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Judicial Review under the Irish Constitution: More American than Commonwealth

Seamus O'Tuama*

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Introduction

The Irish legal system emerged from the British system. Yet the Irish constitution diverges from the Commonwealth model and more closely resembles the American constitution in both substance and application. This means that while the Irish parliamentary system is very much based on the Westminster model, the legal system, while remaining within the Common Law family, has important distinctions. One of the key areas of divergence from the Commonwealth model is in judicial review. This has important ramifications for the recognition and elaboration of human rights under the constitution. This article explores some of the historical reasons for the shift from the Commonwealth model and the nature and consequence of some of those differences. It also contrasts certain aspects of the Irish judicial review process with those pertaining in the United States; in particular it highlights some anti-democratic tendencies in the Irish system.

The emergence of Judicial Review under the Irish Constitution

The new Irish constitution of 1937, or *Bunreacht na hÉireann*, made a fundamental move away from the British constitutional model of parliamentary primacy. Its predecessor the Irish Free State Constitution was a child of the British parliament and was framed in the context of the British experience. When framing the new constitution Éamon de Valera[1] may have been

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[1] Éamon de Valera as Irish Prime Minister (*Taoiseach*) personally engaged in the drafting of a new constitution to set his stamp on the fledgling state (see Brian Farrell(ed) (1988) *De Valera's constitution and ours*, Dublin: Gill and Macmillan).

influenced more by a wish to break the colonial link than in giving reign to the judiciary, steeped as he was in a conservative tradition. It is likely that his view of the separation of powers resembled those of Alexander Hamilton in *Federalist 78*, where he envisaged the judiciary as properly the weakest of the three branches of government. This would deny the potential for strong judicial review as 'the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void'.[2]

Looking at Judicial Review in American history from the early 20th century one might be tempted to assume that the current form of judicial review existed from the beginning, but as Wolfe points out it is not the case. Wolfe divides the development of judicial review under the American constitution into two distinct genres, covering three periods.[3] He terms these genres as 'traditional' and 'modern', the first to some degree can be likened to Tushnet's description of 'weak judicial review' and the modern to 'strong judicial review' although they are not identical.[4] The first period, during which the traditional model was in the ascendancy, covered the time from the adoption of the constitution up till the end of the Civil War. The modern period in Wolfe's view emerged from 1937, with the intervening 70 years or so being a period of transition.

In terms of de Valera's project, it can be assumed that as he was working before the true emergence of the modern or stronger tradition of judicial review, he could not have anticipated its potential impact for his constitution. However the Irish Constitution contains explicit measures for judicial review in Articles 26 and 34, thus the seeds were sown by de Valera, which would allow for the emergence of strong judicial review along American lines, but confined to the superior courts. The transition in Ireland's case was foreshortened; the period of transition was just two decades. The Irish Constitution operated entirely within the compass of the modern genre in the United States, mediated by the younger judges who pushed out the frontiers of judicial review, drawing on their own knowledge and experience of the American model. It may not have been as critical in terms of influence, but it is worth noting that the postwar German federal constitution also assumed a strong judicial review approach. It is clear that in both the American and the Irish cases there was a transition from a weaker form to a stronger form. To the point where 'the courts have *general* authority to determine what the Constitution means… the courts' constitutional interpretations are authoritative and binding on the other branches, at least in the short to medium run'.[5]

Weber makes some interesting observations on judicial review or what he calls 'Judge-Made Law'. He points out that a judge will feel obliged in subsequent cases to reiterate a maxim used

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[2] Hamilton, Alexander (1788) *The Federalist* No. 78 The Judiciary Department Independent Journal, Saturday, June 14, 1788.

[3] Wolfe, Christopher (1981) 'A Theory of U.S. Constitutional History' *The Journal of Politics*, Vol. 43, No. 2. (May, 1981), pp. 292-316.

[4] Tushnet, Mark (2003) 'Alternative Forms of Judicial Review', Michigan Law Review, Vol. 101, August 2003, 2781-2802.

[5] Ibid, p. 2784.

in order to avoid a charge of bias for changing the norm on which his/her decision was made. There is also a tendency for judges to follow each other in a similar vein:[6]

> The more stable the tradition, the more the judges will depend on those maxims which guided their predecessors, because it is just then that every decision, regardless of how it came into existence, appears as being derived from the exclusively and persistently correct tradition.

This in Weber's words is a pattern that lays claim to 'permanent validity'. We can see this trend in two aspects of judicial review under the Irish Constitution. The first is the gestation period from the adoption of the constitution to the emergence of the type of strong or modern judicial review which subsequently emerged. The break with the British model and the move to what might be described as the American model emerged with a new generation of judges who had greater exposure to the workings of the US Constitution. The second point of note is that there then emerges an Irish tradition.

While the first point led to a new wave of judicial activism, the second may in time lead to stultification through a desire to sanctify the tradition as it were. This latter trend is likely due to Weber's account of the nature of the work of legal professionals vis-à-vis the making of law. He holds firmly to the view that professional jurists hold a pre-eminent role in the shaping of law, but that their innovation is, by the nature of their profession, bounded. He states that: 'prophets are the only ones who have taken a really consciously "creative" attitude towards existing law'.[7] On the other side he places a clear limitation on the advances wrought through the activities of legal professionals, due to their role as 'interpreters' rather than 'creators', 'even those jurists who, from an objective point of view, have been the most creative ones... regarded themselves to be but the mouthpiece of norms already existing'.[8]

This perspective casts a less positive and dynamic light on the possibilities of original innovation arising through judicial review. This is a more contentious position than Weber might have imagined as judicial review in the modern or strong form has come more to the fore only in the generations after his death.

Both Gardbaum and Tushnet offer interesting insights on how constitutions and or constitutional traditions establish strong or weak forms of judicial review. Gardbaum makes the point that strong forms of judicial review became the norm from 1945 in an attempt to safeguard the rights of citizens from the excesses of their own governments.[9]

Delany writing in 1957, before the full flowering of judicial review under the Irish Constitution, provides a keen insight into how judicial review was then considered by the Irish judiciary and the trends he saw emerging. The first point he makes is that the judges then on the bench had

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[6] Weber, Max (1978) *Economy and Society (Volume 2).* Roth, Guenther & Wittich, Claus (Eds.) Berkeley: University of California Press, p. 759.

[7] Ibid, p. 894.

[8] Ibid, p. 894.

[9] Gardbaum, Stephen (2001) 'The New Commonwealth Model of Constitutionalism' *American Journal of Comparative Law*, Fall, 2001, 49, 707-760. p. 714-5.

been 'trained, in the main, in an atmosphere of unlimited parliamentary sovereignty'[10] He also notes that 'surprisingly few' constitutional cases had come before the courts, notwithstanding 'an express power of review', concluding that the idea is 'an unfamiliar one', but he nonetheless detects the beginnings of change.[11] His discussion on the *National Union of Railwaymen and Others v. Sullivan* case in the High Court and especially in the judgement of Murnaghan in the Supreme Court appeal indicate a sea change in the Irish judiciary:[12]

> In some Constitutions it is left to the Legislature to interpret the meaning of these principles, but in other types of Constitutions, of which ours is one, an authority is chosen which is clothed with the power and burdened with the duty of seeing that the Legislature shall not transgress the limits set upon its powers.

