in utilising the historical approach the courts do not go the extra step and make any quantifiable attempt to work out what precisely was the intent of the enacters or ratifiers of framers in 1937? Although there is at times reference to contemporary statues or Dáil Debates there is no real attempt to ascertain what people (enacters, framers or ratifiers) in 1937 thought words meant. There's no reference at all to contemporary sources.

3: The Historical Approach in Irish Constitutional Law/ Initial Critical Conclusions

There are a number of critical and philosophical objections to the approach of the Irish Courts which can be summarised at this juncture but will, be developed in detail later. First, there is a lack of clarity in the Irish jurisprudence distinguishing between different types of historicism, all are melded together. Thus for example there is a different historicism if you adopt "framers intent" (assuming we can identify same) "ratifiers intent" (assuming we can identify same) or public opinion and public mores (again assuming we can identify same with any clarity). Such distinctions have been well etched in the writings in The United States. Second, the usage and preference for historicism as opposed to the utilisation of another approach is entirely random and inconsistent though this is subject to the caveat that recently there has been a marked favouritism shown to the historical approach. Third, specifically with respect to the *Zaponne* case, that case in particular accepts the dubious argument that the constitution should not be embraced as a living instrument where textual rights are involved. It must be emphasised that failing to recognise that textual rights can be interpreted in a living fashion does not make sense for to reiterate what was bequeathed to us by our forefathers was a text with guidance which successive generations need to re-interpret to meet their own challenges and needs. Indeed, that point is made by Kelly where the learned authors, as aforementioned, emphasised the need to focus on the words of the text. Justice Dunne's concern that this does not provide us with a clear basis to interpret the text can be responded to with the argument that Justice, Prudence, Charity provides that basis the meaning of which must change and evolve over time.[27]

Fourth, the politics of historicism need to be drawn out. Philosophically and politically it can be related to a conservative position that defers to executive decisions. Of course it is no accident that historicism, as in *Sinott* for example, is closely married to judicial deference and separation of powers.

Finally and most importantly of all why should we truly care what framers, ratifiers or public opinion thought in 1937? Of what relevance is the dead hand of history to a contemporary constitutional text?

4: Originalism and Original Intent: A Critical Analysis of the Intellectual Debate in The United States

The issue of historicism has been vibrantly discussed in the United States and welcome clarity and guidance can be derived from that. Before we undertake a survey of those writings we might note the following distinctions drawn in what, in definitional terms at least, has become a complex intellectual discussion.

(i) *Old Originalism* or *Original Intent* from the 1980's is linked to the intention of the founding fathers or a subtle shift to meet objections, the ratifiers.

(ii) *New Originalism* (if I can term it thus) or *Original Meaning Originalism* or *Original Public Meaning* focuses on the original public meaning and to one jurist[28] *writteness o*f the Constitution which might be clear but leaves a measure of indeterminancy and thus discretion for future generations.

(iii) Recently a further distinction is drawn by one new originalist[29] between *Original Meaning* and *Original Expected Application*. The argument is whereas *Original*

> *Expected Application* binds us to the intention of our forefathers *Original Meaning* gives us a text which we show attention and fidelity to and which provides a blueprint for future generations.

The parameters of the United States debate now need to be probed in more detail. In essence the original version of *Originalism* (now termed inter alia *Old Originalism*) contended that in order to construe the constitution judges should search for the intention of the founding fathers. The view was a rejection of what was perceived as the judicial activism of the Warren and Burger courts and was initiated by Reagan's Attorney General Edwin Meese who argued for *"Original Intention" to put decisions back on the proper path of the intention of the founding fathers and respect democratic principles*.[30] Thus, it is important to stress that from the outset originalism is associated with conservatism political principles. There was a subtle shift in nuance in such theorists from O*riginal Intent* to *Original Understanding* or *Original Meaning* to deal with the objection that it was the ratifiers not the framers intention that was important but even at the time there were powerful intellectual objections.

For example Brest argued that we cannot share in the mental states of founding fathers or ratifiers because they might have conflicting mental states and their intentions are in detail unknowable. Further, and crucially, it seems to me, the founding fathers or ratifiers have no future intention of the state affairs and social circumstances after they lived and which the Constitution was presumably designed to cope with.[31]

Later, H. Jefferson Powell added a further criticism which is that the founding fathers did not believe that looking to the framers intention was an appropriate strategy but that it was the public words of the text that were binding.[32]

There is one further powerful and all pervasive intellectual objection to *Original Intent*. which is a dominant theme of this article. Even if we were certain of the precise intent of the founding fathers and ratifiers and even if we knew they intended to bind us to their settled historical meaning why should we care? Why, in substance, should we be bound by the dead hand of history?

In reaction to these criticisms the *Original Intent* movement shifted its position. Spurred on by Justice Scalia and members of Reagan's justice department the movement now began to argue it was not the intention of the founding fathers or ratifiers that was important but the publically shared meanings of the text.

The *New Originalism* (or *"Original Meaning Originalism"*)[33] has as its central idea that the meaning of the constitution is the original public meaning of the document or its conventional semantic meaning including the meaning as changed by amendment. Such theorists then began to look at dictionaries and documents of public record to ascertain what the citizen of the time thought on constitutional matters. They believed that such searches would discipline courts from engaging in judicial activism.

This view was commenced as indicated by Justice Scalia[34] and most recently has been advocated by Barnett and Whittington.[35] Such theorists are not univocal but also seem to contend that original public meaning of the constitution may not be clear in all circumstances and that because of constitutional indeterminacy constitutional practice requires interpretation and construction. Thus there are gaps, or to borrow the words of Hart, there is an open texture in the Constitution. Thus they allow that construction comes on the scene when the original meaning runs out. However, there is widespread disagreement as to what to do when the text runs out. Barnett contends that into that open texture a judge should resolve a case in a manner which is justice enhancing. Whittington contends that a court should defer to political branches. Two potentially opposite conclusions.

