Four Score and Seven Years of the Constitution – Is a New Birth of Freedom Required?

Delivered by Mr Justice Gerard Hogan at the Attorney General's Conference on 11 October 2024

1. The title of this paper is, of course, a conscious echo of the celebrated words of President Lincoln at Gettysburg, since by a coincidence we stand 87 years since the entry into force of the Constitution on 29th December 1937. In the first part of this conference we are asked to take stock and to look forward in terms of constitutional development.

2. When Lincoln spoke at Gettysburg in November 1863 the United States was facing a major military and constitutional crisis. Grant and Sherman would in time solve the military crisis and the constitutional crisis was ultimately solved by the enactment of the 13th, 14th and 15th Amendments in the years that followed the Civil War. For all our problems Ireland of 2024 is undoubtedly in a happier place and there is, I think, no *imperative and immediate* need for constitutional change of the kind which Lincoln then had in mind. Here I would not wish to be misunderstood. Many may think that constitutional change is necessary and overdue. Some may think, for example, that enhanced constitutional protection for socio-economic rights is required. Others may wish that the last vestiges of Catholic nationalism which remain in parts of the Constitution such as the Preamble should be removed. Others again may have different types of changes

in mind, such as in relation to the family or property rights or in respect of the electoral system.

3. I do not propose to express a view on any of these proposals. Of course, as a private citizen I have my own personal views. I merely wish to state that in my view *just right now* there is no *imperative* need for change. Instead what I want to do in this paper is to attempt – a bit like Judge Brack in Ibsen's *Hedda Gabler* – to make some assessments – even predictions – about the future based on our own constitutional experience over the last four score and seven years.

How well drafted the Constitution actually is

4. In the 1970s and 1980s it was fashionable in certain quarters to dismiss - and even ridicule - the Constitution. Certain political scientists and historians pointed to the old Article 2 and Article 3, the ban on divorce and the special position clause in Article 44. Although the majority of these commentators were not lawyers, their lack of expertise in constitutional law, constitutional history and comparative constitutional law did not inhibit them in the least from making dogmatic statements about a topic of which they evidently knew very little. With the honourable exception of JH Whyte[1] – who still got some things wrong – few, if any of them, ever bothered to read a law report. Unfortunately, this commentary contributed to a false narrative regarding the merits of the Constitution, so that to adapt Vetter's words, their assessment resembles an El Greco painting: recognisable but distorted.

5. I propose to give just two examples in respect of this essentially false narrative. First, I came across a statement some years ago in a Leaving Certificate History textbook to the effect that the Constitution's ban on contraceptives was

[1] Church and State in Modern Ireland (Dublin, 2nd ed., 1997).

found invalid by the European Court of Human Rights in the *McGee* case. Second, we still tend to beat ourselves up regarding the so-called "special position" clause in the old Article 44. I do not deny but that this clause was unsatisfactory, and I am personally glad it was removed by referendum in 1972. But there seems to have been no understanding that in 1972 – and even to this day – that many European constitutions have clauses of this or similar kinds without any of the angst which this long-repealed provision still causes: the Norwegian Constitution's ban on Jesuits was, for example, only lifted in 1959. Over the summer I read a somewhat intemperate critique of the old special position clause by a Unionist commentator. One is tempted to ask whether he had ever read the Act of Settlement 1701. Even today the Succession to the Crown Act 2013 has not changed the ban on Roman Catholics becoming Sovereign in the UK.

6. I say this not by way of criticism of other countries, but rather to say that the Hibernian exceptionalism in relation to areas such as religion and the role of the family which many of these commentators found in the Constitution has, in fact, close comparators even to this day in other European constitutions.

7. While no one denies the failures and weaknesses of the Constitution, insufficient attention has been paid to the other side of the ledger. It is striking how just how well drafted the Constitution actually is. Here one must pay tribute to John Hearne, its principal drafter, but also to the heritage bestowed by the drafters of the Irish Free State Constitution from which the drafters borrowed considerably in 1937. The quality of drafting is, perhaps, a matter of first impression but the elegant ordering of the Constitution's structure has stood the test of time. Perhaps there were good drafting reasons for the existence of Article 28A and Article 42A, but I suggest that for the future this drafting technique of creating entirely new provisions outside the existing structure (e.g. Article 28A) is

one which should – where at all possible – be avoided in the case of any future referendums.

