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I. Introduction

Nowadays human rights are taken very much for granted in the sense that they are universally debated. Their history is a well-trodden ground and their implementation in civil law systems is well documented. Human rights have long been a feature of American jurisprudence and the activity of the Supreme Court of the United States in this sphere has been much discussed and studied. A difference in emphasis, noticeable over the last thirty years or so, is thus described by one observer: "It is frequently difficult, even impossible, to pinpoint historical lines of demarcation. Nevertheless, it was about 1940 when the Supreme Court of the United States became 'activist' in the area of civil liberties and began to place primary emphasis on these matters rather than on substantive governmental power."[1] Ireland was about a century and a half later than the United States in adopting a constitution with entrenched rights; but it looks as though the jurisprudence of the Irish Constitutional Courts may be at present taking a line, with regard to constitutional rights, not altogether dissimilar to that currently being taken by the United States Supreme Court. The matter is worth looking at more closely.

Ireland's legal system belongs to the common law tradition as opposed to the Continental tradition; that is to say, Irish legal philosophy and practice is based upon the English common law and owes little to the legal notions and institutions and the conceptions of lawmaking and interpretation found in countries inspired by the Napoleonic codes and the reception of Roman law. The common law of England was first brought to Ireland in the twelfth century; but it was many centuries before it replaced the native Irish law (called *brehon* law) in all parts of the country.[2] When, in 1919, during the struggle for Irish independence, Republican tribunals were set up, in opposition to the ordinary law-courts which were regarded as having been forced upon Ireland by British rule, it was provided that the early Irish law tracts (as well as the decisions of Continental courts and the Roman law) could be cited as authorities. The Republican tribunals were suspended in 1922. And, apart from one or two isolated questions raised in the courts since then, there has been little further mention of the *brehon* laws. A feature of the English common law, since the nineteenth century at least, has been the assumption of Parliamentary omnicompetence and the rejection of the conception of a natural law. The system, in other words, is one of legal positivism; and it became such through the acceptance of the Austinian doctrine of sovereignty. The doctrine is perfectly expressed in the phrase: *Quod principi placuit legis habet vigorem,* the *princeps* in this case being Parliament.[3]

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1 *Bartholomew, The Supreme Court of the United States, 1965-1966,* 19 WESTERN POL. Q. 705 (1966).

2 *Cf.* A. DONALDSON, SOME COMPARATIVE ASPECTS OF IRISH LAW 5-8 (1957).

3 *Compare* MAY'S PARLIAMENTARY PRACTICE, *cited by* R. O'SULLIVAN, THE KING'S GOOD SERVANT 17-18 (1948):

In the past half-century, however, certain important developments took place to affect the law in Ireland and to introduce into it the conception of limitation upon legislative competence. The background of these developments is a matter of constitutional history—and Irish constitutional history has played a conspicuously important part in determining the juridical form of the British Commonwealth.[4] Our present concern is with two major documents—the constitutions of 1922 and 1937—and with the fundamental rights guaranteed in them.

II. The Constitution of 1922

A. The Historical Background

The final chapter in Ireland's long struggle for freedom opened with the Easter Week Rebellion of 1916. Militarily, the rebellion was a failure; but it ushered in a period in which British rule in Ireland, even when backed by great military force, broke down. A truce was declared on July 11, 1921, and was followed by the prolonged negotiation of a treaty between Great Britain and Ireland, signed on December 6, 1921. The Irish Parliament—Dail Eireann—approved the treaty by a small majority on January 7, 1922; and a provisional government was set up a week later, to which the British Government was to transfer, on an agreed date, its powers and functions in Ireland.

One of the first acts of the provisional government of Ireland (or of the Irish Free State as it was to be called) was to set up a committee to draft a constitution. The committee first met on January 24, 1922, and was addressed by Michael Collins, the Chairman of the Provisional Government. It was given twenty-eight days to produce a draft constitution for a "free and democratic State"—a constitution within the limits of the treaty, one that would take account of the particular position of Northern Ireland (which was to have, as it still has, its own Parliament) and would include safeguards for the Unionist minority. The constitutional committee decided not to copy the model of the flexible, unwritten British Constitution but to study the written constitutions of other countries and to strive to incorporate their best features. Subsequently, the constitution committee compiled and published a collection of constitutions for the guidance of the Provisional Parliament, sitting as a Constituent Assembly. This collection of some eighteen constitutions included those of older British Dominions like Canada, Australia and South Africa as well as those of European

> The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government; but Parliament is not controlled in its discretion and when it errs its errors can only be corrected by itself.