Over time this more vigorous approach by the judiciary would become part of the Irish judicial review culture.[13] Morgan remarks on this suggesting that the Irish judiciary have at times acted in a way 'which it could be queried whether judges have not gone beyond their proper place in the polity'.[14]

The adherence to a strong judicial review model from the bench is illustrated by the comments of Brian Walsh a former member of the Supreme Court, who acknowledged the role the judiciary has played in extending rights provisions under The Irish Constitution: 'Constitutional protection is afforded also to very many rights which, though unspecified, have been recognised by the courts as having the full backing of constitutional protection'.[15]

However as stated above the Irish system migrated from a clearly weak model under the *Soarstát Éireann* or Irish Free State constitution, which model initially continued under the 1937 constitution, but given the strength of Article 34 in particular the emergence of a stronger model was always a possibility.

This happened without the sorts of debates that occurred in Canada, New Zealand and Britain. Four possible explanations can be put forward for this. Firstly there was not the same depth of traditional respect for the supremacy of parliament in Ireland, especially in nationalist politics, from which appointments and appointees would emerge. Secondly, the new Irish constitution was maturing just as the strong American judicial model was gaining international acceptance after 1945. Thirdly the younger Irish jurists had extensive knowledge and contact with the American model. Finally Article 34 and to a lesser extent Article 26 offered not just a mechanism, but an imprimatur for strong judicial review.

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[10] Delany, V.T.H. (1957) 'The Constitution of Ireland: Its Origins and Development' *The University of Toronto Law Journal,* Vol. 12, No. 1 (1957), 1-26. pp. 9-10.

[11] Ibid, pp. 9-10.

[12] Irish Reports (1947) p.99.

[13] Delany, op. cit., pp. 22-24.

[14] Morgan, David G (1999), 'The future of the Irish Constitution' in Neil Collins (Ed) *Issues in Irish Politics Today*, Manchester: Manchester University Press.

[15] Walsh, Brian (1988) 'The Constitution: a view from the bench' in Brian Farrell (Ed), *De Valera's Constitution and Ours*, Dublin: Gill & Macmillan, pp. 193-194.

Circumstances militated against weak judicial review in the Irish context. Firstly as was the case with the *Canadian Bill of Rights 1960*, the Irish Free State constitution suffered from being too pliable in the face of political imperatives. It fell precisely into the framework of a weak model as described by Tushnet. '[T]he mark of weak-form review is that ordinary legislative majorities can displace judicial interpretations of the constitution in the relative short run'.[16]

Secondly de Valera was negatively disposed towards a constitution that had the Anglo-Irish Treaty[17] as a schedule. And thirdly de Valera was disposed to the American view of government, both positively as a model for a newly independent state and negatively as an alternative to the British model. Outlining a key difference between the 1922 or Irish Free State constitution and the 1937 constitution Delany highlights a new direction in the latter. While the 1922 constitution was conflicted 'between the British monarchical system and Irish republicanism', there was no such ambiguity from 1937 'and Ireland's formal relationship with the traditional type of dominion constitution was terminated'.[18]

Had Ireland not taken that road in 1937 it might have pursued a path towards what Gardbaum calls the 'New Commonwealth Model of Constitutionalism'.[19] This model describes a form of weak judicial review that has emerged primarily in Canada (*Canadian Constitution Act 1982*); New Zealand (*New Zealand Bill of Rights Act 1990*) and in Britain (*Human Rights Act 1998*). Under this type of weak judicial review the courts have powers to question the constitutionality of provisions, but this can be circumvented by the legislatures. It is a stronger provision than that which pertained under the Irish Free State constitution, as it includes a non-binding role for the courts. While all three countries set out to establish a stronger protection for human rights and at the same time steer some sort of middle ground between the old model of parliamentary supremacy and the strong judicial review position in America and Ireland, the measures are neither uniform in substance nor operation. Nor are they free from disapproval as is demonstrated by critiques like those of Anderson in a hard-hitting comment on the Law Lords decision in December 2004 against the detention of foreign suspects under the 2001 British anti-terrorism legislation.[20] Anderson holds that the British constitutional tradition is undermined by that decision which flowed from Britain's agreement to sign up to the European Convention on Human Rights. 'We signed out of unfocused benevolence - and a few decades later, we realised that we had signed up to a foreign appeal court which could overturn our laws'.[21]

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[16] Tushnet, op. cit., p. 2786.

[17] The Anglo-Irish Treaty signed and ratified by the British and Irish sides brought the Irish War of Independence to a conclusion and allowed for the creation of the Irish Free State. It led to a major political split and subsequent Civil War in Ireland. De Valera led the defeated Anti-Treaty side.

[18] Delany, op. cit. p. 10.

[19] Gardbaum, op. cit., 707-760.

[20] In a strongly worded judgement the Law Lords found that the *Anti Terrorism Crime and Security Act, 2001* was discriminatory, disproportionate, unwarranted and a threat to traditional British liberty. For more detailed discussion and comment see for instance *The Independent*, *The Guardian*, *The Times* for December 17, 2004 and following days.

[21] Anderson, Bruce (2004) 'The Law Lords have usurped the right of the British people to defend themselves' *The Independent*, December 20, 2004.

This has led, in his view, to the undermining of parliamentary sovereignty. He holds that human rights have been best served under the traditional British constitutional system, where parliament ultimately decides rather than being in a position where 'doctrines of human rights are given precedence over the legal system and the Parliamentary process'.[22]

Gardbaum sums up the differences and similarities in the three commonwealth systems:[23]

> … Canada by instituting a limited overriding bill of rights; New Zealand by a purely interpretive one; and Britain by a mixture of the two… preserves the core element of parliamentary sovereignty... In Canada by exercising the override; in New Zealand by enacting legislation that expressly or by unambiguous implication limits rights; in Britain, first by express limitation and then by refusing to amend or repeal the statute after a judicial declaration of incompatibility.

The *Canadian Constitution Act, 1982* through Section 33 of the *Canadian Charter of Rights and Freedoms* allows both the federal and provincial governments to enact laws that might conflict with the charter's provisions, with some exceptions. To do this a legislature would have to include a clear statement of its intentions, a 'notwithstanding clause'. This was, perhaps cynically, done by the Quebec government who opposed the proposal for political reasons, when it re-enacting its entire body of law with an omnibus notwithstanding clause. This was subsequently upheld in the Canadian Supreme Court in the 1988 case *Ford v. Quebec*.[24] While Canada provided the model for both New Zealand and Britain, Gardbaum contends that the three jurisdictions have interpreted and implemented it in different ways as outlined above.

