

## A written constitution for an independent Scotland: an Irish perspective

Juliette Casey,  
Advocate.

*The author considers three aspects of the recently published interim constitution for Scotland and seeks to highlight possible lessons from Ireland's experience of framing and reforming its own constitution.*

### Introduction

The Scottish government's commitment to a written constitution, contained in its White Paper issued in November 2013,<sup>[1]</sup> offered a glimpse of what the constitutional arrangements in an independent Scotland might look like. A more detailed vision was brought into focus at the beginning of the summer on 16 June with the publication of the draft Scottish Independence Bill. This draft Bill<sup>[2]</sup> sets out an interim constitution which, if the "Yes Scotland" campaign is victorious on 18 September, will take effect on "Independence Day" scheduled for 24 March 2016. While this is only an interim constitution, and during the interim constitutional period it is anticipated that it would "sit alongside a refreshed and rewritten Scotland Act"<sup>[3]</sup> the Scottish government anticipates that there may be "continuities and similarities" between the interim constitution and a permanent constitution.<sup>[4]</sup> The Bill offers insights into both the substantive terms of the interim constitution and the process by which a permanent written constitution will be drafted following the Scottish Parliament elections in May 2016. I will focus here on three aspects of the interim constitution. The provisions relating to rights, the related power of the courts to judicially review legislation and, finally, the process by which any permanent written constitution will be drafted. Although never a perfect constitution, the Irish constitution was "prescient" in many respects.<sup>[5]</sup> Drawing on the Irish experience of constitutional formation and reform, I will suggest here how it might be invoked as a useful touchstone as the constitutional changes on the horizon in Scotland draw ever closer.

### Key components of the interim constitution

Among the key components in any written constitution are those provisions that relate to rights, the power of the courts to uphold those rights and the forum in which this takes effect. Sections 26–28 of the interim constitution are

devoted to rights. These provisions draw on the panoply of protections offered by the European Convention on Human Rights.<sup>[6]</sup> Section 28 is a specific equality provision while s.29 imposes a duty on the Scottish government and public authorities to seek to safeguard, support and promote the wellbeing of the children of Scotland. Although not included in the rights section of the interim constitution, s.24 envisages that directly effective EU law forms part of Scots law.<sup>[7]</sup> It seems that this section at least envisages that any protection afforded by EU law treaties is also to be incorporated.

Sections 13–15 of the interim constitution relate to matters juridical. Section 13 provides for the independence of the judiciary while s.14 provides that the existing high courts, the Court of Session and the High Court of Justiciary, will be in their respective areas of competence "the Supreme Court of Scotland".<sup>[8]</sup> Accordingly, no appeal lies against the decisions of the Supreme Court.<sup>[9]</sup> However, this statement of supremacy does not affect the jurisdiction of the Court of Justice or the European Union, the European Court of Human Rights or any other court or tribunal established under an international agreement to which Scotland is a party.<sup>[10]</sup> Finally, there is a general statement that the rule of law continues to apply in Scotland and that every person is subject to, and must act in accordance with, that principle.<sup>[11]</sup> The suggestion appears to be that judges will be given fundamental powers including the power to review acts of the Scottish Parliament but the precise scope of this power is not defined.<sup>[12]</sup>

Section 33 provides that the Scottish Parliament must, as soon as possible after independence day, make provision by Act of Parliament for the establishment of an independent constitutional convention. This body is to be charged with the task of drawing up a written constitution for agreement by or on behalf of the people of Scotland.<sup>[13]</sup> The White Paper of November 2013 tells us that the convention would be "open, participative and inclusive" and that the constitution "should be designed by the people of Scotland, for the people of Scotland". The Bill leaves the membership of the convention and its operational rules for the Scottish Parliament to determine, including "the procedure by which the written constitution prepared by the Convention is to be agreed by or on behalf of the people"<sup>[14]</sup> while the White Paper tells us that the Scottish government has been looking at "international best practice".