Lord Shawcross, former British Attorney-General, expressed the position more dramatically in a remark that has been widely quoted: "Parliament is sovereign; it can make any laws. It could ordain that all blue-eyed babies should be destroyed at birth; but it has been recognised that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, those laws will be supported and can be enforced." This, is, doubtless, a deformation of the genuine conception of the common law; but it is clearly accepted as part, and an important part, of the (unwritten) constitution of Britain.

4 *Cf.* I. JENNINGS, CONSTITUTIONAL LAWS OF THE COMMONWEALTH (1952); H. FRANZEN, *Irland und Grossbrittanien seit 1919*, in JAHRBUCH DES OFFENTLICHEN RECHTS 280-375 (1938).

and American countries.[5] The models which seem to have most influenced the framers of the new constitution were the constitutions of the United States of America, of the Swiss Confederation and of Weimar Germany.[6]

The draft constitution was published on June 15, 1922, on the eve of the elections to the new Parliament, which was to sit as a Constituent Assembly. Civil War, however, broke out at the end of June and the meeting of the Constituent Assembly took place, after repeated postponements, on September 9, 1922. The draft constitution was adopted in substance, although considerably modified in detail, and became the Constitution of the Irish Free State on October 25, 1922. The preamble of the act enacting the constitution reads:

> Dail Eireann, sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows:
>
> 1. The Constitution set forth in the first Schedule hereto annexed shall be the Constitution of the Irish Free State. . . .

And article 2 of the constitution reads:

> All powers of government and all authority legislative, executive and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under and in accord with this Constitution.

These democratic assertions are important in view of differences of interpretation that later arose. None of the other members of the British Commonwealth enjoyed sovereignty at its origin to enact a constitution for itself. The Canadian Constitution, for example, derives its validity from the "British North America Act, 1867"; and New Zealand (1852), Australia (1900) and the Union of South Africa (1909) depend for their constitutions on legislative acts of the British Parliament. The claim to sovereignty on the part of the Irish Constituent Assembly did not pass unnoticed. The British Parliament endorsed the Constitution in the Irish Free State Constitution Act of 1922; and, later on, Irish and English constitutional lawyers were to differ on the question of the source of the jurisdiction that was given effect in the constitution.[7]

B. Fundamental Rights in the 1922 Constitution

A revolutionary feature of the constitution of the Irish Fre State was the

5 SELECT CONSTITUTIONS OF THE WORLD, prepared for Presentation to Dail Eireann by order of the Irish Provisional Government, Dublin 1922. *Cf.* O'BRIEN, THE IRISH CONSTITUTION 44-47 (1929).

6 Farrell, *The Drafting of the Irish Free State Constitution,* 5 IRISH JURIST 115-40 (1970). In this article, the author has cast a great deal of new light on the deliberations of the Constitutional Committee and on their preliminary drafts of the constitution.

7 *Cf.* O'BRIEN, THE IRISH CONSTITUTION 56 (1929); H. FRANZEN, *supra* note 4, at 314-18.

inclusion of certain fundamental rights. It has more than once been pointed out that "in no other Constitution in the Empire—with the exception of a single clause in the British North America Act—is any attempt made to fetter the discretion of Parliaments by the imposition of juristic limitations of their legislative capacity."[8]

The English tradition was not to have abstract formulations of human rights, but rather pragmatic guarantees such as the Magna Carta or the Habeas Corpus Act of 1679 or, in more general terms, the concept of "the rule of law" and juridical precedent. Ireland's unhappy experience of the innumerable suspensions of the Habeas Corpus Act engendered a distrust of such guarantees and made the decision of the framers of the Free State Constitution to insert provisions concerning fundamental rights very understandable.

