Inaugural Editorial

We sometimes struggle to find anniversaries of significant events on which to hang other less significant events as if the suggested symmetry, which is usually coincidental, entailed some kind of poetic beauty. In that spirit of coincidental symmetry it is (merely) appropriate to launch a new scholarly review dedicated to human rights in 2010, the sixtieth anniversary of the signing in Rome of the European Convention on Human Rights (ECHR) following the establishment of the Council of Europe.

Despite some serious tension between the Irish and British delegations in the negotiations that led to the creation of the Council of Europe in 1949 arising from the so-called "sore thumb policy" then pursued by the Irish — whereby every opportunity was used to raise the issue of Irish partition as a human rights violation — there was significant agreement between the Irish and British on the contents of the ECHR. De Valera was, notably, effective in this process pointing up a quaint historical irony given that his then prominent foe, Churchill, provided inspiration for the Convention in earlier speeches calling for a pan-European codification of the common law by means of a convention or charter protecting civil and political rights as a democratic bulwark against totalitarianism.

Ironies persist. Now the Conservative Party in the United Kingdom — one of the parties of Churchill — is committed to repealing the UK Human Rights Act of 1998, the Act that incorporates the ECHR into UK law, and replacing it with a "British" Bill of Rights. This proposal is controversial, even within the Conservative Party, and it ignores the very "Britishness" of the ECHR with its focus on a dated but valuable set of civil and political rights. Those who are accused of favouring "rights inflation' or of being "rights supremacists" complain about the ECHR for precisely this reason, that it doesn't go far enough. Sixty years on, the European Convention on Human Rights seems somewhat unloved.

And, yet, its achievements are remarkable. The Convention and the European Court of Human Rights are heralded as the outstanding success story of regional rights protection. Competition for this accolade is, admittedly, not keen. The European Court of Human Rights, although hybrid in character by comparison to other so-called constitutional courts, has earned the healthy respect of national apex courts (in Europe and beyond) on a broad range of human rights issues. The Court has, occasionally, shown a tendency to be inconsistent and unattractively pragmatic but what collegiate court has not exhibited such fallibility consistent with the human fallibility of its individual parts?

The ECHR has been of critical importance in both parts of the island of Ireland since the 1950s. This was recognised in the Belfast / Good Friday Agreement of 1998 where the Convention was viewed, for better or worse, as providing a "neutral" benchmark of minimal rights protection for the island as a whole. It was in the

context of the Agreement that the legislation to give further effect to the ECHR in Irish law was proposed. While the ECHR Act 2003 has, predictably, been undramatic in its impact to date, it has normalised recourse to the Convention in domestic legal practice, something which was happening anyway prior to incorporation, and may yet add some value in areas of law where domestic standards fall short of Convention standards.

The debate on indirect incorporation of the ECHR revealed a strange defensiveness on the part of certain commentators about the relative merits of the Irish Constitution of 1937, but it also revealed a somewhat misplaced enthusiasm on the part of rights advocates about the added-value, in terms of substantive rights protection, to be gained under the Convention. Colm O Cinneide characterises this tension as one between "particularism" and "cosmopolitanism".

But perhaps the debate was merely a shadow of the real debate in Irish constitutional jurisprudence which is — since cases like *Sinnott* and *TD* that hinged on the distinction between commutative and distributive justice — about where to draw the line in applying the separation of powers doctrine and how far the judicial branch should go in deferring to the Legislature and Executive, especially on matters of socio-economic justice.

This tension was sharply revealed (ironically, on an issue of commutative justice) in the recent Supreme Court (3:2) decision in *Meadows v Minister for Justice, Equality & Law Reform* [2010] IESC. The majority in this case has dented the established Irish application of "Wednesbury reasonableness" (Hibernicised as "O'Keeffe reasonableness") as the appropriate standard of scrutiny in judicial review of administrative actions. The apparent judicial embrace of the alternative standard of "anxious consideration" or "anxious scrutiny" was not driven by zealous devotion to the ECHR or international human rights standards generally but the jurisprudence on which it drew was influenced by the Convention, as was acknowledged by Mr Justice Fennelly.