## A WRITTEN CONSTITUTION FOR AN INDEPENDENT SCOTLAND: AN IRISH PERSPECTIVE

All of this is, of course, a long way off from taking effect for a whole range of reasons<sup>[15]</sup>, not least of which is the assumption that there will be a yes vote in the referendum on 18 September. Nevertheless, these developments have precipitated a debate which has clear resonances with that ongoing in Ireland. The purpose of this short commentary is not to suggest a complete transplantation of a constitution from a different country and of a different era but merely to highlight possible lessons from a neighbouring country's experience of framing and reforming its constitution.

### Formation of the Irish Constitution

Ireland has had two separate constitutions since it obtained independence from the United Kingdom in 1921. The Irish Free State Constitution was enacted in 1922 following the end of the Irish War for Independence and the signing of the Anglo-Irish Treaty of 1921. The 1922 constitution did not receive wide support from the general population owing to procedural and substantive issues. Its enactment ultimately instigated a civil war in Ireland. The 1937 constitution, known as *Bunreacht na hÉireann*, was the first constitution ever adopted by a popular vote in a simple majority referendum on 2 July 1937 and it entered into force on 29 December 1937.<sup>[16]</sup> The 1937 constitution borrowed heavily from continental European constitutions, most notably the Weimer Constitution of 1919, and the USA<sup>[17]</sup> and it has been described as representing "a visible outward symbol of nation-building, something to set Ireland apart from its colonial past".<sup>[18]</sup>

Although Ireland has amended its constitution over 25 times since 1937, mostly within the last 30 years, this constitution still exists. The Scottish government's commitment to the idea of sovereignty<sup>[19]</sup> was also the driving concept behind *Bunreacht na hÉireann*.<sup>[20]</sup> This concept is articulated in the 1937 constitution which clearly recognises the supreme authority of the people, and not the dominance of the state over its citizens.<sup>[21]</sup> This emphasis on legally enforceable rights with a corresponding obligation on the state to guarantee and defend those rights was entirely at odds with the prevailing political climate across continental Europe in which human rights were not a priority. The late Walsh J writing extrajudicially stated that the constitution "[i]s not simply a composition of exhortations or aspirations which it is hoped will be followed, it is the basic law which distributes powers and imposes obligations and guarantees rights and which binds

the People together with the strongest of moral and legal chains".<sup>[22]</sup>

### Fundamental rights in the Irish Constitution

Two of the great strengths of Ireland's constitution may be said to lie in its commitment to fundamental rights and the corresponding power of its judicial review provision. Five of the 50 articles of the constitution are devoted to fundamental rights. The fundamental rights are equality, liberty, family, education and children, the home, free speech, religion and freedom of thought and property.<sup>[23]</sup> The inclusion of fundamental rights represented a radical break from English constitutional doctrine as enunciated by Blackstone and Dicey.<sup>[24]</sup> A further source of rights was discovered in the landmark case of *Ryan v Attorney General*<sup>[25]</sup> where Kenny J interpreted arts 40.3.1<sup>o</sup>-40.3.3<sup>o</sup><sup>[26]</sup> as guaranteeing the right to bodily integrity, a right which is not explicitly referred to in the text. These articles form the basis of the powerful constitutional doctrine of unenumerated rights and they, in and of themselves, have generated a rich seam of caselaw.<sup>[27]</sup> Unlike the South African Constitution which incorporates an extensive list of directly enforceable socio-economic rights,<sup>[28]</sup> the protection of socio-economic rights in the Irish Constitution is weak.<sup>[29]</sup> Article 45<sup>[30]</sup> deals with the directive principles of social policy and it has been suggested that the drafters of the constitution came up with this provision as the ultimate compromise regarding the protection of socio-economic rights.<sup>[31]</sup> Although unsuccessful in practice in Ireland, these principles have found their way into other constitutions.<sup>[32]</sup> The principles set out in this article are directed to the Oireachtas and are explicitly non-justiciable in any court of law. The first major attempt to invoke the constitution in the domain of socio-economic rights was *O'Reilly v Limerick Corporation*.<sup>[33]</sup> In this case, members of the travelling community complained that their squalid living conditions constituted a breach of their constitutional rights. Drawing on the distinction between distributive justice, which was understood to relate to the allocation of common goods and burdens within society, and commutative justice, which was understood to relate to an adjudication on legal rights, Costello J considered that the case presented a non-justiciable political controversy and that the courts had no role in adjudicating upon the manner in which the nation's wealth had been distributed because this was a solely a matter for the government. Central to this

## AWRITTEN CONSTITUTION FOR AN INDEPENDENT SCOTLAND: AN IRISH PERSPECTIVE

reasoning, of course, is the high constitutional doctrine of the separation of powers.