8. The referenda to date in their own way provide empirical proof of the quality of the drafting, since nearly all constitutional amendments to date have struggled to match the elegance of the original 1937. A good example here is supplied by the hapless 7th Amendment in 1979 dealing with Seanad representation, the drafting of which was compared unfavourably to the original text by the Supreme Court in *Heneghan v. Minister for Environment (No.1)*[2] last year.

The merits of longevity

9. It is rather remarkable that the Constitution is now one of the most long-lived in Europe: that is something that quite probably had not been anticipated in the 70s and 80s when an entirely new Constitution seemed to be on the cards. Within Europe only Norway – and perhaps more arguably – Belgium, Netherland, Luxembourg, Finland and Denmark have claims to greater constitutional longevity. (In some instances, the original Constitution was notionally continued but in reality, was deleted and replaced by a new document, such as may be said to have happened in Finland in 2000). Longevity has its virtues: the frequency of new constitutions and constitutional changes between French 2nd and 5th Republics is itself a strong argument against frequent constitutional change.

Look for constitutional change only when it is really necessary

10. All of this means that constitutional change should be advanced only when it is strictly necessary. Allow me to give an example.

[2] [2023] IESC 7, [2023] 2 ILRM 1.

11. In June 1976 the Supreme Court delivered its judgment in *M v. An Bord Uchtála,*[3] a case where the natural parents (who had since married) sought the return of a child who had been placed with adoptive parents some years previously. The Supreme Court held that An Bord Uchtála had been guilty of (apparently) long standing failures in the manner in which it had applied the Adoption Act 1952. These matters were addressed by the Adoption Act 1976. But the parents in *M* had also challenged the constitutionality of the 1976 Act on the ground that An Bord Uchtála was not a court, but that it was nonetheless exercising judicial powers contrary to Article 34.1 of the Constitution. As it happens, the Supreme Court held that in view of the fact that the natural parents had succeeded on the standard vires grounds there was no reason to address that wider constitutional issue, even though the effect of that failure to determine and settle that question was to leave a shadow over the workings of the Board and, by extension, tens of thousands of adoption orders. The 6th Amendment addressed this particular issue by providing, in effect, that no adoption should be declared invalid simply because An Bord Uchtála was exercising judicial functions.

12. Yet there is perhaps more to this than meets the eye. Why, you might ask, is this is important or even relevant to contemporary debates? To answer this, let us next look briefly at the debates on this issue in the Oireachtas. Introducing the 6th Amendment Bill in March 1979, the then Minister for Justice (Mr. Gerard Collins TD) referred to the Supreme Court decision in *M* and then said:

> "….. the Supreme Court declared that a particular adoption order was invalid. They did so on the basis that there had been defects in the processing of the case and the court did not have to decide whether there was any basic constitutional defect in the Adoption Acts by reason of the

[3] [1977] IR 287.

fact that those Acts provide that adoption orders are to be made by a body which is not a court. The processing defects revealed by the Supreme Court's decision drew attention, in turn, to procedural difficulties which the Acts themselves gave rise to, but those difficulties were dealt with by a number of provisions in the Adoption Act, 1976. Accordingly, the present Bill does not arise from anything that was decided by the Supreme Court in that case. Nevertheless, the case has a bearing on the introduction of the Bill because ever since the Supreme Court judgment there appears to be no doubt that the opinion has been held in legal circles that if the court had had to deal in that case with the constitutional position they might have considered themselves obliged to find that, in making adoption orders, the Adoption Board were purporting to exercise powers of a kind that the Constitution reserves to the courts. The Government accept that there were grounds for fearing that that might have been the outcome.

I am not of course saying that, if the issue were now to be raised before the Supreme Court, the court would necessarily rule against the validity of the present system. On the contrary, I am advised and believe that a strong argument could be put to the court in favour of validity…..”

13. Pausing at this point, some might think that the argument that An Bord Uchtála was exercising judicial powers was not a particularly strong one, although of course it could not be said that the point was without merit or unarguable. After all, the making of an adoption order was one which - historically, at least - had never been vested in the courts and the Board did not seem ever to have been given adjudicatory powers akin to those vested in the courts in relation to matters such as custody and wardship.