In his trenchant dissent in *Meadows*, Mr Justice Hardiman gave vent to a deeply-felt scepticism about anxious consideration in withering terms:

> "The phrase is used in different senses, which any outside observer of judicial developments must find thoroughly confusing. But such observers are mostly lawyers, academic or otherwise, and are almost invariably *partis pris*, whose strong taste for novelty, and specifically for the extension of the domain of the law, leads them to pass lightly over the absence of rigour or even of specific meaning, in the phrase as now used. They do this, seduced by the intoxicating prospect it has come to represent of a dramatic judicial incursion into the political and administrative field."

Without entering into an involved discourse on the points at issue in *Meadows* (a topic that will be considered in the next issue of this Review), the passage of Hardiman, J, just quoted, serves to illustrate a problem of general but fundamental concern raised by rights sceptics in respect of rights enthusiasts. The suggestion seems to be that those who favour more recourse to international human rights

instruments favour more recourse to the courts as an effective way of advancing human rights. There is some truth in this rather reductive assertion but it does insufficient justice to the idealism of those who view the rule of law differently than those who, by virtue of their positions, ordain the prevailing judicial orthodoxy. The difference is, essentially, between those who see separation of powers as a means to achieving the rule of law and those who see the separation of powers as an end in itself.

Undoubtedly, some see human rights as a source of proxy public morality or "new civic religion", a code of conduct for a post-modern age. According to this view, instead of just raising awkward questions human rights provide a comprehensive set of answers. Human rights, like religion, are about certainty and not doubt.

This can, of course, limit our imagination causing us to see human rights-based solutions solely or mainly as judicialised solutions. Thus, the necessarily political dimension of the struggle for rights — and it usually is a struggle — is problematised to the point where political processes are by-passed in favour of transcendent judicial intervention. In this crudely cast dilemma, when politics is the problem the courts become the solution. Social movements and the mobilisation of people in the name of ideals seem like a relic of the past although, in less prosperous times like now, this may change.

The foregoing is, admittedly, a caricature of the rights enthusiast but one which is deployed to great effect by those who, depending on the occasion and the audience, embellish or mask their real objection to certain human rights. A more balanced and humorous representation is to be found in Conor Gearty's book of unusual brevity but rich insight, *Can Human Rights Survive?* (Cambridge University Press, 2006), in which he states:

> "Human rights people are stuck, required without the support of many symbols to practise their beliefs in exactly those places — developed modern societies — where belief in anything is hard enough and belief in something moral apparently rooted in nature hardest of all. They are the disciples of an idea rather than a sacred text or even a holy (much less a divine) person, and the closest they get to congregational worship is the occasional drinks party after a human rights lecture. (They are usually too polite for the solidarity that comes from public protest)."

The human rights community must address these issues of substance and presentation even if they feel that criticisms levelled by their detractors are unfair. Too much time is spent on winning arguments about textual formulae that may or may not affect actual outcomes for actual human beings. Having one's sense of virtue crystallised in a text — whether international or domestic — is not its own reward.

Perhaps it is more useful to see human rights instruments — whether constitutional or otherwise — as the beginning rather than the end of dialogue. Thus, in his book, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009), Gregoire Webber argues that constitutional rights are "under-determinate"

and suggests that: "…citizens frame and adopt constitutional rights in a manner that leaves the resolution of rights disputes to a *later day*." The unfinished business of the Constitution is progressed, *inter alia*, by the Legislature.

In the Irish context this raises a very real practical problem which partially explains the enthusiasm of some for recourse to judicial and quasi-judicial solutions. That is the problem of a weak Legislature controlled in most vital respects by the Executive with no serious capacity to hold the Executive to account. This has recently been decried by the Ombudsman, Emily O'Reilly, for transforming the constitutional ideal of some balance as between branches of government into a fiction. Undue judicial deference to the political branches of Government will inevitably entail a disproportionate deference to the Executive.