These issues raised in the context of socio-economic rights formed the backdrop to discussions in hundreds of actions dealing with a huge range of educational issues ranging from the treatment of children with special needs to the construction of special regimes for disruptive and unruly children. The result was a whole range of novel court orders ranging from fixing the appropriate pupil/teacher ratio in special schools to directing the government to build secure units for disturbed juveniles. Although based on arts 42.4 and 42.5,<sup>[34]</sup> one of the fundamental rights provisions, these cases reveal how a full blown socio-economic right would work in practice.<sup>[35]</sup>

### Judicial review in the Irish Constitution

Another great strength of Bunreacht na hÉireann is art.34.3.2.<sup>[36]</sup> This article expressly confers upon the High Court and the Supreme Court the power to review the constitutionality of legislation. This represented a marked break from the British tradition of parliamentary sovereignty that dominated in Ireland until the enactment of the constitution. The importance of the judicial role in interpreting a constitution in its time to reflect the needs of the people it serves has been widely acknowledged.<sup>[37]</sup> In the period since the constitution has been enacted there have been over 75 declarations that particular laws and rules were unconstitutional<sup>[38]</sup> and we saw here the capacity for judicial activism to respond to changing societal needs in the areas of unenumerated rights and to a limited extent in the context of socio economic rights. Although this provision was influenced by the USA, the United States Constitution of 1788 did not explicitly provide for this jurisdiction and the power of constitutional review of Acts of Congress was not asserted until the case of *Marbury v Madison*<sup>[39]</sup> by Marshall CJ who explained that “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”<sup>[40]</sup> As Denham CJ has noted of the Irish Constitution this “was a visionary approach to a democracy with three organs of State, where the Superior Courts were entrusted with judicial review of legislation.”<sup>[41]</sup>

Article 34 of the constitution rigidly provides for a Supreme Court and a High Court and establishes the essential constitutional responsibilities of these courts. Denham CJ has

advocated the establishment of a Court of Appeal set between the High Court and the Supreme Court which would free up the Supreme Court to focus on cases relating to constitutional law or cases of exceptional public importance. Although there is archival evidence which has recently come to light which suggests that the drafters<sup>[42]</sup> were considering the possibility of a constitutional court with exclusive jurisdiction to determine the validity of any law having regard to the provisions of the constitution, this did not materialise and has been viewed as “missed opportunity”.<sup>[43]</sup> While this proposal would have been a major change for a common law jurisdiction, it is synonymous with the civil law tradition and arguably, one that would fit with the Scottish mixed legal system.

### The Convention on the Irish Constitution

The constitution has been a central feature of the Irish legal system and the verdict of one of Ireland’s leading constitutional scholars was that the constitution produced results which were, on the whole, “beneficial, rational, progressive and fair”.<sup>[44]</sup> However, over the decades, Ireland has experienced many economic and social changes.<sup>[45]</sup> Critics of the constitution have underscored sexist attitudes enshrined in art.41.2<sup>[46]</sup> as well as concerns over the non-incorporation of treaties into domestic law and the constitution’s silence on the rights of children.<sup>[47]</sup> Running in parallel has been a growing political consensus for constitutional change. When Fine Gael and the Labour party formed a coalition government in 2011 the government promised to “establish a constitutional convention to consider comprehensive constitutional reform ... and report within 12 months”. The coalition’s programme focussed on six specific constitutional reform issues<sup>[48]</sup> and it left open the possibility that the convention could recommend other relevant amendments. Following input from the Irish political science community highlighting the importance of involving citizens in the constitutional reform process, Parliament voted in July 2012 to establish “the Convention on the Constitution”.