This new model attempts to create a balance between the traditional supremacy of parliament, as operated under the Irish Free State constitution, and the type of strong judicial review model adopted by America and followed by other countries after the second world war.[25] The commonwealth model came long after the acceptance of strong judicial review under the Irish constitution, which was in line with contemporary practice in the United States.[26] The latter presumes that human rights are universal and immutable and therefore should be protected from interference even by the legislative branch of government. There is here an unspoken notion that rights will continue to extend off an unbreachable baseline. A baseline may be true of certain fundamental rights, but it would be foolish to presume it applies to all rights. The very process of judicial appointment recognises this dual possibility, the courts could engage in trimming rights that the legislature might wish to expand. The fate of the social rights proposed by T.H. Marshall in the latter part of the 20th century indicate how rights can shrink, but it should not be assumed that this would or could only emanate from the legislature.

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[22] Ibid.

[23] Gardbaum, op. cit., p. 744.

[24] Ford v. Quebec (Attorney General), File No.: 20306, Supreme Court of Canada, [1988] 2 S.C.R. 712; 1988 S.C.R.

[25] Gardbaum, op. cit., p. 714-5.

[26] See discussion on this in Wolfe, op. cit., pp. 292-316.

Regardless of strong or weak judicial review rights remain open not just to interpretation by the courts, and even if immutable they can be changed through a constitutional amendment. International commitments and memberships of bodies like the United Nations and the Council of European present constraints on unilateralism, but not all rights are encapsulated in the *Universal Declaration of Human Rights* and the *European Convention on Human Rights and Fundamental Freedoms* and not all states respect rights as universally as these documents might hope.

In terms of rights the constitution is like a safety deposit box in the name of a club or society (a state). The contents are owned equally by all members of the club (citizens). From within the club a special committee (judiciary) is appointed which has powers to safeguard and keep an inventory of the contents, using a set of rules, which they adopt and can change without reference to the full club membership. The club membership has the right to dispose of the contents of the box or add to it. The special committee on reviewing the contents can suggest that a certain item is not on the inventory and may even acknowledge on their inventory an item previously voted for removal by the membership albeit under a different label. Chief Justice Finlay's judgement in the Irish Supreme Court *X Case* in 1992 seemed to do just that vis-à-vis a majority of the Irish citizenry who believed they had drawn a line under abortion in the Eighth Amendment.[27]

> 37. I, therefore, conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40, s.3, sub-s. 3 of the Constitution.[28]

The main argument in favour of a weaker model is that the legislature is closer to the will of the people and therefore more democratic. Harel claims that rather than being antidemocratic judicial review in fact defends the rights of the majority against the power of the legislature and thus provides 'mechanisms for a faithful implementation of the will of the people'.[29] This argument is not so straightforward. For instance the weaker form of judicial review could just as easily be construed as fostering a concentration of power in an elite, the government, at the expense of parliament and one of the other branches of government, the judiciary.

The weak form allows some ceding of power to the courts. It does not grant the courts the force to face down the legislature on the constitutionality of a law as can happen in Ireland.[30] The new Commonwealth forms have potency in terms both of their legitimacy to question legislation and as moral gatekeepers. Not least is the potential of a judicial opinion to impact on public opinion and shift the balance of argument in the public sphere, which might ultimately derail a measure. The judiciary on the other hand also acts as a sort of permanent opposition with the power to act

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[27] While I agree with the conclusion of the Supreme Court it is fair to say that many Irish citizens were at least surprised that the terms of the constitutional amendment could have been interpreted in this way.

[28] A.G. v. X[1992] IESC 1; [1992] 1 IR 1 (5th March, 1992) Supreme Court: The Attorney General (Plaintiff) v. X. and Others (Defendant) 1992 No. 846P.

[29] Harel, Alon (2003) 'Rights-Based Judicial Review: A Democratic Justification' *Law and Philosophy* 22: 247-276. p.249.

[30] See *Bunreacht na hÉireann* Articles 26 and 34.

against government wishes. At one level this offers a bulwark against precipitous or unreflective action by governments in the face of a crisis real or imagined. While judges are ultimately appointed by governments, they generally occupy office for longer periods, sometimes bearing the mark of several governments. That has obvious advantages and disadvantages. On the plus side they have an independence that allows them to speak against the mood of the moment which could have the impact of putting reflection into the model and forcing another perspective onto the agenda. On the negative side they could represent entrenched views in the manner suggested by Weber.

How judges are appointed in the United States and in Ireland, would not give rise to much confidence in the courts' capacity to act democratically. Schmidhauser rejects the notion that the American political system is a 'government of laws, not men'. He makes the point that it is individuals who 'make, enforce, and interpret the law', thus the work of the courts carry 'the indelible stamp of the judges and justices who have served on them'.[31] He also points out that lower socio-economic groups find it very difficult to get the education, professional status and political connections to put them in the frame for selection.[32] He posits three unstated requirements that greatly enhance potential selection for the superior courts especially. Candidates who: i. come from a relatively privileged and politically active family; ii. have excellent legal training and connections; and iii. are an established and successful politician or lawyer; are at a distinct advantage.[33] Cook in her discussion on the appointment of women judges would add gender to the list.[34]

In the Irish case similar trends can be identified, some of which were addressed with the introduction of the *Courts and Court Officers Act, 1995*, which established a Judicial Appointments Advisory Board.

In some ways the *Judicial Appointments Advisory Board* serves a function not unlike that of the US Senate in the ratification process, except in this case it puts forward a list of candidates from which the government may choose. In its 2002 Annual Report the Board acknowledges that while 'there is no obligation on the Minister to request the Board to make recommendations'[35] about any vacancy arising, nonetheless this has been the practice for all appointments since the introduction of the legislation. Likewise the government could choose to ignore all of the recommended candidates; however this has not occurred to date. This system does not remove political involvement in appointments, but it presents a very different picture to that described by Conway. Conway's trawl through the National Archives highlights a total lack of transparency in the system, between the circulation of an initial memo by the Minister and the arrival of 'the pink

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[31] Schmidhauser, John R. (1979) *Judges and Justices: the federal appellate judiciary.* Boston: Little, Brown & Co. p. 11.

[32] Ibid, p. 96.

[33] Ibid, pp. 95-100.

[34] See Cook, Beverly B. (2000) 'Women as Supreme Court Candidates: from Florence Allen to Sandra O'Connor' in Hall, Kermit L. (ed) *The Supreme Court in American Society: Equal Justice Under Law* New York and London: Garland Publishing. pp. 16-28.

[35] Judicial Appointments Advisory Board (2002) Annual Report 2002. Dublin: Government Publications. p. 23

slip recording the name of the person appointed'.[36] His account however is replete with examples of the sorts of representations that were made by politicians, bishops and even candidates.