14. The Minister's thoughtful speech met with widespread approval, but one small caveat was entered by the late John Kelly TD:

> "…. I want to speak for a little while on the technique the House is using today, and intends that the people should use, in order to cure a difficulty which appears either to have arisen or is likely to arise. I want to draw the attention of the House to the fact that this is the first occasion in 42 years on which an amendment of the Constitution has been necessary, or appears necessary, as a plugging operation. It is the first occasion on which an ad hoc amendment has been undertaken.
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> There have been five constitutional amendments to date. The first, in 1939, the validity of which I strongly doubt, bore on the attribution of an artificial extended meaning to the expression "time of war" in Article 28. The second, in 1941, was a kind of tidying-up operation in which, marginal changes or only verbal changes were made. The third, fourth and fifth all took place in 1972 and effected, respectively, the excision from Article 44 of the special position of the Catholic Church, the permission to the State to become a member of the European Economic Community and the reduction of the voting age to 18. These were not ad hoc measures; they were all substantive changes of the Constitution for general purposes.
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> The Bill before us does not fall into this category; it is in a different category; it is an ad hoc plugging operation. While I sympathise with the Government's anxiety to carry out that plugging operation, and while only the unfortunate accident of the 1977 General Election prevented my Government from doing so, we ought to stop and look carefully at this technique—perhaps no very serious issue arises on it this time—and ask

ourselves whether this is the right way to go about fixing a problem of this kind."

15. So, one might ask: was this the right way to address the problem which the *M* case had created?

16. Before answering it, allow me to give another historical example. In the celebrated case of *The State (Burke) v Lennon*[4] the brother of an internee detained under Part VI of the Offences against the State Act 1939 brought an application for his release under Article 40.4.2.º In early December 1939 Gavan Duffy J held that Part VI of the 1939 Act was unconstitutional and he directed the internee's release. The State had endeavoured to appeal that ruling, but on 13 December 1939 the Supreme Court held, following pre-Constitution common law practice that no appeal lay against an order of release under Article 40.4.2 (habeas corpus). In the wake of the Supreme Court's decision that no appeal lay, the Government felt that it no option but to release all the interned prisoners.

17. It was necessary, however, for the power of the Oireachtas to provide for internment to be determined by the Supreme Court. The Government accordingly met and arranged for a new version of the Offences against the State Bill 1940 providing for internment to be passed by the Houses of the Oireachtas. During the course of the Oireachtas debates the Government expressed the wish that the President would convene a meeting of the Council of State so that the issue of an Article 26 reference could be considered. This duly occurred and the Bill was referred to the Supreme Court where the constitutionality of the 1940 Bill was upheld.[5] While this story is generally well known, the comments of the then Taoiseach (Mr. De Valera TD) in the Seanad are, I suggest, of particular interest.

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[4] [1940] IR 136.

[5] *Re Article 26 and the Offences against the State (Amendment) Bill [*1940] IR 470.

18. The Taoiseach first expressed his unhappiness with the High Court decision and reflected on the options open to the Government:

> "It is in those circumstances that we are coming to the House. A certain measure was felt to be necessary for public safety. Last June we passed a certain Act intended to meet, not merely times of crisis, but the peculiar circumstances of our conditions here even in ordinary peace time. That instrument for preserving the safety of the public was broken in our hands by the court's decision. *We have got to remedy that situation. It is suggested to us that we should remedy it by amending the Constitution.* There is no use in minimising my connection with the Constitution; no doubt, I had a principal part in determining what the Constitution should contain. On that account I have, perhaps, more feeling about it—as was suggested here —than a person who had nothing to do with its drafting. But it is not my Constitution; it is the Constitution which was recommended by Dáil Eireann to the Irish people and which was enacted by the Irish people. This is much less my Constitution than an Act of the Oireachtas is the draftsman's Act. *This Constitution is a basic law enacted by the Irish people; I think it is very unwise to start tampering with it and changing it to meet changing circumstances. If particular circumstances have to be met, it is desirable to meet them within the Constitution."*

19. The Taoiseach then observed that whereas in some circumstances the Constitution could have been changed within a three year period from the date of the inauguration of the first President without the need for a referendum, thereafter a referendum would be necessary:

> "….After three years, if a difficulty like the present one arises, the change will have to be made within the Constitution and not by changing the

Constitution itself. During these three years, if the change suggested appears to the President to be of a fundamental character, it would be his duty as guardian of the Constitution to see that the change was referred to the people. I was taunted in the Dáil with the idea that I was afraid of having the matter referred to the people. That is not right; it is not that. *A plebiscite is a costly affair; it means a campaign to educate the people regarding what they are being asked to decide, and it means a certain amount of disturbance. It is not a thing to be lightly undertaken. From these points of view we, the Government, came to the conclusion that the change ought to be effected without, if possible, a change in the Constitution.*