The demographic make up of the group was designed to reflect that of Ireland generally with a fixed number of members taken from different age groups, sex, region, social class and occupational status. Initially the names of the citizen members were kept secret because of the danger of exposing the members to lobby groups but in response to public criticism, the names and the areas in which the convention members lived were released. A convention website was created

## A WRITTEN CONSTITUTION FOR AN INDEPENDENT SCOTLAND: AN IRISH PERSPECTIVE

which allowed for input from the general public but public interest groups were specifically excluded by Parliament on the basis that they constituted “special interests”. The discussions of the various different meetings of the convention were streamed.

There was one inaugural meeting of the convention on 1 December 2012 followed by nine sessions in 2013 through to December 1 2013. The convention also held nine regional meetings in October and November of 2013 and members of the public were informed about these regional meetings by means of a Facebook page. Parliament mandated the convention to consider eight specific issues.<sup>[49]</sup> Parliament also indicated that it was not obliged to proceed with any amendment proposal, but promised to respond formally to each recommendation and to debate it in the parliament within four months of submission. It is for the government to decide whether or not to support each report on an individual basis and each reform proposal will also require an individual referendum vote.

Within several weeks of each meeting, the convention released reports that provided background on each reform proposal it discussed during the meeting. The meeting reports included summaries of each meeting; convention recommendations; internal voting results; meeting agendas; expert presentations; and summaries of convention discussions on particular reform proposals. The convention used several different approaches in considering reform topics and in preparing its own recommendations. For issues involving greater complexity<sup>[50]</sup>, the convention took longer and, when appropriate, it used the ballot system to eliminate options with a view to focussing its ultimate proposals while in another case following the hearing of expert testimony, the convention chose to debate a recommendation and opted to make a new recommendation.<sup>[51]</sup>

In its Second Report<sup>[52]</sup> the Constitutional Convention was required to consider two matters both of which related to the role of women in Irish life. These discussions focussed on arts 41.2 and 40 of the constitution. First, the convention had to consider whether to amend the clause on women in the home enshrined in art.41.2 and second, how best to encourage greater participation of women in public life and increase the participation of women in politics. Article 41.2.1<sup>o</sup> provides that “the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved”. A majority of the convention members favoured

changing art.41.2 to make it “gender neutral” and made the further recommendation to include “other carers in the home”<sup>[53]</sup> and “to include carers beyond the home”<sup>[54]</sup> In his statement to the Dáil, the Minister for Justice Equality and Defence, Alan Shatter, TD supported this approach and recognised that “[w]hile women have always played a central role in the family, over 975,000 women are now also active in the labour market. Of these, over 500,000 have children and therefore additional caring responsibilities. A further significant number of adults, both men and women, have caring responsibilities for older parents and other adult dependents.”<sup>[55]</sup> On a continuum, a majority of participants at the convention also recommended that the state should offer a “reasonable level of support” to ensure that those to whom the newly constructed amendment should apply “shall not be obliged by economic necessity to engage in labour”<sup>[56]</sup>. In response to the second matter on the issue of participation, a majority of the convention members recommended that the constitution should be amended to include an explicit provision on gender equality.<sup>[57]</sup> The question whether the constitution ought to place a duty on the State to take positive action to enhance women’s participation in politics and public life was narrowly defeated<sup>[58]</sup> but a significant majority recommended more government action in this area.<sup>[59]</sup> A sizeable majority were of the view that the text of the entire constitution should be amended to include gender inclusive language.<sup>[60]</sup>

The Parliament also authorised the convention to consider “Any Other Amendments.” Economic, Social and Cultural Rights was one of two topics the convention members selected. A large majority<sup>[61]</sup> favoured changes to the constitution in order to strengthen the protection of the ESC rights. A minority<sup>[62]</sup> of the convention members recommended that the issue be referred elsewhere for further consideration of the implications of possible reforms. The convention also recommended that there should be a constitutional provision that the state would progressively realise ESC rights, subject to maximum available resources, that this duty would be cognisable by the courts, and that the provision would not diminish the level of protection already afforded in the constitution. The convention identified a number of specific rights including housing, social security, rights for those with disabilities, healthcare and language and cultural rights which it recommended should be enumerated in the