The new system in no way indicates that Schmidhauser's[37] thesis is any less valid, nor that the system is essentially less political. Additionally in the reporting period 2002, the numbers of women presenting for consideration for judicial appointments declined in relation to the seniority of the positions. Women represented 26.5% of candidates at District Court level, but there were none at Supreme Court level. In 2002 within the overall scheme 30.8% of successful candidates were women. This translates as four women out of a total of 14 appointments, one to the High Court, two to the Circuit Court and one to the District Court. There is however a trend towards a fairer representation of women in the Irish judiciary, even if there is still some distance to go, in 1996 only 13.3% of Irish judges were women, by 2004 this had increased to 21.5%.

Judicial Review in Practice

Former Chief Justice Brian Walsh was clear on how he saw the role of the judiciary in reviewing and interpreting The Irish Constitution:[38]

> Our courts have said that wherever there is a constitutional right the very existence of that right provides its own remedy, and gives the courts power to take measures necessary to give effect to the vindication or the defence of that constitutional right.

In the US Supreme Court Justice Hughes outlined similar sentiments, but in less equivocal terms. 'We are under a Constitution, but the Constitution is what the judges say it is'.[39] This latter view although sounding cynical, Hogan points out, certainly has validity under the Irish constitution. While the constitution vests considerable powers with the courts to interpret the constitution, it gives them few guidelines on how they should exercise these powers. 'There is no universal rule pre-ordaining the manner in which the Constitution is interpreted'.[40] And he goes on to point out that its interpretation has drawn its inspiration from many sources, including: public opinion, an historical view, liberal approach, natural law, extra-constitutional principles, harmonious interpretation, viewed as an entire document. He outlines each in detail and cites cases in support of each.[41] In the end he is forced to the conclusion that[42]

> [n]o particular theory or method of constitutional interpretation has been applied by the courts. Indeed, this lack of consistency has been so prevalent that individual judges have from time to time adopted different approaches to this question, utilising whatever method

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[36] Conway, Kieran (1996) 'Views from the National Archives on Judicial Appointments', Irish Law Times, April 1996, pp. 95-97. p. 95.

[37] Schmidhauser, op. cit.

[38] Walsh, Brian (1988) 'The Constitution: a view from the bench' in Brian Farrell (Ed), *De Valera's Constitution and Ours*, Dublin: Gill & Macmillan, p. 193.

[39] Quoted in Gerard Hogan (1987), 'Constitutional Interpretation' in Frank Litton (Ed.), *The Constitution of Ireland 1937-1987*, Dublin: IPA, p. 173.

[40] Ibid, p. 173.

[41] For full details see Hogan, ibid.

[42] Ibid, p. 187.

might seem to be most convenient or to offer adventitious support for a conclusion they had already reached.

The dangers of such a diverse and unpredictable approach cannot be ignored. It is hardly ideal that a constitution should be subject to the whims of judges or the good fortune of those pleading its extension or protection. Schauer pursues the same issue when he speaks of judges 'reaching perhaps politically or morally wise decisions'[43] but not in the context of strict precedence nor on tight interpretations of the constitution itself. He points out the serious pitfalls in trying to achieve neutrality, but it still raises issues about the role of the judiciary vis-à-vis legitimate democratic government. To what extent is judicial review stepping into the political domain, or indeed is it after all a part of the political domain given its status as one of the three branches of government. There are essentially three questions, none of which are new. How can we best achieve good government; is democracy the best approach and how best can rights be safeguarded. Questions about judicial review wittingly or unwittingly are concerned with these three questions.

Harel outlines the three principal arguments in favour of judicial review: *limitations hypothesis; review hypothesis;* and *judicial review hypothesis.* Each is grounded in a different justification. The limitations hypothesis relies on the idea that rights are external to the polity, that, not unlike natural law, they are not subject to change by the polity. The review hypothesis claims that you need very strong powers of review that guarantee to limit the powers of the legislature, keeping it to its proper domain, this impacts on democracy, but it is a price that has to be paid. The third, judicial review, holds that since the review process is essentially a legal one, then the best people equipped to do it are lawyers through the judicial system.[44]

Harel offers a critique of judicial review as being undemocratic, because he says 'that even if judges rely on societal norms and values when using their powers of judicial review, it is still *judges* doing so, not us'.[45] This has some validity, but it presumes democracy to equate with an Athenian type direct democracy framework. The reality of contemporary complex societies is that we have to look outside that sort of framework to re-imagine a democratic approach that still has meaning in terms of citizens having the ultimate say.

Judicial Review under the Irish Constitution

Judicial review has, with a few notable exceptions, in the main extended rather than restricted rights provisions and generally has had a permissive influence on Irish society.[46] It is of the utmost importance to consider the vulnerability of the constitution in this haphazard climate in view of the single opinion restrictions of Articles 26 and 34:

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[43] Schauer, Frederick (2003) 'Neutrality and Judicial Review' *Law and Philosophy* 22: 217-240. p. 223.

[44] Harel, op. cit., p. 250.

[45] Ibid, p. 257.

[46] The 1983 Norris v. Attorney General case provides perhaps the most controversial countervailing decision by the Supreme Court, albeit by a majority of three to two. In this case the unconstitutionality of Ireland's archaic male homosexual laws was being sought on the basis of the right to individual personal privacy of consenting adults. See also the discussion on the Hamilton judgement in re. Attorney General(S.P.U.C.) v Open Door Counselling and Well Woman Centre.

> *Article 26.2.2°* The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.
>
> *Article 34.4.5°* The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.

While the possibility existed from its enactment, the process of extending the range of rights defended by the constitution did not in fact begin in a serious way until the early 1960s. High Court Justice Donal Barrington was part of that generation of barristers who began the process of realising the value of the constitution.

He identifies two reasons why this process did not begin sooner. The first was the setback of the 1940 Supreme Court judgement on the constitutionality of the *Offences Against the State Act*. This judgement in effect gave a sort of precedence to the British model of parliamentary sovereignty by saying that a person deprived of his or her liberty under a law which was not repugnant to the constitution had no recourse to protection under Article 40.3.[47] This left the Constitution as a 'broken reed' in the eyes of barristers according to Barrington.

The second reason that the process of judicial review did not begin sooner was that the judges and lawyers had all been educated in the pre-constitution era. It was not until the new judges, led by Chief Justice Cearbhall Ó Dalaigh, began to recognise the legal existence of the constitution, did constitutional pleadings become a common and important feature of Irish cases. The 1963 case brought by Gladys Ryan to prevent the fluoridation of the public water supply was one of the most important early cases. In short she felt that water fluoridation was harmful to her own and her children's health and as such impinged on her constitutional right to 'bodily integrity'. This right she felt existed, if not explicitly stated, arising from Article 40.3.1˚.

Justice John Kenny upheld this contention in the High Court, although he did not disallow fluoridation as he judged it to be harmless—this decision was confirmed by a Supreme Court judgement. Of the Kenny judgement, Kelly says: 'The principle for which she was contending, namely that the citizen's rights are not exhausted by the specific recitals in special constitutional articles, he fully admitted'.[48] In his judgement, through interpreting the words 'in particular' to signify that other unspecified rights also exist, Kenny opened up a new realm of judicial review under The Irish Constitution. '[T]he acceptance of interpretations which acknowledged the existence of implied constitutional rights were first chartered'.[49] What Kenny did in fact was to

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[47] Barrington, Donal (1987) 'The Constitution in the Courts', in Frank Litton (Ed.), *The Constitution of Ireland 1937-1987*, Dublin: IPA, pp. 110-127.