That brings me to another matter. *We ought not to change the Constitution, in any case, before a change has been proved necessary.* As I pointed out in the Dáil, what has been decided in court is this: a High Court judge has, under habeas corpus, caused to be liberated by his judgment a number of people who had been interned. In giving his judgment in that case, he expressed opinions about the unconstitutionality of the particular Act under which they were interned. In accordance with an Article of the Constitution which we believed gave us a right of appeal in all cases, we appealed, but the Supreme Court held that an appeal did not lie. What has really happened, therefore, is that it has been definitely and finally decided by the Supreme Court that an appeal does not lie. The Supreme Court has not given a final judgment on the Act, and it is only the opinion of the Supreme Court which can be a final judgment; they have not said that this particular Act was unconstitutional. *In other words, the opinion expressed by the High Court judge could possibly be reversed by the Supreme Court, and I think it is right that that issue should be tried, if there is any way of trying it out.*

There was an appeal, and it was to try out that issue rather than the mere question of the liberation or retention of the particular prisoners that was the cause of the appeal.

We wanted to have that matter tried out, and it seemed to us, at any rate, that the judge, in delivering judgment, and in giving what was called a speaking order, had the view that an appeal did lie. The Supreme Court have definitely said that an appeal does not lie, and therefore, that method of getting the question of the constitutionality of the Act tried has failed. Another method may get the result we wish for, namely, a definite and final decision on that matter, and what is proposed is that that Part of the Offences Against the State Act which is intended to have what I might call a more permanent character, which was objected to by the judge, should, with whatever slight modifications may be regarded as necessary, be re-enacted. *We are presuming that it is likely that the President, having before him the decision of the judge of the High Court that this particular Part is contrary to the Constitution, will cause the new Bill to be referred, according to the Constitution, to the Supreme Court for an authoritative decision.* When that decision has been got, we shall know whether or not the view expressed by the High Court judge, which would imply, I think, that we would not have powers, under the Constitution, of internment, is right or not.

I said—perhaps it was a rather unfortunate phrase, but it expressed exactly what my thought was—when I was being urged to take the other course, namely, to amend the Constitution, that in view of what appeared to me to be the plain language of the Constitution, it was only if I had the conviction that the judges were going to be perverse, that I would amend the

Constitution rather than assume that the Emergency Powers Bill cannot be invalidated by the Constitution; in other words, it would be a confession on my part of an inner feeling that the judges were going to act contrary to common sense and to the plain language of the Constitution, if I had such a doubt of getting a judgment in our favour as would make me decide to amend the Constitution."

20. The Taoiseach then made the following very interesting remarks on the role of the Supreme Court in matters of this kind:

"When the Constitution was passing through the Dáil, I adverted to this particular difficulty that courts which are administering ordinary law have been held by many constitutional writers to be very imperfect courts for dealing with constitutional matters. Their whole training of a narrow legalistic type makes them look for an interpretation in a Constitution which it is quite impossible to have. Constitutions last over a long period and we refrained in drawing up the Constitution from getting the Parliamentary Draftsman to draft it. We asked him to look over, and he agreed with us that it was better that it should be put in the every-day simple language of the ordinary man, instead of in definite legal phraseology. On the same basis, I think, if you want to make a will, people tell you not to go to the lawyer, or the half lawyer, but to write it down simply on a piece of paper and keep away as far as you can from legal expressions which have special connotations and are interpreted in a definite way. *This was intended to be a simple, straightforward, common-sense document and our hope was that, as it would need to be interpreted from time to time in accordance with developments—if it were to last without change and if circumstances were to change, the document might be, so to speak, frozen in its existing*

words— there would be a living body which would be able to take account of the changing circumstances and interpret the Constitution in accordance with those changing circumstances.

That was the view taken by the Supreme Court of the United States and if there have been so few amendments of the Constitution of the United States, it has been due to two reasons, the first being that it was extremely difficult to make any changes and they were, therefore, in this position that either the courts had to interpret that fundamental document in accordance with its spirit, its general intention, or the whole thing would be smashed in a very short time. The second reason was that the Supreme Court of the United States took the attitude that the Legislature was to be presumed to be acting honestly and within the Constitution, and that an Act was to be declared unconstitutional, only if it was quite definite and clear that it was so; that is, the presumption was to be always in favour of the Legislature.

This whole difficulty was so much present to my mind that I think you will find in the Dáil Debates on the Constitution that I spoke of the devices used in other countries with regard to written Constitutions by which a special Constitutional Court is set up, not being the highest court in the land in ordinary legal matters, but a court composed of some judges and other people experienced in public affairs— for example, the Council of State, as we have it here, or something of that sort—and that body is the body to interpret the Constitution, the reason again being the difficulty I have been speaking about of taking an instrument of that kind and interpreting it in regard to legislation from time to time. I still have the hope, and it was with this hope that the Supreme Court in the Constitution was intended to be the final authoritative body, that the Supreme Court in dealing with these

things will deal with them in a way which will make it possible to have the Constitution a workable instrument."