## AWRITTEN CONSTITUTION FOR AN INDEPENDENT SCOTLAND: AN IRISH PERSPECTIVE

constitution.<sup>[63]</sup> While this constitutional reform process is unique to Ireland's history and culture, it has been treated seriously by the government and the Irish people and it has been offered as a good model of deliberative democracy<sup>[64]</sup> and a template for parties considering similar efforts elsewhere.<sup>[65]</sup>

### Conclusion

As the 18 September deadline draws closer, the public demand for greater clarity and certainty is ever more pressing. The interim constitution is a first step towards formulating a written constitution. I isolated here three basic yet key aspects of a constitution which require careful consideration: those provisions relating to rights, their enforcement and the forum in which this takes effect. Irish society and legal landscape has changed almost beyond recognition since 1937, and although never perfect, Bunreacht na hÉireann has much to offer in terms of the general approach to protecting rights both enumerated and unenumerated. Taken together with the willingness of the judiciary to assume the mantle of interpreting the constitution, its vibrancy has been ensured. Equally, its strong judicial review provision has been much lauded. The lack of a constitutional court, by contrast, is a source of some regret in Ireland and it may well be that this negative Irish experience will inform future debate in Scotland resulting in suitable provision in any future written constitution. The provision in the Bill to engage an independent constitutional convention is a welcome prospect. As the Irish experience has demonstrated, a country's written constitution is not the preserve of any one sector of society. The form of the Irish Constitutional Convention appears to have worked well and the participation of members of the public has resulted in considered and meaningful proposals for reforming key aspects of the Irish Constitution.

These are truly interesting times to be a member of civil society in Scotland and, whatever the result on 18 September, the debate on independence has raised questions of constitutional reform which, at some level, look likely to shape the future of Scotland for some time to come.

[I would like to thank Professor Stephen Tierney. The usual caveats apply.]

### Appendix

[1] <http://www.scotland.gov.uk/Resource/0043/00439021.pdf>.

[2] <http://www.scotland.gov.uk/Resource/0045/00452762.pdf>.

[3] *Ibid*, Explanatory Notes, p.50.

[4] *Ibid*, Explanatory Notes, p.64.

[5] *A v Governor of Arbour Hill Prison* [2006] 4 I.R. 88 at pp.145–146.

[6] Specifically they are arts 2-12 and 14 of the Convention, arts 1-3 of the First Protocol to the Convention, agreed at Paris on 20 March 1952, art.1 of the Thirteenth Protocol to the Convention, agreed at Vilnius on 3 May 2001 as read with arts 16-18 of the Convention. Section 27(2) provides that [t]hose rights and freedoms have effect for the purposes of this Act as they have effect for the time being in relation to Scotland.

[7] Section 24(3)(a) defines EU law as meaning (i) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and (ii) all those remedies and procedures from time to time provided for by or under those treaties.

[8] Section 14 of the Bill.

[9] Section 14(4).

[10] Section 14(5).

[11] Section 15(1) and (2).

[12] Stephen Tierney, p.4 <http://ukconstitutionallaw.org/2014/06/24/stephen-tierney-leaving-westminster-constitutional-supremacy-in-an-independent-scotland>.

[13] Section 33(1) of the Bill.

[14] Section 33(3)(e) of the Bill.

[15] Cf. Stephen Tierney, p.2, <http://ukconstitutionallaw.org/2014/06/24/stephen-tierney-leaving-westminster-constitutional-supremacy-in-an-independent-scotland>.

[16] Hon. Gerard Hogan, The 1937 Constitution, Address to the Constitutional Convention, THE CONVENTION ON THE CONSTITUTION, 1 December 2012, available at [www.constitution.ie/AttachmentDownload.ashx?mid=d0e7d26f-283e-e211-a5a0-005056a32ee4](http://www.constitution.ie/AttachmentDownload.ashx?mid=d0e7d26f-283e-e211-a5a0-005056a32ee4).