It must be emphasised that such theorists do not adequately address the scale of indeterminacy. A constitution is replete with abstract concepts and ideas which fall to be interpreted by successive generations. One cannot deny that the Constitution does not have specific words which are unambiguous, and which merit following, only that much of the rights driven language is inherently plastic and capable of multiple interpretation. If we trawl through the preamble for instance we find such concepts as "*Justice, Prudence and Charity*" or "*True Social Order*" or "*Dignity*" or "*The Common Good*" a concept that indeed pervades the constitutional text as a whole. In short even by confining our analysis to the preamble the Constitution is replete with abstract ideas and concepts that are inherently malleable from an interpretative standpoint.

Barnett has recently argued that following the *writteneness* of the text (it does not need emphasising that we also have a written text) in some fashion legitimates the use of the states coercive power and the legitimacy of judicial action. That ultimately it defers to a theory of popular sovereignty in that the people gave their permission to that written text (which in this jurisdiction they extend frequently by referendum) with the government acting as agents of the people.

Barnett expands:

> This normative defence of a written constitution is based on the claim that the people (either collectively or as individuals) retain their sovereignty or rights. They are the principals and the government as a whole, including Congress, are mere agents or "servants" of the people. In a principal-agent relationship, the principal retains some or all of her rights while delegating certain powers to the agent, who must exercise those powers on (a) on the principal's behalf and (b) subject to the principal's control.[36]

Further, Barnett argues:

> A written constitution defines the nature of this agency relationship and, by so doing in writing, helps police it. It is easier to see where the agent exceeds its proper powers when these powers are defined in writing. In Lon Fuller's terms, writings serve the evidentiary, cautionary and channelling functions of formality.[37]

Barnett concludes that:

> In the absence of a proper amendment, the meaning of the written Constitution should remain the same until it is properly changed. This is another way of describing original public meaning originalism.[38]

It might be noted that there are other defences of *Originalism* apart from the *Writtenness* argument. Whittington defends *Originalism* on popular sovereignty grounds and Solum makes the important distinction between *Descriptive Originalism* and *Normative Originalism*.[39] According to this distinction, as a

purely descriptive matter, original public meaning is simply what a text does mean according to the Gricean[40] theory of language, which Solum thinks is the best available theory of meaning in this context. Whether and to what extent judges or others *ought to* adhere to this meaning is what Solum calls "*Normative Originalism*."[41]

Now all of this is very interesting but how can we be certain as to what constitutes the original semantic or public meaning of a document given the babble of conflicting voices and motivations at the time of enactment? Further, those theorists concede that the original semantic or public reading runs out. Surely, to reiterate, a constitution is mostly though not exclusively, composed of language and ideas of great abstraction whereby the original semantic ideas (assuming we can reconstruct same) is only useful in marginal cases?[42] Finally, why should we bother even looking for an original semantic or public meaning when we are faced with present day problems? There is an immediate philosophical objection to Old and New Orginalism and that is that a text is a living instrument read through the prism of contemporary observers and for the purposes of advancing modern day concepts of justice. Even if we can ascertain an *Original Intent or Meaning* why, to adopt Solum's classification, should we normatively choose to follow it?

As Dworkin indicates:[43]

> "fairness cannot explain why people now should be governed by the detailed political convictions of officials elected long ago when popular morality, economic circumstances and almost everything else was different.

Further, Dworkin elaborates:

> "Strong historicism ties judges to historical concrete intentions even more firmly; it requires them to treat these intentions as exhausting the Constitution altogether. But this is tantamount to denying the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman's time imagination and interest stopped. The Constitution takes rights seriously; historicism does not."[44]

The view that a Constitution should follow the intentions of long dead forefathers has been characterised/caricatured? as the *dead hand* objection but does it make philosophical sense to follow the intentions of our long gone forefathers?

In this context the insight deriving from structuralism is that it is no longer possible to theorise the subject as a sovereign entity, since like the sign, and like concepts it is defined relationally. What I am is a function of what I am not, what I repress, what I exclude, as well as the various cultural messages, which pass through me. Further, For Benveniste the subject, the *"i"* is nothing more than a position in language, defined in contrast to its other, "*you*". *I* implies a *you,* and so the position of subjectivity is relational, not essential or original. I only come to know myself through contrast with other subjects, and therefore have an existence, which is indissociable from the network of discursive relations in society.[45] For Roland Barthes such an approach leads him to reject the notion of an author of a text — to uncover the meaning of a text we do not look to authorial intention but to the complex layers of meaning in an individual text, which cannot be reduced to a single meaning.[46]

An application of this for law is posited by Margaret Davies:

> "It should be clear . . . that the intention of any Founding Fathers can never be the only criterion for the interpretation of a Constitution. Even if we could gain access to the minds of such people, and even if they were somehow of one mind, the authoritative thing is the text of the constitution: if the meaning of the text is not so much a function of intention, but of context, of language and culture, then the attempt to limit meaning to the first and only understanding will be futile . . . we should be focusing on asking what a good (sensible, just) meaning would be, given the current social circumstances.[47]