[48] Kelly, John (1988), 'Fundamental Rights in the Constitution' in Brian Farrell (Ed), *De Valera's Constitution and Ours*, Dublin: Gill & Macmillan, p. 168. For the actual case transcripts see Ryan v Attorney General[1965]IR294.

[49] Doolan, Brian (1984), *Constitutional Law and Constitutional Rights in Ireland*, Dublin: Gill & Macmillan, p. 90.

allow for the possibility of such a contention that certain rights may not in fact be listed in the text, but could, nonetheless, be recognised if and when the case for such recognition was placed before the High Court.[50] Beytagh somewhat mischievously ask: 'One may wonder, then, about the enumeration of those that are in fact listed'.[51]

Kelly lists a series of similar cases which followed and established the following: the right to marital privacy, right to earn a livelihood, right to litigate, right to fair proceedings, right to travel and hold a passport, certain rights of mothers and so-called illegitimate children.[52]

Justice Hamilton, in the more recent and perhaps better known case involving telephone tapping by the Minister for Justice and journalists Geraldine Kennedy and Bruce Arnold in 1987, recognized the right to privacy. Effectively adding the right to privacy to those rights already enumerated in the constitution.[53]

Brian Walsh, served on the benches of the High and Supreme Courts for thirty years and together with then Chief Justice Cearbhall Ó Dalaigh and Justice John Kenny was part of that era which saw the greatest constitutional judicial activism. Walsh was the author of so many of the important judgements of the period that the leading constitutional lawyer, Thomas Connolly remarked that: 'Brian Walsh is writing the constitutional law of this country'.[54] Kelly eloquently describes this era beginning in the early 1960s as follows: 'This new judicial generation at the top led to nothing less than a revolution in constitutional jurisprudence, most particularly in the area of fundamental rights'.[55]

Walsh viewed the constitution firstly as the fundamental law of the state—the basic law. He also saw it as a living dynamic document, one concerned with the cultural and normative reality of the contemporary society in which it is being interpreted, not as a pedantic or scholastic document to be examined only historically and textually.[56]

> It is a law that embraces both social and political objectives, and is one that gives force of law to certain moral concepts. Therefore it is inevitable that many of the cases that come before the courts will mirror many social, economic, philosophical and political debates that engage our people.

Judicial Review operates in a climate where all legislation is presumed to be constitutional, a position that contrasts with the weaker or commonwealth models.[57] Walsh points out that the

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[50] For further discussion on this see also Morgan, David G (1999) 'The future of the Irish Constitution' in Neil Collins (Ed) *Issues in Irish Politics Today*, Manchester: Manchester University Press.

[51] Beytagh, Francis X (1997), *Constitutionalism in Contemporary Ireland*, Dublin: Roundhall Sweet & Maxwell, p. 32.

[52] Kelly, op. cit., p. 169. The full list of cases and reports is included in footnotes 19-25 inclusive, ibid, p. 173.

[53] See also Casey, James (1987), *Constitutional Law in Ireland*, London: Sweet & Maxwell, p. 158.

[54] Quoted in Barrington, op. cit., p. 115.

[55] Kelly, op. cit., p. 167.

[56] Walsh, op. cit., p. 192.

[57] *Bunreacht na hÉireann*, Article 15.4.1.

Oireachtas[58] is directed by the constitution to enact only laws that are constitutional and that the judiciary operates on the presumption that this is how the Oireachtas in fact operates.[59] 'Therefore if any statute is capable of being given a construction that is not inconsistent with the provisions of the Constitution, the courts will presume that this is the construction intended by legislators'.[60] This is not a totally naive premise, he also points out that the very existence of judicial review presents a deterrent to those who might be tempted to legislate outside the restraints of the Constitution:[61]

> ... the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts.

This became particularly noticeable in government legislative policy during Mary Robinson's term as President of Ireland.

It is important too to recognise the judicial view of the actual legal document—*Bunreacht na hÉireann* (Constitution of Ireland). Walsh states that the courts see it as a contemporary fundamental law that speaks in the present tense. It is therefore interpreted in terms of what it means in contemporary Irish society rather than what it meant in 1937.[62]

The possibility of judicial review has expanded the number and type of constitutional cases being taken. Initially most of the cases involved individuals, whose position relative to the law may have been shared by others, but essentially these were people who found themselves in a difficult legal position and who now sought relief by way of a constitutional case to prove the precedence of some right over a piece of legislation which they thought to be repugnant to the Constitution.

Barrington points out that many interest groups have also initiated constitutional cases—through an individual member.[63] He lists farmers, ratepayers, taxpayers, trade unions, bank officials and police officers. One could also add to this list and include among others—the Norris case relating to homosexual rights,[64] the Crotty case regarding the ratification of the Single European Act,[65] the McKenna Case on the use of public expenditure to support one side in a referendum

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[58] The Oireachtas is the National Parliament of Ireland. It consists of the President and two Houses: Dáil Éireann (the House of Representatives) and Seanad Éireann (the Senate).

[59] Walsh, op. cit., p. 194.

[60] Ibid, p. 194.

[61] Walsh, Brian (1980) Livestock Marts Case[Unreported], May 1980, p. 341 as quoted in Barrington, op. cit., p. 119.

[62] Walsh, op. cit, p. 195.

[63] Barrington, op. cit., p. 116.

[64] Norris v Attorney General [1984], IR 36.

[65] Crotty v An Taoiseach [1987] IR 713.

campaign[66] and a number of cases relating to the Eight Amendment and the so-called 'right to life provision' in Article 40.3.3.[67]

One over-riding consideration of course in all these cases is having the financial means to support the cost of such litigation. The risk of losing the case and being saddled with the excessive costs involved puts this option beyond the means of most individuals and groups. Kelly vigorously denies this bar,[68] but despite his protestations regarding the generosity and good will of the legal profession his case is very much disproved by the actual experience of litigants.

This flexibility of interpretation of the provisions of The Irish Constitution through judicial review, like the American constitution, makes it possible to recognise and protect unspecified rights as much as those contained in the text. By contrast the European Convention on Human Rights is a more rigidly defined international charter—which by its nature precludes the possibility of as wide an interpretation. It cannot certainly, given the current level of international diplomacy, go beyond the clearly defined principles of the signatory countries.