[17] *Ibid*, at para.10.

[18] Hon. Mrs Justice Susan Denham, Chief Justice, "Some Thoughts on the Constitution of Ireland at 75" in *The Constitution of Ireland: Perspectives and Prospects*, Bloomsbury Professional, 2012, p.3.

[19] <http://news.scotland.gov.uk/Speeches-Briefings/The-constitutional-future-of-an-independent-Scotland-dbd.aspx>.

## A WRITTEN CONSTITUTION FOR AN INDEPENDENT SCOTLAND: AN IRISH PERSPECTIVE

[20] Murphy, "The 1937 Constitution-Some Historical Reflections" in Murphy and Twomey (eds) *Ireland's Evolving Constitution 1937-1997* (Hart Publishing, 1998), p.12.

[21] Article 6.1 of Bunreacht na hÉireann. The equivalent provisions in the interim Scottish constitution are ss.2 and 3.

[22] Casey, *Constitutional Law in Ireland* (Sweet & Maxwell, 1987), pp.vii-viii.

[23] Articles 40-44 of the constitution.

[24] Keane J writing extra judicially in "Fundamental Rights in Irish Law: A note on the historical background" in O'Reilly (ed) *Human Rights and Constitutional Law* (The Round Hall Press, 1992) 25, p.27.

[25] [1965] I.R. 294.

[26] Article 40.3.1<sup>o</sup> provides that the State guarantees in its law to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. Article 40.3.2<sup>o</sup> provides that the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

[27] In *G v An Bord Uchtála* [1980] I.R. 32 at p.56, for example, O'Higgins CJ held that the child has the right to realise his or her full personality and dignity as a human being. See also the first Chapter of the Charter of Fundamental Rights of the European Union 2009 is dedicated to "Dignity". Article 1 proclaims that "[h]uman dignity is inviolable. It must be respected and protected".

[28] See, for example, the case of *Soobramoney v Minister of Health*, 1998 (1) SA 765 (CC) in which a patient with chronic renal failure claimed that the failure by the authorities to provide him with the dialysis treatment he needed to keep him alive violated his right to adequate health care as protected by s.27(1) of the South African Constitution.

[29] See, however, the discussion below where the Constitutional Convention in Ireland has voted in favour of reforming economic, social and cultural rights in the convention.

[30] Article 45 provides that [t]he principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of these principles in the making of laws shall be the care of the Oireachtas exclusively and shall not be cognisable by any court under any of the provisions of the constitution.

1. The state shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.

2. The state shall, in particular, direct its policy toward securing: (i) That the citizens, (all of whom

men and women women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs. (ii) That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes at best to subserve the common good. (iii) That especially the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment. (iv) That in what pertains to the control of credit the constant and predominant aim the welfare of the people as a whole. (v) That there may be established on the land in economic security as many families as in the circumstances shall be practicable.

3.1<sup>o</sup> The State shall favour and, where necessary, supplement private initiative in industry and commerce.

2<sup>o</sup> The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.

4.1<sup>o</sup> The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community and, where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged.

2<sup>o</sup> The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.

[31] Gerard Hogan, *Directive Principles, Socio-Economic Rights and the Constitution*, *The Irish Jurist*, Vol.XXXVI 2001, p.175.

[32] India (1947) and Burma (1947), Pakistan (1962), Sri Lanka (1972), Bangladesh (1972), Tanzania (1977), Nigeria (1979), Zanzibar (1984), Ghana (1992), Uganda (1997), Namibia (1990), the constitutions of the Pacific Island states of Papua new Guinea, Tuvalu, Solomon Islands, Kiribati, Vanuatu, Belau, and Western Samoa.

[33] [1989] I.L.R.M. 181.

[34] Article 42.4 provides that "[t]he State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religion and moral formation".