5: Professor Balkin Steps In

A very useful contribution to the discussion has recently been provided by Professor Jack Balkin, who has also written on structuralism.[48] Professor Balkin traces the discussion from the *Original Intent* doctrine of the 1980's to the *New Originalist* position of *Original Meaning Originalism* or *Original Public Meaning* and shows how the later change was brought about by the perceived failing of *Original Intent*. Balkin draws a further distinction between *Original Meaning* and *Original Expected Application*. *Original Expected Application* binds us to the intention of our forefathers (assuming we can assess same). *Original Meaning* gives us a text which we show attention and fidelity to and which provides a blueprint for future generations. *Original Meaning* (as defined by Balkin) is a commitment to the fidelity of the text and the principles of the text which must mean different things to successive generations as words mean different things over time and the nuances of the abstract terms and vague clauses of a constitutional text shift and change. He argues for a form of *redemptive constitutionalism* through the passage of history where the open ended language of the constitution delegates the application of terms to future interpreters. He argues that:

> "The whole purpose of a constitutions cannot be simply to forestall political judgements by later generations on important issues of justice, to preserve past practices of social custom or judgements of political morality, or to freeze existing assessments of rights in time. When we view these open ended rights provisions together with the more rule like structural features of constitutions, we can see that they serve a somewhat different goal. They are designed to channel and discipline future political judgements not forestall it.[49]

Balkin also upbraids the *Original Meaning Originalists* as:

> Today original meaning originalists often view original expected applications as very strong evidence of original meaning even (or perhaps especially) when the text points to abstract principles and standards.[50]

Balkin asks the question what do abstract provisions in the constitutional text do?

> Are they designed only to limit future generations, or are they also designed to delegate the articulation and implementation of important constitutional principles to the future?[51]

Balkin later expands on the constraints on political judgement imposed by the text but cautions against freezing political judgments in time and argues that the constitution is an aspirational document and that the position of those such as Justice Scalia whereby we are constrained by the original intent of framers or enacters is a "*narrative of decline.*"

In contrast, Balkin argues that principles existing and embedded in the constitution can be re-interpreted by successive generation to face contemporary issues. Thus he argues that the *class* clause in the constitution can protect the right of homosexuals even if no one at the time of enactment of the constitution knew what a homosexual was or would not have protected them even if they did know.[52]

In sum Balkin argues for a common project and a shared political commitment over time and later lyrically for a *transgenerational political project*.[53]

6: Dworkin on Historicism

Ronald Dworkin, as aforementioned, has written eloquently, about historicism and particularly so around the time of the nomination of Judge Robert Bork to the Supreme Court and the publication of Bork's *Tempting of America*.[54] In *Bork's Own Postmortem*[55] he summarises his views. Dworkin draws a distinction between the framers linguistic intentions and their legal intentions and argues that although the framers linguistic intentions fix what they said, it does not follow that their legal intentions fix what they did. In assessing the legal intentions of the framers Dworkin argues:

> "They intended to commit the nation to abstract principles of political morality about speech and punishment and equality, for example. They also had a variety of more concrete convictions about the correct application of these abstract principles to particular issues. If contemporary judges think their concrete convictions were in conflict with their abstract ones, because they did not reach the correct conclusions about the effect of their own principles, then the judges have a choice to make. It is unhelpful to tell them to follow the framers intentions. They need to know what legal intentions – at how general a level of abstraction – and why. So Bork and others who support the original understanding thesis must supply an independent normative theory – a particular political conception of constitutional democracy – to answer that need. That normative theory must justify not only a general attitude of deference, but also what I shall call an interpretative schema: particular account of how different levels of the framers convictions and expectations contribute to concrete judicial decisions."[56]

Dworkin elaborates that framers intent can be viewed on levels of generality and that we must seeks to "*disentangle the principle they enacted from their convictions about its proper application in order to discover the political content of their decisions.*" Dworkin expands that Bork uses framers intent inconsistently and at different levels of generality. For example he uses framers intent in a reductive fashion and in a very strict sense for the cruel and unusual punishment clause of the eight amendment (to permit capital punishment) but in a broader sense for the principle of equality (to meet the future but not contemplated at the time need of outlawing racial desegregation). Thus Bork never settles on a coherent interpretative schema, according to Dworkin, and the metric of contradiction suffuses the book. For example Dworkin points out in extrapolating on the contradictions:

> If it does not matter that the framers and the public thought segregation was constitutional, then why should it matter whether they also thought affirmative action quotas were constitutional?[57]

Dworkin, in substance, also argues that the cruel and unusual punishment clause though it did not forbid capital punishment at the time does so now. Dworkin also rejects Bork's argument that judges should not engage in moral choices in that Bork inconsistently endorse the very proposition he seeks to deny and in any event the act of contemporary interpretation as to what a constitution involves necessitates, as I understand Dworkin's argument, judges making such moral choices.

Dworkin concludes that:

> There is nothing abstruse or even unfamiliar in the notion that the Constitution lays down abstract principles whose dimensions and application are inherently controversial, that judges have the responsibility to interpret these abstract principles in a way that fits, dignifies and improves our political history.[58]
>
> In this context there is a parable by Ludwig Wittgenstein whereby a mother asks her husband to teach their child a game, whereupon the husband instructs the child in how to play at dice. "*I didn't mean that kind of game,*" the mother protests. And the philosopher asks what she means by "*mean.*" Did she mean that she had thought of dice and ruled it out, or that if she had thought of it she would have ruled it out, or whatever?

In short we have to ask today what equality, the common good, social justice, due process mean? We cannot be clear as to the extent and ambit of framers intent assuming we can identify same, which is well nigh impossible.

7: Is Historicism Valid or Indeed Useful as a Matter of Constitutional Adjudication?

The position of both Balkin and Dworkin is a welcome one, In essence that although fidelity and respect should be shown to the principles and language inherent in the text that the text requires to be interpreted by future generations and judges and that a form of "historicism" or "originalism" that seeks to reconstruct legislative or forefather or public mores intention is not an apposite way of dealing with contemporary problems. It might be added that the use of such a "historicism" or "originalism" would have lead to the rejection of one of the leading cases in our Constitutional law.