The Single Opinion

The Irish Constitution has an important limitation, which makes its interpretation more restrictive and less dynamic than the American constitution to which its approach to judicial review is broadly similar. That is the 'single opinion' requirement outlined in Articles 26 and 34, as discussed above, which is categorical in its assertion that 'no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed'.[69]

This restriction on the publication and dissemination of a single opinion firmly rejects the merits of a dissenting judgement. Former Supreme Court Judge, Brian Walsh points out the limitations of this in his foreword to *Constitutional Law in Ireland*. 'The obligatory concealment of the existence of assenting or dissenting opinions also seriously hampers the development of our constitutional jurisprudence'.[70] He contrasts this fetter with the similar requirement of the German constitution, which '[a]fter several years of being bound by an identical rule was ultimately released from it to the great benefit of German constitutional jurisprudence'.[71]

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[66] See McKenna v An Taoiseach (No 2) [1995] 2 IR 10.

[67] The most notable case in this regard is perhaps the X Case of 1994.

[68] Kelly, John (1987), 'The Constitution: Law and Manifesto' in Frank Litton (Ed.), *The Constitution of Ireland 1937-1987*, Dublin: IPA., p. 211 and footnote 4, p. 217.

[69] *Bunreacht na hÉireann*, Article 26.2.2.

[70] Walsh, Brian (1987) 'Foreword' to Casey, James *Constitutional Law in Ireland*, London: Sweet & Maxwell, p. xii.

[71] Ibid, p. xii.

It is interesting to note that the single opinion requirements of Articles 26 and 34 were only added by an Act of the Oireachtas in 1941, in that period granted to the Oireachtas to make amendments to the constitution.[72] The single opinion requirement has not, therefore, been ratified by the people of Ireland in the same manner that the Constitution itself was in the 1937 referendum.

Casey points out that the Committee on Court Practice and Procedures found the single opinion rule 'undesirable and injurious'.[73] The 1967 Committee on the Constitution viewed it quite differently suggesting that '[a]ny publication of other opinions would only tend to create uncertainty in the minds of the people on matters of constitutional importance'.[74] Casey is correct in describing this as a paternalistic view of society and laments the fact that a number of referenda have been held to amend the constitution and provisions for the removal of these clauses could quite easily have been considered with one of them. Its passage in 1941 clearly points to a closed worldview by the legislature, similar to the doctrinal position of the Roman Catholic church, *viz.* the existence of a single indisputable truth. It assumes a great naiveté on the part of the public and especially in their inability to make discernments between subtle, but perhaps key points in both norms and law. It is a *volte-face* against the very ideas of discursive opinion- and will-formation, and indeed against the liberal maxims in favour of the autonomy of the individual. The introduction of this provision displays a great sense of insecurity in the de Valera cabinet, that their project could be de-railed by jurists, many of whom would still have been appointed by their political opponents and all would have been trained in the context of a British constitutional model.

The Dáil Debates of 1941 give credence to de Valera's paternalistic orientation. 'From the point of view of the public interest, it is better to have a single judgement pronounced and no indication given that other judges held a different view'.[75] Even though the Supreme Court upheld the constitutionality of the 1940 Offences Against the State Act, in delivering the judgement, Sullivan stated that it was the majority view. Although there was in fact no minority view, de Valera felt that the hint of one could undermine public confidence in this or other sensitive politically motivated Bills and thus closed that possibility by introducing the single opinion amendments in 1941. In this de Valera created two points of weakness in his great project.

Firstly, he undermined his inspired decision to have the 1937 constitution adopted in a plebiscite. The retrospective act of closing the door, now that he faced a serious political dilemma in relation to repressive legislation, saw him revert to the logic of the previous constitution of giving precedence to parliament. In this he took a perfectly legal and constitutional short cut through his own safeguards that insisted on constitutional amendments being approved both by the

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[72] Under Article 51, the Oireachtas was allowed to enact constitutional amendments without reference to the people for a period of three years after the first President taking office, this in effect lasted until June 27, 1941.

[73] Casey, op. cit., p. 296.

[74] *Report of the Committee on the Constitution* (1967) Dublin: Stationery Office (Imprint 1968) prl. 9817, paragraph 100.

[75] Casey, James (1988), 'Changing the Constitution: Amendment and Judicial Review', in Brian Farrell (Ed), *De Valera's Constitution and Ours*, Dublin: Gill & Macmillan, see footnote 12, p. 161.

Oireachtas and the people through a plebiscite. This put into the Irish Constitution a fundamental principle which had not been put before the people and could not claim the popular imprimatur of the rest of the document.

Secondly, consistently with his own worldview, he reduced the potential of the constitution to become a dynamic document with a strong latent potential to introduce reform with the evolution of society. This sits comfortably with his own conservative ideology and with the urge for retrenchment in the historical context of World War II and the challenge to the state's legitimacy emanating from the Irish Republican movement. It is also true that although judicial review was part of the US reality, it was still completely novel in the Irish context. Given a paternalistic and conservative agenda, it would not have been viewed positively in any case, and given the prevailing dogma of single truth values, it was almost heretical. The government contrived to deprive the constitution of one of its potentially most dynamic forces. Barrington is particularly strong on what he sees as the fallout from this decision: 'The dissenting judgement has an honourable place in the evolution of the law and at times turns out to be more influential than the judgement of the majority'.[76]

The assertion that the minority view can be a vital catalyst in the development of our concept of right is absolutely valid, and whatever short-sighted political gain may have been achieved by enforcing the single opinion in 1941 it has been outlived in the ensuing years. It is not a surprising measure in a political framework where participation was kept at a minimum. Not only does this measure restrict the judiciary's ability to develop and expand concepts of right and law, but it also restricts the public's ability to actively engage in discourse on these same issues. De Valera believed in closed government, a tradition that has persisted, despite claims by various subsequent governments to the contrary. In 1994 on being elected Taoiseach John Bruton proposed that his government would govern 'as transparently as if it were working behind a pane of glass'.[77] The actualisation of that may not have been quite as open and in 1997 there was a necessity to hold a Cabinet Confidentiality referendum. Winds of change blow through the Irish system, but a residual ethos of closed government still persists even if the philosophy of minimal participation and a belief in the maintenance of the *status quo* received a severe buffeting through government and church scandals in the 1990s.

Perhaps, as Keogh points out, we should be thankful that de Valera resisted some of the more reactionary religious and political forces active in Ireland and most of Europe in the 1930s.[78] His suspicion of the judiciary and legal system was too great even in the sensitive political reality of the period. While he had been in power for over eight years at that stage a substantial rump of the judiciary was still from the pre-Fianna Fáil[79] era and many had been the products of an education under the philosophy of the British legal system, in which circumstances his short-term

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[76] Barrington, op. cit., p. 121.

[77] Dáil Debates, 447, paragraph 1160.

[78] Keogh, Dermot (1988), 'Church, State and Society' in Brian Farrell (Ed), *De Valera's Constitution and Ours*, Dublin: Gill & Macmillan.

[79] Fianna Fáil is the political party formed by Éamon de Valera in 1926 as his vehicle to reengage in constitutional politics following the civil war. He led the party to government in 1932 and it has been the largest political party in Ireland since.

suspicions may have had a justification. The single opinion muzzle was possibly calculated to contain a short-term problem, while the concept of an active judicial review would have been as distasteful as it was inconceivable.