Article 42.5 provides that "[i]n exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall

A WRITTEN CONSTITUTION FOR AN INDEPENDENT SCOTLAND:  
AN IRISH PERSPECTIVE

endeavour to supply the place of parents, but always with due regard to the natural and imprescriptible rights of the child” cf. *O’Donoghue v Minister for Education* [1996] 2 I.R. 20 (the case was actually decided in May 1993) where the mother of a severely disabled young boy claimed successfully that her child’s constitutional right to free primary education had been violated by reason of the failure of the State to provide free primary education as guaranteed by art.42.4; *FN v Minister for Education* [1995] 1 I.R. 409 where Geoghan J held at p.416 that “ where there is a child with very special needs which cannot be provided by the parents or guardian there is a constitutional obligation on the State under Article 42.5 of the Constitution to cater for those needs in order to vindicate the constitutional rights of the child”. *DB v Minister for Justice* [1999] 1 I.R. 39 where Kelly J granted an order directing the Minister for Justice “to provide funding and to do all things necessary for the building, opening and maintenance of a high support unit” for young offenders. The applicant was a young offender who required secure accommodation in a high support unit, but who had failed to obtain same due to a shortage of facilities; *TD v Minister for Education* [2000] 2 I.L.R.M. 321 to like effect where the right was conceded by the State; *Sinnott v Minister for Education* [2001] IESC 63; [2001] 2 I.R. 505 where the Supreme Court held that the educational provisions of the constitution ceased at 18 years of age Hardiman J reasoning at [2001] 2 I.R., p.699 that “[d]ecisions of this sort are normally a matter for the legislative and executive arms of government. This is not merely a matter of demarcation of administrative convenience. It is a reflection of the constitutionally mandated division of the general powers of government, set out in Article 6 of the Constitution. A system of separation of powers of this sort is a part of the constitutional arrangements of all free societies.” In the leading case of *Buckley and Others (Sinn Féin) v. Attorney General* [1950] I.R. 67, the Supreme Court addressed this topic as follows at p.81: “The manifest object of [art.6] was to recognise and ordain that, in the State, all powers of government should be exercised in accordance with the well recognised principle of the distribution of powers between the legislative, executive and judicial organs of the State and to require that these powers should not be exercised otherwise. The subsequent articles are designed to carry into effect this distribution of powers.”

[35] The relevant provisions in the Charter of Fundamental Rights of the European Union are to be found in Title IV arts 27–38.

[36] This provision provides that “[s]ave as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court”.

[37] Walsh, “200 Years of American Constitutionalism—A Foreign Perspective,” 48 Ohio St. L. J. 757. Cf. Baroness Hale of Richmond in the context of the ECHR, “*Beanstalk or Living Instrument? How Tall can the ECHR Grow?*” Barnard’s Inn Reading 2011 available at [www.supremecourt.gov.uk](http://www.supremecourt.gov.uk).

[38] Hogan, 2012, [12].

[39] (1803) 5 US 137.

[40] The full implications of this decision first appear in the decision of *Scott v Sandford* (1857) 60 US 393 which struck down as unconstitutional a law condemning slavery.

[41] *Leadership in Human Rights Law, Past and Future*, speech by Denham J to the Irish Human Rights Commission and Law Society of Ireland Public Conference, 16 October 2004.

[42] The circumstantial evidence suggests that this proposal came from Mr John Hearne. One draft envisages that the High Court was not to have jurisdiction to entertain or determine the question of the validity of any law but could refer a question to the Constitutional Court. Cf. Hogan, *John Hearne and the Plan for a Constitutional Court*, (2011) 18(1) D.U.L.J. 75.

[43] The Hon Mrs Justice Susan Denham, “Some Thoughts on the Constitution of Ireland at 75”, *The Constitution of Ireland: Perspectives and Prospects*, Bloomsbury Professional, 2012, at p.23. The Government has committed to the establishment of a Court of Appeal in its Programme for Government 2011-2016.

[44] *Ibid* at para.13 referring to the late Professor John Kelly, TD.

[45] Many of the amendments to the constitution arose from Ireland’s new status as an EU Member State. Others reflected further changes in social values including the passage of a divorce referendum.