In *McGee v AG*[59] a right to marital privacy was recognised leading to a right to contraceptives for marital couples. Let us suppose we do what O' Keefe J did in the High Court and use the historical method by casting our mind back to 1937 and we have the added support of the Customs and Consolidation Act 1935 to evince legislative intention. Did the plain people of Ireland of comely maidens dancing at the crossroads vote for a Constitution which recognised contraception? Did the Dáil Deputy two years after the Customs and Consolidation Act believe he was enshrining a charter for contraceptive usage? Did Mr De Valera or John

Charles McQuaid or the myriad of civil servants who might be considered the founding fathers of the Constitution?[60] To use the historical method or new or old "originalism" *McGee* was wrongly decided.[61] *McGee* of all decisions is one where we do not have great difficulty in reconstructing original intent.[62]

Of course the reason the court of that period did not is that they thought that historicism fails to treat the Constitution as a living instruments that changes and evolves as concepts of justice, prudence and charity change and evolve where rights driven claims are involved.[63]

It is a static view that our constitutional dispensation should be ruled by the dead hands of our forefathers. Further, to reiterate, why should we care much what they individually or collectively thought, beyond the principles contained in the text that they have bequeathed to us? Moreover, how can we definitively ascertain what was the intention of people or legislators or constitutional architects in 1937 at the magical moment of constitutional creation? How can we reconstruct the babble of different voices and interpretations to provide overall clarity? And more importantly why should we? Finally, how do we know that it was the immortal intention of the framers of the constitution or the people in 1937 that time stopped and that their intentions would bind future generations to the dimensions and contours of constitutional protection?

In short outright "historicism" and "originalism" does not do justice to a text that needs to be re visited by present day interpreters as far as rights driven claims are involved. It might be added that the freezing of a text in permafrost does not make sense to a present generation who need to resolve practical problems that revolve around the interpretation of complex concepts and values.

In fact historicism is the worst forms of judicial deference and is in fact anti-democratic. It ties the judiciary, not to deference to a present legislator and its democratic mandate but to deference to the intentions of past legislators whose democratic mandate is long gone. Moreover, it assumes the problems of the past are those of the present and that in some rose tinted way our ancestors knew best.

Further, it might be added, the distinction drawn in *Zappone* where the construction of the constitution as a living instrument is disapplied to textual rights does not work. Our forefathers gave us as a gift a charter of rights and principles which successive generations need to flesh out and give content to. To be ruled by their contemporary intentions is in fact to be ruled by a long dead democratic mandate.

It must be admitted, as Balkin and even Dworkin intimates, that we ought to show fidelity to the principles contained in the constitutional text, that is the gift of our forefathers and we can change those principles by amendment. In short the constitution, as amended, is textually a reflection of our sovereignty and we should embrace its textual sacredness but that does not mean that we should not develop the scope and content of existing rights to meet present needs.

On retirement Justice Brennan argued against "original intent" on a number of grounds. He noted that the "*proponents of this facile historicism justify it as a depoliticization of the judiciary*" but "*the political underpinning of such a choice should not escape notice*" and that a "*position that upholds constitutional claims only if they were within the specific contemplation of the framers in effect establishes a presumption of resolving textual ambiguity against the claim of constitutional right*". Brennan further argues, apropos the US Constitution but equally applicable to our own, that a constitution is not just a majoritarian document but embodies substantive value choices that are put beyond the legislature which need to be enforced by the judiciary in modern circumstances.[64]

8: The Unspecified Rights: A gnawing and unresolved doubt

However, if we embrace textual sacredness where do the unspecified rights stand? The problem is if they are not contained in the original or amended text is a judge in reading unspecified ignoring the fundamental principles contained in the original text as amended? This is a troubling issue for which this article provides no clear resolution but the following can be usefully argued.

Article 40.3 refers to the fact that *in particular* life, good name, person and property are cognisable rights. The use of the word *in particular* by our forefathers as a matter of textual construction surely meant they did not seek to bind us to those four rights exclusively otherwise why use the words in particular? The overall schema of the constitution is to protect fundamental rights. It is a rights driven charter in part. Thus the development of unspecified rights is a welcome development to meet new needs and expectations.

Further, the mirror opposite of historical interpretation and its counterpoint is to develop the constitution according to the doctrine of justice, prudence and charity.

In *In Re Article 26 and the Regulation of Information (Services out of the State for Termination of Pregnancies Bill) 1995,*[65] the Supreme Court considered the concepts of justice, prudence and charity in some detail and the court indicated that It falls on the judges to interpret the Constitution and in so doing determine the rights which are superior or antecedent to positive law or which are inalienable or imprescriptible. 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 and crucially:

> 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 must be conditioned by the passage of time.

And the Court concluded from a consideration of the case law which recognised the existence of a personal right not enumerated in the Constitution:

> "[I]t is manifest that the Court in each such case had satisfied itself that such personal right was one which could reasonably be implied from and was guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity."

This it is clear that the concepts of Justice, Prudence and Charity are a source for the developments of human rights within the constitutional framework in a teleological fashion. However, Justice, Prudence and Charity are words contained in the preamble and thus not binding in terms of a definitive application. The question remains, troubling and inconclusive in its resolution, can the language of the preamble be

legitimately used for constitutional change and development and in particular the recognition of new rights?

9: Conclusions

In substance the following can be said in conclusion. Pure historicism whereby we seek to ascertain either the intention of people or mores or forefathers or ratifiers in 1937 should be rejected on a variety of different grounds. It was not the intention of the founding fathers to bind us to their contemporary intent all they bequeathed to us was a set of principles for future generations to interpret. Further, it is impossible to reconstruct their intent or the intention of the ratifiers or of the people and the exercise of reconstructing their intention is a sisyphean task which it is fruitless to undertake.