21. I have taken the liberty of quoting from Taoiseach de Valera at considerable length not only because I think one can fairly say that he was one politician with an instinctive feeling for legal matters generally and constitutional law in particular. I also do so because these words - especially those which I have highlighted - urge an approach to constitutional change which I think is the appropriate one. That approach counsels change within the document were at all possible by urging flexibility and accommodating circumstances by a "living Constitution" approach. It also seeks to avoid ad hoc amendments unless there is no other solution. Again, de Valera was well placed to have seen at first hand the damage to the stability and coherence of the constitutional order which a series of promiscuous and off-hand ad hoc and sometimes even "implicit" amendments which had wreaked havoc on the Constitution of the Irish Free State[6] and the textual evidence clearly shows that he was determined to ensure that this experience would not be repeated with the Constitution of Ireland.

22. In the light of this, let us return to the problem posed by the *M* case. Faced with the problems produced by the aftermath of the *M* case, was there any better solution than the *ad hoc* constitutional amendment of the 6th Amendment? I would suggest that there was: why not introduce a new Bill reproducing the substance of the powers of the Board and seek to have that referred to the Supreme Court under Article 26? After all, the issue in question was a pure question of law and entirely apt for final adjudication by the Supreme Court in this fashion.

23. If that Court had upheld the constitutionality of the measure, then, of course, the problem would have been solved without the need for a constitutional

[6] Kelly, *The Irish Constitution* (Dublin, 2018) at 2067-2069.

amendment. If, on the other hand, the Court had found the powers of the Board to have been unconstitutional on this ground, then this would probably have signalled the need for a greater root and branch approach to this question, because other administrative bodies - and not just An Bord Uchtála - would surely have been affected by the fallout of such a decision. All of this would quite possibly have meant that an even broader reform of Article 37 would have been necessary as distinct from the simply ad hoc measure that it is currently embraced by what has become Article 37.2.

24. So, one may ask, why was Article 26 not used in that case? From this remove it is difficult to say, but it contrasts with the approach taken with the Electoral (Amendment) Bill 1983 which had proposed to extend the franchise to British citizens. Although the then Taoiseach (C.J. Haughey TD) had previously told the Dáil that two previous Attorneys General had advised the Government that a referendum would not be necessary the constitutionality of this proposal was surely open to serious doubt. The enumeration by Article 16 of one category of persons entitled to vote (namely, Irish citizens) seemed to create an implicitly closed category of persons so entitled. After all, if the legal view conveyed to the Dáil by Taoiseach Haughey were correct and it was open to the Oireachtas to extend the franchise in this manner, then by the very same logic it would have been open to the Oireachtas to reduce the voting age from 21 to 18 and the 4th Amendment of the Constitution Act 1972 would have been unnecessary.

25. As it happens, the Minister of State at the Department of the Environment (Mr. R. Quinn TD) freely acknowledged these constitutional difficulties in the course of the Dáil Debates on the Bill:

> "Recent consideration of this matter has led to the view that where the Constitution guarantees certain rights to a particular category it does not

necessarily follow that the Oireachtas is inhibited from granting similar rights by law to other categories. …..We are proceeding on the basis that the appropriate legal advice available to the Government indicates that what is proposed in this Bill is compatible with the provisions of the Constitution. The present Attorney General has referred to the clear fact that there is no express restriction of the franchise conferred by Article 16.1 of the Constitution. However, he has also drawn attention, as have his predecessors, to the fact that this question of the exclusivity or otherwise of the rights granted to citizens by the Constitution has never been authoritatively decided by the Supreme Court so that it is not possible that any advice given in the absence of such a decision would be authoritative and completely conclusive. In such circumstances, should the President — in the exercise of his absolute discretion, of course, which I emphasise — see fit to refer this Bill to the Supreme Court, such a reference would have the very considerable advantage of removing all possibility of doubt from such a vital area as the validity of our electoral law."