The single opinion rule is at variance with the constitution's thrust of vesting exclusive interpretative power with the judiciary. It seems untenable to hold that the judiciary is charged with this most important of constitutional tasks on one hand and yet deprived of the trust to responsibly discharge this responsibility to the full. It is possible in the context of a new and as yet not fully established state, to see how de Valera's agenda might be thwarted by a hostile judiciary. The evidence would suggest though that all arms of the state, put their duty and loyalty to the state before their personal preferences. To imagine a context where a judiciary might create uncertainty and instability through a concerted campaign against the state, fomenting dissension and questioning legitimacy, could rightly be labelled paranoia. Partially gagging the highest court in the state ultimately was counter productive to de Valera's own agenda as it weakened rather than strengthened the Irish Constitution.

The Single Opinion Crux

The Constitutional amendments of June 25, 1941 included the single opinion stipulation, but also placed another very important proviso on the question of constitutionality. This proviso contained in Article 34, 3, 3˚ in effect means that once a law has been deemed to be constitutional it can never again have its constitutionality tested. This Article reads:[80]

> No Court whatever shall have jurisdiction to question the validity of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.

This could have serious ramifications in the long term. For instance the US Constitution is over two hundred years old, in that period societal mores have changed considerably. A law tested under the Article 34 provisions seems to at least partially undermine Brian Walsh's understanding of the constitution as a contemporary document. Article 34 places part of the constitution and the laws it enshrines permanently locked in time.

The idea of judicial dissent as opposed to judicial unanimity revolves around issues of democracy and power. Denying a vehicle to express dissent invests judicial reviews with the authority of a law, which is unified and understandable, a point made vis-à-vis some continental courts by Kelman. He says that judges in courts influenced by French law are driven by 'the need to foster the myth of the law's impersonality and inexorability'[81] above all personal reservations or the need to maintain consistency. Judges are thus vested with almost sacred authority, they sit in judgement and reach the only possible conclusion, which is legal, just and immutable. It is not a democratic process, it is about seeking out legal truth and acting upon it.

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[80] *Bunreacht na hÉireann*, Article 34.3.3.

[81] Kelman, Maurice (1985) 'The Forked Path of Dissent' *The Supreme Court Review*, Vol. 1985, 227-298. p. 227.

Secondly it logically holds that the legislative process and popular consent decree what is law. It is easy to see why de Valera might prefer this approach as it places the political elite at the epicenter of the process. If the law is not right or the judgement is not acceptable it comes back to the executive and legislature to fix it. This is done through recourse to new legislation and/or through the introduction of a constitutional referendum. Here the courts get an opportunity to speak, but having spoken the political elite have an opportunity to revise. So the denial of democracy within the judicial system, keeps the message tight and the target in focus. To take the route of majority and minority judgements essentially enhances internal democracy§ within the judiciary and gives judges power vis-à-vis the law and politics. The law in no longer unitary, but is what the judges say it is (majority) or say it could be, seen from another perspective (minority). So now discourse and debate on the law is in the realm of the judiciary rather than the legislature.

Stack describes as an institutional approach, one where a single opinion, delivered by a judge is not an individual view but that of the court as an institution. This distances individual judges from decisions and creates the impression that what is emerging is the rule of law not the rule of men. In other words the court has interpreted the law, in the manner in which priests interpret the word of god. Neither the individual judge nor priest can be taken to book, nor seen to have undue influence as the process is essentially about distilling the truth or the truth in the law. Stack says: 'Dissent exposes the individuality that the institutional approach depends upon suppressing.'[82] The attraction of an institutional approach for de Valera is easy to appreciate. He did not want to promote a judicial approach that might open up legal discourse, but rather one that would keep it bounded, keep it strong and maintain the vision of a unitary state based on a single fundamental law, albeit of many articles.

In some ways the single opinion steers the Irish system somewhere between the American and German systems and those of the new commonwealth models discussed above, ironically through a different mechanism. While the commonwealth models and the American system both allow dissent the cultural fundamentals are different. One holds with the supremacy of parliament the other with the constitution. In Ireland's case it veers towards the constitution, but with handcuffs, that would limit the scope of judicial activism, which over time would require remedy through the action of parliament. What de Valera did not truly envisage was the emergence of stronger judicial review; nor the wholehearted acceptance of his constitution as the legitimate fundamental law; nor that constitutional referenda could change articles, but not necessarily judicial opinions; nor that the political elite cannot always sway the people to their point of view, a lesson he learned when trying to replace the proportional representation system used in elections.[83]

Stack's discussion on the importance of dissent in the American context of a democracy premised on deliberation, is the very opposite to the de Valera project of attempting to create unity not diversity. For Stack dissent legitimizes a court as it demonstrates that it reaches 'its judgments

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[82] Stack, Kevin M. (1996) 'The Practice of Dissent in the Supreme Court' *The Yale Law Journal*, Vol. 105, No. 8 (June 1996), 2235-2259. p. 2240.

[83] On June 17, 1959 a proposal by the de Valera government to amend the electoral system for Dáil Éireann elections from proportional representation under the single transferable vote method to the so-called first past the post method was rejected in a referendum.

through a deliberative process', in a manner not unlike the legislature.[84]Whether Stack's hypothesis is true of America today is a question for another time. If we were to apply the single opinion rule rigidly on the US Constitution it would not have been possible in the light of the Dredd Scott case[85] for American slaves or even the children of former slaves to obtain full and equal citizenship—certainly not without a constitutional amendment.

In the case of The Irish Constitution the further removed in time we become from the ruling deeming a particular law or part of it to be constitutional the less likely it is to hold true in an unfolding contemporary interpretative scenario.

This rule too has a limiting effect on the President's prerogative to refer Bills to the Supreme Court. Article 26 gives the President the power to refer any Bill to the Supreme Court for adjudication on its constitutionality—a policy adopted more often by Mary Robinson than any other President, but also used by her successor Mary McAleese and even by de Valera himself during his time as President. The mechanism for seeking Supreme Court adjudication is straightforward: 'Under Art. 26, the President, after consultation with the Council of State, may refer any bill to the Supreme Court to consider whether the bill is unconstitutional'.[86] The instrument is however rigid both in its implementation and consequences and weak in terms of process. It loses most of its potential by the stipulation that a bill so tested can never again have its constitutionality reviewed. Casey describes the process as follows:[87]

> Article 26 imposes tight time-limits. The reference must be made not later than seven days from the date of the Bill's presentation for signature: Article 26.1.2˚. Thus the President has only one week in which to meditate on the Bill, assemble the Council of State and reflect on the views expressed, and make his decision.

Morgan points out that the case is argued before the Court by council appointed on behalf of the Court on one side and the Attorney General on the other, defending the constitutionality of the bill. Barrington rightly explains that this is purely a hypothetical case and will '[l]ack the force and credibility of facts'.[88]Such an approach is seriously deficient by comparison to real litigation.