Finally and not least of all we should not be bound by the dead hand of our forefathers. We should not truly care except as a passing historical interest what they intended in vastly different social and economic circumstances.

However, fidelity should however be shown to the text, the gift of our forefathers, but the text is a document to be interpreted dynamically by successive generations particular given the very abstract and plastic rights based language involved.[66]

Finally, the development of unspecified rights is problematical in that it adds to the text and thus to some extent distorts fidelity. In this context *McGee* may have been wrongly decided in that it created right not envisaged by the historic principles that have been bequeathed to us by the framers.

The implications of these conclusions are stark. If this is the case and historicism as adopted by The Irish Supreme Court is invalid as a method of constitutional interpretation at least for textual rights then it calls into serious question the outcome in a succession of constitutional cases. Is *Sinott* rightly decided? Is *Zappone*, now on appeal to the Supreme Court, rightly decided? Historicism may be right in the political sense of right wing but is it right in the interpretative and philosophical sense.

Perhaps the concluding words should be left to a judge given that recently much of Irish Jurisprudence has uncritically embraced the viability of historicism. Brennan J in retirement, as aforementioned, dealt with historicism in detail. He concluded his telling remarks in the following fashion which serves as an epitaph for this paper.

> "[T]he genius of the constitution rests not in any static meaning" but in "the adaptability of its great principles to cope with current problems and current needs" and the "ultimate question must be, what do the words of the text mean in our time."[67]

Endnotes

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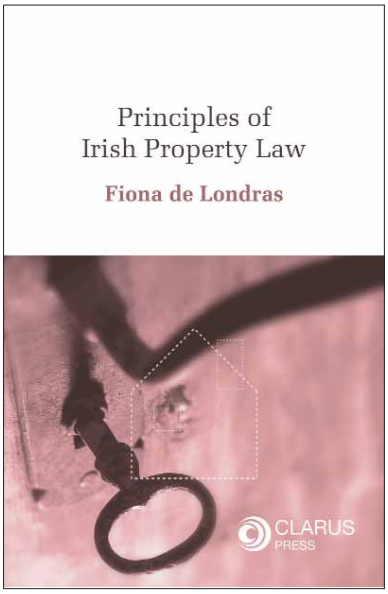
1. I would like to thank Dr. Oran Doyle in particular and David Prendergast and Donal Coffey for various suggestions they have made both at the time this paper in more rudimentary form was presented to the Irish Jurisprudence Society and since. I might add that they are not in any way responsible for the views expressed herein.
2. Oliver Wendell Holmes on interpreting the Constitution. State of Missouri v. Holland 252 U.S. 416 (1920).
3. As will become clear the United States as a matter of linguistic convention have termed historicism original intent or variants of same which are discussed later.
4. [1940] IR 470.
5. [1962] IR 1.
6. [1965] IR 411.
7. [1974] IR 287.
8. [1972] IR 69.
9. [1984] IR 248.
10. [1983] ILRM 449.
11. *Op. Cit* at 5.
12. [1974] IR 284 at 319.
13. The use of justice, prudence and charity as an interpretative schema has its faults in that the language is derived from the preamble, a point I will dwell on later in the paper.
14. [1984] IR 36.
15. [2001] 2 IR 545.
16. Kelly: The Irish Constitution [Tottel Publishing] 4th Edition [2004] at 22.
17. Unreported Supreme Court, 9th March 2006.
18. *Op. Cit* at 13.
19. In this context it might be noted that there is also the arbitrary non use of historicism when the courts randomly choose not to use historicism. For example would the outcome in C.C v. Ireland, Unreported, Supreme Court, 23rd May 2006 be different if historicism had been used? I am grateful to Dr. Doyle for this point.
20. Unreported, High Court, Judgement of 14th December 2006.
21. At Page 121 of her judgment.
22. At Page 126 of her judgment.
23. [2001] 4 IR 259.
24. [1965] 2 IR 294.
25. [2001] 2IR 139. Cited by Kelly at 29–30.
26. Kelly, The Irish Constitution,(Tottel Publishing) (2003) at 28–29.
27. At Page 126 of her judgment. Though whether Justice, Prudence and Charity provide a sufficiently grounded textual basis given its insertion in the non binding preamble is a matter of some doubt which will be addressed later.
28. Barnett.
29. Jack Balkin whose views are discussed in detail later.
30. There were many speeches but representative of his views is Edwin Meese III Construing The Constitution, 19 U.C Davis L. Rev 22 (1985). The bible of the movement was by a judge; Bork, The Tempting of America(1990) who was an unsuccessful republican nominee to the Supreme Court not least for his view that original intent did not encompass the abortion right adumbrated in Roe v. Wade 410 US 113 (1973).
31. Paul Brest, The Misconceived Quest for The Original Understanding 60 B.Y.L.Rev 204 (1980).
32. H Jefferson Powell, The Original Understanding of Original Intent 98 Harv. L.Rev 22 (1985).
33. It should be noted at this juncture to note that the definitional categorisations remind one of the debate in The Life of Brian between the representatives of the Judean Peoples Front and The Peoples Front of Judea!.
34. Representative of his views is Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).
35. Randy Barnett, Restoring the Lost Constitution (Princeton University Press 2003); Keith Whittington, Constitutional Interpretation (University Press of Kansas 2001); Keith Whittington, Constitutional Construction (Harvard University Press 2001).
36. Letter on Originalism, October 29th 2007, Randy Barnett in the website, The Volokh Conspiracy
37. *Op. Cit* at 30.
38. *Op. Cit* at 30.
39. Larry Solum, October 30th 2007, Semantic and Normative Originalism, Comments on Brian Lieter's Justifying Originalism in The Legal Theory Blog.
40. Grice provided, and developed, an analysis of the notion of linguistic meaning in terms of speaker meaning (according to his initial suggestion, 'A meant something by x' is roughly equivalent to 'A uttered x with the intention of inducing a belief by means of the recognition of this intention').
41. Larry Solum, October 30th 2007, Semantic and Normative Originalism, Comments on Brian Lieter's Justifying Originalism in The Legal Theory Blog.
42. In this context one might introduce the Dwokinean idea of hard cases and the interpretative obligation of judges. To the extent that Dworkin commits himself to the position that most cases are hard cases and involve interpretation then surely most constitutional cases are hard cases that involve judges searching for contemporary resolutions to deal with the abstract language of the document.
43. Law's Empire At 364.
44. Law's Empire At 369.
45. Benveniste: Problems in general linguistics, translated by Mary Elizabeth Meek, 2 vols. Coral Gables, Florida: (1971).
46. An essay by Barthes in 1967 contained in many anthologies.
47. Margaret Davies: Asking The Law Question (Sydney: Sweet and Maxwell: 1994).
48. I am indebted to Professor Balkin in sending me the full text of his recent paper on interpretation. Jacques Balkin: Original Meaning and Constitutional Redemption, November 5th 2007. Constitutional Commentary Vol. 24 at 100.
49. At Page 130.
50. At 122.