26. These words were more or less an open invitation to the President to refer the Bill which is what ultimately happened. The Supreme Court duly found the Bill to be unconstitutional and the 9th Amendment of the Constitution Act 1984 followed in its wake. This, I think, was an excellent use of the Article 26 procedure. There was a real doubt about the constitutionality of the measure and given the importance of the matter for the electoral process, certainty was essential. The matter was sent to the Supreme Court by the President and the Court pronounced authoritatively on that question. It is true that a referendum was necessary and a constitutional amendment followed in its path. But at least everything was tried

before resort was had to this step and this approach is, I suggest, clearly preferable to that taken in respect of the 6th Amendment.

27. Much of the foregoing analysis was prompted by what seems to be a succession of proposals over the last decade or so for *ad hoc* constitutional amendments as the ultimate solution for a variety of perceived constitutional problems. But I cannot help thinking that this process of *ad hoc* constitutional amendments is somewhat unfortunate and that it should be avoided where at all possible. While I accept that (exceptionally) *ad hoc* amendments of this kind may be necessary, frequent resort to these devices simply undermines the stability and coherence of the Constitution and disfigures the rather graceful constitutional architecture which has been in place since 1937.

28. Here there may also be an opportunity for the more frequent use of the Article 26 procedure as part of a dialogue between the various branches of government. Of course, it may readily be acknowledged that this Article 26 procedure has its drawbacks, a topic to which I will briefly return presently.

Judicial dialogue

29. The Ceann Comhairle recently remarked on the difficulties faced by legislators. He contrasted his experience of legislative debate in the Dáil unfavourably with the debate which took place at the Council of State on the Judicial Appointments Bill. I have some sympathy for all sides in this: legislators have many pressing commitments, and they cannot really be expected to parse even important legislation line by line. By contrast the Council of State has a significant component of lawyers and judges who are well versed to testing the meaning of language, often by reference to the Constitution.

30. This is where judicial dialogue and statutory interpretation comes in – shades here of Professor Kavanagh's analysis in her recent book, *The Collaborative Constitution*. I sometimes think that statutory interpretation is like bidding conventions between partners (neither of whom can see the other's hand) in a game of bridge. Statutory clauses such as "notwithstanding the provisions of s. 23(1)(d)" in many ways presents the same sort of dilemma of the bridge player such as: what exactly was that Two Club bid from my partner meant to signify? This is where judicial dialogue comes.

31. Judicial review at its best is supposed to draw attention to the (often inadvertent) legislative failure to have regard to the rights of particular individuals or where the legislation has inadvertent consequences.

32. An interesting example of this form of dialogue is provided by the Swedish Law Council. This body is composed of both serving and retired judges which gives (non-binding) advice on draft legislation coming before the Riksdag. The first thing to say is that it seems to be a busy institution, having given over fifty determinations in 2024. To give a flavour of its determinations: the last few weeks have seen determinations on subjects such as children's welfare, compliance with EU Directives and planning and infrastructure legislation. To our eyes, the determinations have almost the flavour of counsel's opinion rather than a judicial determination as such, although other legislation, prior Law Council determinations and case-law are often referred to. Sometimes policy considerations are mentioned, but many examples quoted by the Council address questions of drafting and they frequently make recommendations for suggested textual changes. In other cases, the Council addresses questions of the potential compatibility of the draft law with either EU law or the ECHR.

33. The Law Council must be regarded as one of the two great innovations of the Swedish legal system, the other being, of course, the Ombudsman. Yet there is perhaps no reason why a version of the Law Council could not also migrate here. It might be objected that the Attorney General's Office provides this form of guidance, but apart from the fact that the advice is given only to the Government and not to the Oireachtas as such, the advantage of the Law Council procedure is that it would provide for an independent, detached view of the drafting and perhaps some otherwise unanticipated policy or legal issues that had not otherwise been picked up. Both the Parliamentary Counsel and the AG's Office have a great cadre of lawyers who are specialists in this area, but the views from outside the drafting process is often helpful.

34. It is true that serving judges could not properly sit on such a body – at least without constitutional change – but an Irish version of the Law Council might nonetheless operate vis-à-vis the Oireachtas and the Attorney General's office in much the same way as the Fiscal Council now operates vis-a-vis the Department of Finance and the Central Bank in matters of economic policy.

35. Other legal systems also either provide for or have this type of dialogue. One sees it most markedly in the type of abstract or ex ante judicial review in the constitutional courts of countries such as France and Germany. The German Constitutional Court in particular has developed methods of dialogue which are designed to encourage better law-making from the Bundestag through the use of so-called admonitory decisions. In effect, the Court will nullify a particular law but leave the law or practice intact, sometimes for a specified period. Two examples of this may be given.