The apparent disdain for politics on the part of some rights enthusiasts offends judges and others who are alive to the dangers of judicial trespass on the political domain. But it may well indicate an astute appreciation on the part of such enthusiasts of the dysfunction at the heart of the Irish polity. This dysfunction may, of course, be an intended consequence of the 1937 Constitution. More benignly, it may be something that remains uncorrected by operation of the constitutional mandate. Why, then, are more people not protesting about this instead of studying legal texts and briefing solicitors? What is missing in our political life animated by a public morality that one would expect to draw on an ethic of civic republicanism?

In his book, *Ship of Fools* (Faber & Faber, 2009), Fintan O'Toole writes about this in the most forceful terms:

> "The Irish had been taught for generations to identify morality with religion, and a very narrow kind of religion at that. Morality was about what happened in bedrooms, not in boardrooms. It was about the body, not the body politic. Masturbation was a much more serious sin than tax evasion. In a mindset where homosexuality was much worse than cooking the books, it was okay to be bent as long as you were straight. This nineteenth-century ethic was not pushed aside by the creation of a coherent and deeply rooted civic, democratic and social morality. It mostly collapsed under its own weight of hypocrisy. The familiar code of values, the language in which right and wrong could be discussed, lost its meaning before Irish society had fully learned to speak any other tongue."

What O'Toole identifies so eloquently cannot be solved by a lazy liberalism that replaces the discarded moral framework once provided by religion with a comprehensive manifesto for goodness and happy outcomes passed off as "human rights". At a more conscious, strategic level we must not rely on the external imposition of 'progressive' solutions for want of the energy required to convince fellow citizens of the objective merit of such solutions. This view of human rights as a holistic catalogue of trendy and progressive answers to troubling questions is utterly devoid of meaning and purpose.

The *Irish Human Rights Law Review*, which will be published on an annual basis, will challenge this view of human rights devoid of real meaning by focusing mainly but not exclusively on human rights values distilled in human rights law. It is not

because law is seen as the be-all and end-all of human rights protection and promotion that this focus will be adopted but because this area of law now requires a more rigorous treatment as a mainstream area of growing relevance to domestic legal practice.

In a common law jurisdiction domestic legal practice is never hermetically sealed from "external" or "foreign" influence but the influence of international human rights law could be greater. The recent restatement of dualism in classical and unreconstructed terms by Chief Justice Murray in the case of *McD v L & Another* [2009] IESC 81, the case involving a dispute between a lesbian couple and their gay male sperm donor, was unsurprising. But dualism is no more than an enabling mechanism in the Constitution that invites Parliament to achieve a greater integration of municipal and international law by means of legislative or constitutional incorporation.

This understanding of dualism is consistent with a fair appreciation of the aptitude of the Constitution's primary framer, De Valera, in the international domain. He was an avowed nationalist and a capable internationalist. When judges restate their understanding of the relevant provision of De Valera's constitution — Article 29.6, which requires some act of legislative incorporation before an international instrument can be enforced by a court — they are not objecting to international law *per se* but, rather, describing the absence of a necessary political act required in a dualist system. The real issue is, therefore, political. Unless and until the Oireachtas gives further effect to international human rights instruments in domestic law they will remain of no more than persuasive authority before the Irish courts. In the case of the ECHR this "problem" may well be solved by EU accession to the Convention but that will only add to the confusion with other, arguably more important, international instruments.

A necessary part of the effort to "patriate" international human rights obligations, or at least to create a more active "dialogue" between international and municipal systems, is a vibrant, critical discourse on the domestic legal and political significance of those instruments of human rights protection to which the State is a party. In this annual Review we will endeavour to provide a space in which these issues can be discussed in a rigorous and scholarly manner. This inaugural edition contains articles and case notes on a diverse range of topics including: the right to a fair trial, the work of the Irish Human Rights Commission, privacy, equality, immigration, children's rights, housing rights, jurisdictional issues pertaining to the European Court of Justice and European Court of Human Rights, freedom of expression and recognition of same-sex marriage. In subsequent editions we will revisit some of these topics and deal with other issues of academic and practical concern.

Donncha O'Connell,
Editor.