51. At 122.
52. At 158.
53. At 199.
54. *Op. Cit* at 23.
55. An essay contained in Chapter 14 of Freedom's Law (Oxford University Press) 1996.
56. Freedom's Law at 296.
57. Freedom's Law at 299.
58. Freedom's Law at 305.
59. [1974] IR 287.
60. It must be stressed that the contribution of the civil servant John Hearne has been vastly under appreciated as is made clear in Keogh and McCarthy: The Making of The Irish Constitution 1937 (Mercier: 2007). As far as what John Charles McQuaid thought it is made clear in the aforementioned book that as well as suggestions, ideas and books forwarded to De Valera his general view was that a constitution was *"a thesis of philosophy and theology . . . . It should enshrine and set forth what ought to be our Christian endeavour in social policy."* He further indicated in the document entitled Directive Principles that *"We desire – within the vast freedom of the social encyclicals to achieve common good of the nation on Christian lines and by Christian". methods."* Keogh and McCarthy *at* 108. Thus it seems tolerably clear that using historicism as a method of constitutional interpretation McQuaid would not have approved of contraceptive usage.
61. I am conscious of course of the argument accepted by Dunne J in *Zappone* that in effect the observations on justice, prudence and charity in *McGee* are confined to unspecified rights but, in my view, that is a wrong reading of the Constitution and in any event does not fully appreciate, as I argue , that if anything a living approach to constitutional interpretation is more appropriate for textual or specified rights.
62. *McGee* of course declares an unspecified right. As will become clearer later in the article unspecified rights are if anything more suitable to a modified historical approach given that they involve non textual guarantees.
63. Though whether the courts were right in creating new unspecified rights which do not mirror the intention of the principles bequeathed to us by the framers is a matter of some doubt.
64. William J Brennan Jr, "The Constitution of The United States: Contemporary Ratification," 35 Res Ipsa Loquitor 4 (Fall/Winter 1985). I am indebted to Sullivan: Constitutional Interpretation and Republican Government (2006) 26 DULJ 221 at 230–231 for these quotes.
65. [1995] 1 IR 18.
66. One caveat, not developed in detail, is that fidelity should be shown to the text if the language is sufficiently specific and not capable of anything but a singular interpretation Thus for example Article 16.2.6 "No law shall be enacted whereby the number of members to be returned for any constituency shall be less than three."
67. William J Brennan Jr, "The Constitution of The United States: Contemporary Ratification," 35 Res Ipsa Loquitor 4 (Fall/Winter 1985). I am indebted to Sullivan: Constitutional Interpretation and Republican.

Book Reviews

Principles of Irish Property Law

By Fiona de Londras
Published by Clarus Press
Price €95
Publication Date: October 2007



Although it is the dreaded subject of many a law student property law remains one of the fundamental courses for any undergraduate considering a professional career in law. While the area is not without valuable core texts, recommended in universities across the country, it is safe to say that de Londras' first edition of *Principles of Irish Property Law* deserves to be included in any "essential reading" list.

Anyone who has studied property law will remember with great fondness the day they were introduced to the concept of tenure and the infamous fee simple! From that day forward the legal language which most students were only coming to grips with took on an unprecedented linguistic challenge. Coupled with complex, archaic concepts the study of Irish property law is one many of us will look back on with anything but fondness.

De Londras has united with Clarus Press to create a textbook which successfully tackles these customary grievances surrounding Irish property law. She achieves this task through the use of an accessible, comprehensible writing style which, although undeniably easy to follow, is not excessively simple to the point that it should be considered a novice type manual.

Without summarizing the contents of the entire book let me address a few areas where I believe the author has been particularly successful.

Chapter one sets the scene with a focused examination of the foundational concepts. Following a clear distinction between real and personal property the author goes on to explain, with considerable clarity, this issue of property as a right, as well as the important concepts of ownership and possession. The final portion of the chapter deals specifically with the concept of land emphasizing its importance to the law of real property.

The concept of tenure is crucial to achieving a complete understanding of the roots of property law principles in Ireland. De Londras' second chapter traces feudalism and tenure in a way that provides the reader with an unambiguous view of the preceding situation without overburdening the reader with more historical information than absolutely necessary. This in turn allows for a smooth transition into the study of more complex areas such as the Use and the doctrine of estates, for which an understanding of feudalism and tenure is essential.