36. I think that there are a number of advantages to this type of dialogue. If the judiciary notice a flaw in the legislation – such as, for example, a failure to

take account of a legitimate interest or where the law has unintended consequences which are beyond the judicial competence to cure or redress – is it not better that the matter would be quickly addressed by the Oireachtas in the knowledge that the courts are not endeavouring to block a policy choice, but rather are seeking to assist the legislative branch to draft the legislation in a way which is fairer or more coherent. If we look carefully at some of the case law, there are already shades of this in Irish law. Again, two examples may be appropriate.

37. In *Blake v. Attorney General*[7] the Supreme Court held that the Rent Restrictions Acts unconstitutional. The basis for the Court's decision was, I think, much misunderstood and was later denounced in the Oireachtas by some speakers. In essence what the Court had was to identify legislation which plainly worked in an arbitrary and unreasonable way. The legislation had frozen the rents at unrealistically low levels and failed to adjust for the high inflation of the 60s and the 70s. The legislation also failed to take account of the respective means of landlord and tenants and the properties to which the legislation had been selected on a rather arbitrary basis based effectively on whether the property had been built in certain (but not all) urban areas prior to 1941.

38. Looked at that way, the legislation was really impossible to defend. What would have been so wrong in the Court de facto suspending the legislation pending review by the Oireachtas with the Court effectively saying: Of course you can have rent restrictions legislation if you wish. But you must respect the essence of the property rights of the property owner, the properties to which the legislation applies must be selected on a rational basis, the respective means of both landlord and tenant must be taken into account and account must be taken of the impact of inflation and other similar changes.

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[7] [1982] IR 117.

39. As it happens, the Court did something a little like that. Even though the Irish courts have not heretofore expressly acknowledged the existence of such an admonitory jurisdiction, one can see shades of this in *Blake.* Conscious, however, that such an invalidation of the Rent Restrictions Acts would have far-reaching consequences by, *e.g.*, suddenly stripping tenants of legally acquired rights of tenure etc., the Court concluded its judgment by directing the lower courts to refuse to enter applications for possession pending the enactment of new legislation by the Oireachtas which would regularise the position and bring the law into line with the Constitution.

40. The other example is supplied by *DK v. Crowley.*[8] In that case the Supreme Court held that s. 3 of the Domestic Violence Act 1996 was unconstitutional because it allowed to one spouse to obtain a barring order on an *ex parte* basis with no in-built safeguards for the other party. These flaws included the fact that the order could be open-ended, that there was no record of what occurred at the *ex parte* hearing and that the onus remained at all times on the party against whom the order was directed to have the order set aside, thus reversing the ordinary onus of proof.

41. This is, I think, an example of where in its understandable eagerness to provide redress to the victims of domestic violence, the Oireachtas overlooked the rights of the other party against whom allegations had been made. The Supreme Court acknowledged that the courts had to have the right to make *ex parte* orders, but in effect invited the Oireachtas to introduce new legislation which struck a fairer balance between the respective rights of the parties. The Oireachtas immediately acted and the Domestic Violence (Amendment) Act 2002 is, I think, a better and fairer item of legislation than its 1996 predecessor.

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[8] [2002] 2 IR 744.

42. Here there may also be an opportunity for the more frequent use of the Article 26 procedure as part of this dialogue. Of course, it may readily be acknowledged that this procedure has its drawbacks, but it is equally clear that the drafters understood that this process was to further a dialogue between the judiciary and the legislators. This is clear from some of the early drafts of the Constitution providing for a Constitutional Court.

43. One model was explicitly based on Article 3 of the Czechoslovak Constitution of 1920. Both Constitutional Courts were to consist of seven members. The two other principal courts (in our case, the High Court and the Supreme Court) were to have the right to choose two members each, with the Chairman and the other two members chosen by the respective Presidents of the State. Likewise, both texts provided for the enactment of a special law regulating the organization and procedure of the Constitutional Court. While in both cases there was a judicial majority of "ordinary" judges, it is not clear that it was necessarily envisaged that the other members would be judges - or perhaps even lawyers.

44. John Hearne's draft was annotated in the margins by de Valera and the fact that he put brackets around the words "and the Constitutional Court" with regard to the standard guarantees in respect of tenure suggests that he may have envisaged that these other members of the Court would not be judges in the ordinary sense of that term. If such proposals had prevailed, then any Irish Constitutional Court might ultimately have evolved much like the French *Conseil Constitutionnel*, with a mixture of judicial and political members.