The concept is a good one, but the machinery open to the President and ultimately the constitution itself is poor. Given a more flexible brief and the removal of the unhelpful rule that constitutionality can only be tested once, this could be one of the more positive elements of the constitution. The President could be more actively involved in affirming and developing the constitution—as it now stands referring a bill to the Supreme Court could be counter productive. A bill of doubtful constitutionality is much more likely to escape the artificial test of a court without witnesses, evidence or litigation than it is to stand up to the test of actual litigation. There

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[84] Stack, op. cit., p. 2236.

[85] The Dredd Scott Case—1856-57, involved a case brought in the US Supreme Court by Dredd Scott, a slave, who sought the status of a free citizen under the constitution as he was living in the free territory of Missouri. In a judgement delivered by Chief Justice Taney his claim was rejected and the Supreme Court held that slaves and their descendants had no rights as citizens and that the US Congress could not forbid slavery. Slavery was eventually abolished by the 13th Amendment of the US Constitution in 1865.

[86] Barrington, op. cit., p. 118.

[87] Casey, op. cit., p. 80.

[88] Morgan, David Gwynn (1985), *Constitutional Law of Ireland*, Dublin: Round Hall Press, p. 106.

is every reason therefore why a President should be very reluctant to refer a bill to the Supreme Court. Part of this problem could be alleviated through the use of the American procedure where a line of legislation can be questioned, rather than the entire Bill. Questions raised about the convening of the Council of State to advise the President on the *Health Amendment (No 2) Bill*[89] in December 2004 intimated such a potential interpretation, given that many observers were concerned about the retrospective aspect of the legislation. But it was reported that a 'spokesperson for the President said she had not "identified" any particular part of the legislation'.[90] Even if she had an issue with a particular part of the legislation that level of focus was not open to her in considering whether to send the legislation to the Supreme Court for review.

Conclusion

In this article I have looked at judicial review under the Irish constitution. In this perusal I have pointed out some important issues for those studying Irish law and government. It is important to point out that the Irish constitution does not fit into the Commonwealth model. This forces those who study the Irish political system to avoid placing Ireland into a convenient category with Commonwealth systems. Yes in terms of the legislative branch of government, Ireland very closely resembles the Commonwealth model. However the nature of the judicial branch, while operating within the Common Law tradition, also operates within the ambit of a constitution that does not recognise parliamentary supremacy in a manner consistent with the Commonwealth model. In this regard then Ireland is closer to the American model. In effect Irish government is a hybrid, with antecedents in the Commonwealth parliamentary model with a strong flavour of the American constitutional model.

I highlight two important areas in which the Irish constitution deviates from the American constitution. Firstly the Irish constitution does not allow for the publication of a minority opinion in Supreme Court judgements. This I argue owes much to the conservative ideology of its main author Éamon de Valera and indeed to the general traditionalist conservative climate in Ireland at the time of its adoption. The impact is that judicial dissent is hidden, giving a false impression of judicial certainty and reducing the potential for both public and judicial expression and debate around current and emerging legal and constitutional issues. In this regard we can say that the Ireland has a far less democratically oriented constitution than the US.

The second significant deviation from the American model is that under the Irish constitution an absolute closure is brought to the constitutionality of an act or bill once it has been adjudicated upon by the Supreme Court. This measure may ultimately lead to a stultification of significant aspects of the constitution, denying it the potential to be the sort of living document envisaged by former Chief Justice Walsh.

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[89] The bill arose after the Attorney General warned that deductions from elderly patients' pensions for publicly funded care in nursing homes were not lawful. It was published on December 15, 2004 and was passed through both Houses of the Oireachtas in a few hours the following day to establish that the deductions: "are and always have been lawful."

[90] Hennessy, Mark (2004) 'Council of State to meet on nursing home Bill', *The Irish Times*, December 20, 2004.

Currently where either the President or a litigant has tested the constitutionality of a bill or act the Supreme Court delivers a final and absolute decision. This is a significant weakness, which I believe ought to be addressed through a review mechanism that would have specific time frames and procedures, but nonetheless leave open the possibility of revisiting the issue. The time frames would be necessary to avoid a constant questioning of constitutionality, especially around controversial questions like the right to life or other vexed issues. The procedures would be necessary to ensure that the door for later testing is neither irretrievably sealed nor too easily opened. Perhaps five years after the Supreme Court ruling the Senate (Seanad) would be automatically presented with a motion to consider lifting the prohibition against a second Supreme Court opinion, which if passed would allow either the President or any other litigant to bring the issue before the courts again. An additional measure might be to set a limitation of say ten years after which any previous constitutional decision of the Supreme Court could be revisited, through normal legal procedures, without reference to the Senate. That would put greater flexibility into a system that currently prevents reasonable review.

I point out the divergence between the American constitutional model and that of the Commonwealth. I place Ireland closer to America, however I feel there is a strong case to nudge Ireland at least in one respect closer to the Commonwealth model. Here I refer to Habermas's idea of a quasi-judicial review function for the legislature.[91] He envisages a parliamentary committee, which might include external lawyers, that would engage in a review of legislation in terms of its constitutionality. This would not in any way step over the separation of powers or the role of the Supreme Court, but rather force legislators to reflect on the legislative process. In this way it would allow the legislature to rise above the cut and thrust of parliamentary engagement and give a more rational, reflexive and considered view of both individual laws and the whole process of law making. In the party political realm in which western democracies exist it would require a cultural shift, but this shift may already be emerging.

A second contention raised by Habermas concerns the place of the legal system in the wider societal context. For him it is not tenable for the judiciary and the broader legal community to operate on an isolated legalistic plane when it comes to interpreting and understanding laws and constitutions. Legal discourse no matter how tightly framed cannot be viewed in isolation from the wider moral discourses of society. Law has already been shaped by rules and principles, the principles themselves are drawn from both a legal and moral base. He points to the evolution from the moral principles of natural law into positive law to support his case. This foundation points to the fact that the logic of argumentation inherent in the modes of justification of law are in fact 'open to moral discourses'. He says 'it is worthy of note that the legal discourses, however bound to existing law, cannot operate within a closed universe of unambiguously fixed legal rules.[92] This approach seeks a greater opening up of the legal system and indeed the judicial branch and in the case of Ireland a need to revisit the sorts of issues I raise vis-à-vis both the single opinion rule and the finality of Supreme Court decisions on constitutionality.

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[91] Habermas, Jürgen (1996), *Between Facts and Norms (Faktizität und Geltung)*, William Rehg (Trans.), Cambridge: Polity Press, p.241.

[92] Habermas, Jürgen (1988), 'Law and Morality', *The Tanner Lectures on Human Values VIII*, Cambridge: Cambridge University Press, p. 230.

What is at issue in all of these concerns is the entire business of good government. Two central concerns on this agenda are democracy and human rights. The fundamental question about democracy does not stop at the legislative and executive branches of government. If we are serious about democracy then it too must play a role in the judicial branch. The second issue, human rights, is not unconnected with democracy, both in terms of how we recognize and justify rights within the broader society and the judicial branch of government.

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