[46] See, for example, Irish Human Rights Commission, “Submission to the UN Committee on the Elimination of All Forms of Discrimination Against Women in respect of Ireland’s Combined Fourth and Fifth Periodic Reports under the UN Convention on the Elimination of All Forms of Discrimination Against Women”, at p.2.

[47] Cf. Maurice Manning, *The Constitution: Human Rights Challenges*, IRISH HUMAN RIGHTS COMMISSION, 3-6 (30 June 2012), [http://www.ihrc.ie/download/pdf/drmauricemanni\\_nghiircpresidentaddress.onconstitutionucdschooloflaw30june2012.pdf](http://www.ihrc.ie/download/pdf/drmauricemanni_nghiircpresidentaddress.onconstitutionucdschooloflaw30june2012.pdf).

[48] These included (1) reviewing the Dáil electoral system; (2) reducing the presidential term to five years and aligning it with the time frame of local and European elections; (3) adding a provision for same sex marriage; (4) amending the clause on women in the home and encouraging greater participation of

## NEWS

women in public life; (5) removing blasphemy from the constitution; and (6) reducing the voting age.

[49] These were reducing the presidential term of office to five years and aligning it with local and European elections; reducing the voting age to 17; reviewing the Dáil electoral system; giving citizens residing outside the state the right to vote in presidential elections; adding a provision for same sex marriage; amending the clause on the role of women in the home and encouraging greater participation of women in public life; increasing the participation of women in politics; and removing the offence of blasphemy from the constitution.

[50] Such as the topic that involved consideration of amendments to the Dáil electoral system.

[51] This occurred in the context of the reform proposal to reduce the voting age to 17. The convention voted to reduce the voting age to 16.

[52] [www.constitution.ie/AttachmentDownload.ashx?mid=268d9308-c9b7-e211-a5a0-005056a32ee4](http://www.constitution.ie/AttachmentDownload.ashx?mid=268d9308-c9b7-e211-a5a0-005056a32ee4).

[53] 98 per cent supported this change.

[54] 62 per cent supported this change.

[55] [www.merrionstreet.ie/index.php/2013/10/statement-by-the-minister-for-justice-equality-and-defence-al](http://www.merrionstreet.ie/index.php/2013/10/statement-by-the-minister-for-justice-equality-and-defence-al).

[56] This response related to the following question: "Noting that Art 41.2.2° says "The State shall ...

endeavour to ensure that [mothers] shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home', what level of obligation should be placed on the State (on a scale of 1-5)?" 35 per cent supported this change.

[57] 62 per cent supported this change. Article 40.1 currently provides that all citizens shall, as human persons, be held equal before the law.

[58] The results were 49 per cent in favour of placing a positive duty on the State; 50 per cent were against while 1 per cent had no opinion.

[59] 97 per cent were in favour of this option.

[60] 89 per cent.

[61] 85 per cent.

[62] 43 per cent.

[63] [www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4](http://www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4).

[64] Chairman's introduction to the Eighth Report of the Convention on the Constitution, Economic, Social and Cultural Right, March 2014. [www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4](http://www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4).

[65] *Constitutional Reform in Ireland*, Legal Memorandum, February 2014, <http://www.mreza-mira.net/wp-content/uploads/Constitutional-Reform-in-Ireland-Feb-2014.pdf>.

## NEWS

### Appointments

#### Judicial Complaints Reviewer

Justice Secretary Kenny MacAskill has announced the appointment of Gillian Thompson OBE as the second Judicial Complaints Reviewer. The appointment will be for a period of three years from 1 September 2014 to 31 August 2017 and has been made with the approval of the Lord President, Lord Gill.

— ♦ —

### Law Reform

#### Report on trust law

The Scottish Law Commission has published a report recommending substantial reform of the law of trusts in Scotland.

Copies of the report are available online at <http://www.scotlawcom.gov.uk/news/trust-report/>. Further information can be obtained by contacting Charles Garland, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR, tel 0131 668 2131, fax 0131 662 4900, email [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk).

♦