45. De Valera also seems to have toyed with the idea of whether personages such as the Attorney General and the Ceann Comhairle might

not be *ex officio* members of the Constitutional Court. There are, of course, echoes of this in Article 31.2.i of the Constitution which provides that the Chairman of Dáil Éireann, the Chairman of Seanad Éireann and the Attorney General are *ex officio* members of the Council of State. A further question raised by de Valera in the margin was whether the Presidential nominees were to receive remuneration and queried whether such nominees were to appointed for "each year or each case?"

46. In the end, this idea proved too radical, and Article 26 is all that remains. I think that there is a case for saying that the procedure is under-used. I know that successive Attorneys General have maintained that they will not stand over the use of Article 26 to settle a dubium: in other words, they will not allow the Government to proceed with a Bill in the Oireachtas unless they are satisfied it will survive constitutional scrutiny. But perhaps this is altogether too narrow a view of Article 26. What is so wrong with in saying that we cannot be certain that this Bill will survive constitutional challenge, but let us ask the Supreme Court for guidance on the topic?

What do we want from constitutional change?

47. There is a story that in the aftermath of the Supreme Court's decision in *McGee v. Attorney General* in December 1973 counsel for the State, Niall McCarthy SC, braced himself for the phone call to the then Attorney General, Declan Costello SC, to tell him that the State had lost and that s. 17 of the Criminal Law (Amendment) Act 1935 – with its ban on the importation of contraceptives - had been found to be unconstitutional. (This, incidentally, was a phone call which as counsel I had to make on more than one occasion so I can sympathise with what Niall McCarthy must have been going through in advance of making that

call.) On this occasion, however, he need not have worried, as McCarthy was pleasantly surprised to hear the Attorney General observe in response that this was excellent news indeed.

48. There are echoes of that in the present topic for debate. At one level the implication of this afternoon's theme is that we need enhanced constitutional protection. To date there have been more than 100 findings of unconstitutionality.[9] In most cases – but not certainly not all – the law was changed for the better. Is this the "Goldilocks" level of judicial review of legislation? Or too much or too little? If, however, we make amendments to the fundamental rights so that these rights are enhanced, the inevitable consequence is that there will be more findings of unconstitutionality. Is that what we as a society want?

Conclusions

49. Writing almost thirty years ago about the (often misunderstood) case-law on property rights[10] I said that there was a *sense* - but, I stress, only a sense - in which the actual wording of the Constitution did not really matter. By this I meant that regardless of the philosophical and textual analysis of these words the courts were themselves essentially asking questions bearing on the internal consistency and proportionality of the impugned legislative measures. Was there a rational reason for the legislation? Did it impair the substance of property rights? Was there fair burden sharing between different categories of persons? Regardless of the precise wording the results would generally be seen the same, even if, for

[9] Hogan, Kenny, Walsh, "An Anthology of Declarations of Unconstitutionality" (2015) 54 *Irish Jurist* 1. This cites 93 final orders, but since then there have been about another dozen such findings.

[10] Hogan, "The Constitution, property rights and proportionality" (1997) 32 *Irish Jurist* 373.

example, the courts had used the wording of Article 1 of the 1st Protocol ECHR as opposed to that found in Article 40.3.2º and Article 43.

50. The same is true of many other constitutional provisions as well. One can, for example, read Article 40.1 dealing with equality in an expansive manner so that it occupies essentially the same ground as that covered by the 14th Amendment of the US Constitution or Article 3 of the German Basic Law. Or if you prefer the common law heritage and its deference to legislative judgments, you can elect to read Article 40.1 as essentially a modest form of equality guarantee, whose successful deployment is confined to exceptional cases.

51. In many ways it is ultimately a question of constitutional culture. The principled judicial activism of the German Constitutional Court is a classic example of Dworkinian "Taking Rights Seriously" in action. That Court can do this because it has the broad support of German society who, for understandable historical reasons, want the Court to perform this counter-majoritarian role of safeguarding the democratic character of the German State while protecting individual rights as well.

52. There were shades of this in the activism of the Ó Dálaigh/Walsh Supreme Court of the 1970s: counter-majoritarian judicial activism was welcomed in many influential quarters because there was a strong sense that the majority culture which had prevailed up to that point was insufficiently protective of minorities and that the Oireachtas was also insufficiently responsive to a range of social and legal problems. Some might argue that times have changed and there is no longer any need for an activist counter-majoritarian constitutional culture.

53. So four and score and seven years on it can be said that just at the moment there is no immediate and imperative need for constitutional change. Irish society,

therefore, has to make up its mind as which of these constitutional cultures it wishes for the future.