Chapter four breaks down and clarifies the various estates that exist in land through the extensive use of accessible examples. This allows for these often problematical concepts to be put into an every day context that students can more easily relate to. From the account of the fee simple through to the explanation of the more troublesome Rule in *Shelly's case*[1] this chapter successfully endeavors to elucidate these undeniably intricate areas.

In addition to producing a text which sets out the existing legal principles in Irish property law de Londras appropriately includes analysis of the future of land law in Ireland. She outlines and explains, where relevant in each chapter, the impact that the Land and Conveyancing Law Reform Bill 2006 will have on modern Irish land law. In particular, the situation in relation to a number of the estates in land and the state of future interests is soon to be radically altered. With such significant change afoot this text is a useful point of reference for professionals and students alike who will now require an informative summary of these proposed reforms.

Fiona de Londras can now stand alongside the leading property law authors with her publication of *Principles of Irish Property Law.* A well written, comprehensible and up-to-date text, it can certainly be included in the Clarus Press expanding list of success stories.

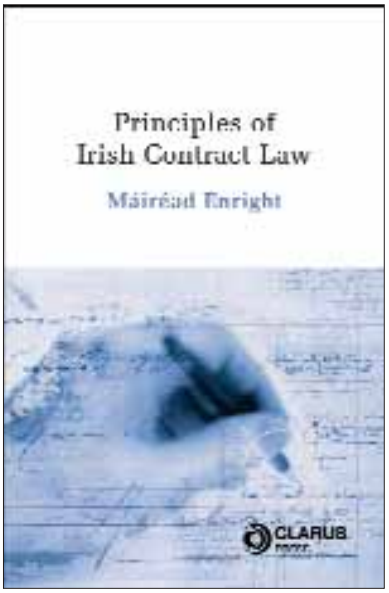
Reviewed by Kate Kelly,[2] *Lecturer in Law, Griffith College Dublin*

Endnotes

1. (1581) 1 Co Rep 88b.
2. This review expresses the personal opinion of the reviewer, however, we would like to acknowledge that the reviewer is an employee of Bellerophon Ltd, who is a shareholder in Clarus Press.

Principles of Irish Contract Law

By Máiréad Enright
Published by Clarus Press
Price €85
Publication Date: October 2007



Irish contract law is an area that has become increasingly well catered for in terms of texts over the last number of years, this is despite the fact that contract law is not as extensively litigated as other legal areas. As such, Máiréad Enright had her work cut out for her to produce a text which would add to and compete with the stellar texts available in this area already. *Principles of Irish Contract Law* however is specifically stated to have been completed with the undergraduate student in mind. To assess whether Ms Enright has fulfilled her part of the bargain, one has to consider what the undergraduate student needs from a contract law text (or indeed any law text).

Contract law tends to be a subject yawned at by many an undergraduate law student and while it is not essential for a text to make this subject interesting if the student does not automatically find it so, it is definitely not a bad thing. Ms Enright seems to have achieved this — she has unusual, thought-provoking (and sometimes funny!) quotes at the beginning of certain chapters and sections within chapters (my favourite being in the chapter on consideration "*Consideration is to contract law as Elvis is to rock and roll: the King*" p 75). She had also provided an interesting and readable contextual basis for the principles and case law which is, I would suggest, essential for any student to grasp the basics of any legal subject. This is particularly evident in the first chapter where an introduction is given to some of the important themes in contract law. Enright discusses some of the problems which arise as a result of the current non-interventionist policy in contract law and suggests that if the goal of contract law is "economic efficiency" then this will cause significant problems in terms of social justice. Apart from the fact that this analysis is a very interesting read it also makes the whole area of contract law more relevant and modern for the student who can sometimes forget its relevance given the age of some of the case law!

A second and more important requirement is that the book makes the area accessible and understandable. Some areas of contract law can be quite complicated such as consideration, promissory estoppel, privity, misrepresentation and mistake. In each of these chapters, Ms Enright has divided each chapter into manageable sections with clear, concise and logical explanations and discussions of the principles and case law. Important extracts from key judgments supplement Ms Enright's explanations.

Finally, Ms Enright has included sections on important areas in which contract law is becoming increasingly relevant —notably e-commerce and contracts on reproduction. As the scope and importance of the internet has grown, e-commerce has expanded at a phenomenal rate. A discussion of e-commerce has been included in the chapters on acceptance (Chapter 5), Statute of Frauds (Chapter 11) and exemption clauses (Chapter 14). The use of contract law in the area of reproduction in Ireland is a very new trend. Enright includes a summary and discussion of the recent case on this point — *MR v TR* [2006] IEHC 221. She notes that contract law has been argued to be a particularly male construct, based on logical transactions rather than a more relationship-based, intuitive approach (which is arguably a more female construct). As such, contract law may not be the perfect legal tool to use the sensitive area of reproduction.

Without doubt, this text will be of great use to the undergraduate student however it is also, I would suggest, a good general text for practitioners or individuals looking for an understandable and readable book on contract law. It covers all the essential areas of contract law in depth and with context and analysis. It goes further than that however by making sure that the reader is aware that contract law is a living, breathing, modern and relevant part of Irish law.

Reviewed by Ciara Fitzgerald[1]*, B.C.L., (NUI), LL.M., (Cantab), Contract Lecturer, The Law School, Griffith College Dublin*

Endnote

1. This review expresses the personal opinion of the reviewer, however, we would like to acknowledge the reviewer is an employee of Bellerophon Ltd, who is a shareholder in Clarus Press.

Conference Note

Ciara Fitzgerald
BCL., LL.M., Deputy Head of Academic Law,
Griffith College Dublin

Second Annual Legal Education Symposium

UCC Law Faculty
Date: 7 December 2007
Venue: UCC

Conference Aim With the ever increasing number of institutions offering law, and law-related courses, and the increasing numbers of students willing to take up those courses, this conference was excellently placed to allow academics, teachers, practitioners and even students to discuss developments in the area of legal education and make some suggestions for the future. The conference was split into three different sessions.

The morning session focused on the evolution of the undergraduate curriculum. The session was opened by the charismatic and incredibly witty Dermot Gleeson SC (former Attorney General, current Chairman of the Governing Body of UCC) who spoke a little on the benefits that can be derived from a career which encompasses both academia and practice. He also expressed doubt as to whether the science model of the Ph.D could be simply transferred to legal Ph.Ds.

The session itself was chaired by Judge Bryan McMahon (Judge of the High Court, and former Professor of Law and Head of the Department of Law in UCC). He introduced the speakers with a little discussion of the vagaries of legal language. The speakers for the first session comprised of Professor Joseph Singer (Bussey Professor of Law, Harvard Law School), Sarah McDonald (Dean of the Honourable Society of the Kings Inns) and Marie McGonagle (Head of Department and Director of the LL.M. in Public Law).

Both Professor Singer and Sarah McDonald spoke of the need to ensure that their curricula provided their students with certain skills. Professor Singer noted that the curriculum in Harvard had changed very little since Christopher Columbus Langdell had reformed it! The new curricula now focus on providing the students with a body of skills considered by the Harvard faculty to be essential skills for a law graduate. Sarah McDonald remarked that the focus of the new Barrister-at-Law degree was to produce graduates with the necessary expertise needed to practice as a barrister – this meant an alteration to the substance of the course itself but also to the method of assessment to ensure that the students were achieving the appropriate learning outcomes.

Marie McGonagle spoke on the evolution of the curricula in NUI Galway. The approach taken by the Faculty there was not a complete overhaul as in Harvard or the Kings Inns but more of an incremental progression. The core basis of theory had been retained and improvements have been made which link into this core rather than just acting as an add-on. Specifically Marie spoke of the need to integrate the use of technology properly and ensure that the student has the appropriate research skills, evaluative skills and communication skills to fully use new technologies in their study and practice of law.

The second part of the morning session involved a number of round table discussions which were essentially seminars focusing on particular pedagogical themes: developing practical skills, teaching with technology, joint law degrees and pedagogy in law. At each session three speakers presented a paper on the theme. I attended the teaching with technology discussion where there were enlightening papers on how to better use available technology to impart knowledge to students. Dr Anderson (Queens University) talked about his use of podcasts with undergraduate tort students. Dr Fahy (DIT) delivered a paper on the use of WebCT in delivering a Legal Research module and Dr. Áine Ryall and Stephen Deane (UCC) discussed the creation of an online forum for use in delivering a module on Environmental Law, an area of law which is derived from a vast array of domestic, European and international sources.

The afternoon session focused on graduate curriculums in law schools, another area which is expanding quite rapidly. The session was chaired by Professor Gerard Quinn (NUI Galway) and had an impressive panel of Professor John Mee (UCC), Professor Colin Scott (UCD) and Dr Eoin O'Dell (TCD). Professor Mee discussed the potential benefits of a development of "Fourth Level" Irish law while Professor Scott focused on how such development will improve the professions but also argued that PhD programmes that have a certain amount of structure to them do have benefits attached to them. Dr. O' Dell's paper followed on from Professor Scott's as he talked about the development of a skills programme in Trinity for PhD students in their first year.

The conference was closed by Celia Wells (Professor of Law, University of Durham) who reflected on some of the issues that had been raised during the conference and also on the developments and challenges legal education is facing. In particular she noted that while there has been a significant increase in the number of women entering into the law, not enough of them are remaining in the profession.

Conclusion

Overall the conference was a great success and all credit must go to UCC for continuing to provide informative, challenging conferences on such a wide range of issues. As we face into a period when there are more law students in Ireland than ever before, this conference was aptly timed to discuss the challenges ahead and suggest possible future paths.

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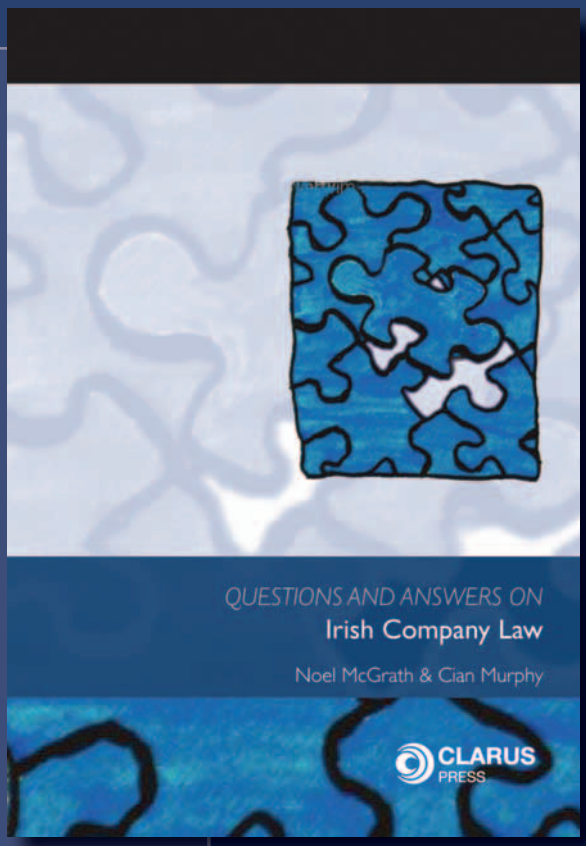

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