These fundamental rights are, for the most part, contained in articles 6-10 of the constitution.[9]

Other rights, mostly concerned with fair trial and equality before the law, are found expressed in articles 43, 70 and 72. The list of rights presents little that could surprise one familiar with the eighteenth-century emphasis upon natural rights and with nineteenth- and twentieth-century practice in constitution-making. The inspiration of the fundamental rights in the Irish Constitution seems to have come from the American Constitution—which, perhaps, is to be expected since both Ireland and America have legal systems fashioned after the English legal system. Furthermore, one member of the Constitutional Committee, C. J. France, who had come to Ireland early in 1922 as representative of the American Committee for Relief in Ireland, had been added precisely because it was suggested that his "legal expertise and transatlantic experience would be of use to the Committee."[10]

C. The Interpretation of the Fundamental Rights

It has often been observed that it is one thing to entrench fundamental

8 J. MORGAN, THE CONSTITUTION—A COMMENTARY, p. 17; *Cf.* L. KOHN, DIE VERFASSUNG DES IRISCHEN FREISTAATS 61 (1928):

> Hierin offenbart sich der revolutionäre Ursprung der irischen Verfassung. In keiner der britischen Kolonialverfassungen ist eine solche Erklärung von Grundrechten enthalten. Vielmehr die Bürger der Selbstverwaltungskolonien die staatsrechtlich englische Bürger blieben, denen nur fur ihre lokalen Angelegenheiten eine quasistaatliche Autonomie vom Mutterland gewährt worden war, dem Freiheitsschutz des englischen Rechts. In der Erklärung der Grundrechte in der irischen Verfassung lag aber nicht nur ein unterschiedendes. Element gegenüber der Verfassungen der britischen Dominions und eine Betonung des staatlichen Characters des neuen irischen Gemeinwesens; sie stellte daruberhinaus einen radikalen Bruch mit den Staatsrechtstradition Englands selbst dar. . . .

9 Article 6—The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. . . .
Article 7—The dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law.
Article 8—Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. . . .
Articel 9—The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. . . .
Article 10—All citizens of the Irish Free State (Saorstät Eireann) have the right to free elementary education.

10 Farrell, *supra* note 6, at 118.

human rights in a document like a constitution and quite another to ensure that they are respected and given full force. An extreme example of the divergence that may exist between the written document and its practical enforcement is provided by the 1936 Constitution of the U.S.S.R.; this constitution contains as comprehensive a list of human and personal rights as one could wish—freedom of speech, of press, of assembly and meetings, of processions and demonstrations, the inviolability of the person and of the home, the secrecy of correspondence[11]—but only a very naive observer would conclude that these rights could be asserted with any effectiveness by the citizen under the Stalin regime. And do not colored citizens' rights in some of the southern states of United States, or the rights of the non-Unionist minority in Northern Ireland, offer similar food for reflection?

It is of interest, therefore, to examine the practical recognition given to the fundamental rights in the 1922 Constitution. The first thing to notice is that the fundamental guarantees had less effect than might be thought by reason of the fact that (according to article 50) the constitution itself could be amended by simple legislation for a period of eight years from the date of its coming into operation. In 1929 the then government amended this article to read "sixteen years" so that the constitution during the whole period of its operation could be amended like any ordinary piece of legislation and without the formality of being submitted to a referendum of the people. This, the most remarkable of the twenty-seven amendments of the constitution during its fifteen years of life, meant that the Parliament acquired absolute control over the constitution.[12] The fundamental rights, then, notwithstanding the solemnity of their expression in the constitution, were not beyond the reach of ordinary legislative power on the part of the government of the time. Indeed, in 1931, the government inserted a new article into the constitution—article 2A—which included the provision that every subsequent article was to be interpreted in accordance with it. This was an article setting up a special military tribunal with the power to impose capital sentence; no subsequent article, none therefore of the fundamental rights articles, was to be interpreted so as to conflict with this new power. This amounted, as has been pointed out, to a doctrine of Parliamentary omnipotence not at all unlike the Austinian doctrine of sovereignty in favor in England. Despite appearances to the contrary, the Irish Free State Constitution was in fact hardly better than the British Constitution of which Laski once said that "it knows no such thing as fundamental laws; the statutes which govern the succession to the throne are changed in the same way as statutes which regulate the sale of intoxicating liquors."[13]

A further difficulty in the way of interpretation of the fundamental rights clauses in the constitution was that, in cases of dispute, the interpretation was assigned to the judges of the High and Supreme Courts. These were not special constitutional courts and the judges comprising them, accustomed to hearing civil and criminal cases, were now asked to decide matters to which they were

11 These rights are found mainly in chapter X of the constitution, "Basic Rights and Duties of Citizens." *See also* F. Van Asbeck, The Universal Declaration of Human Rights and Its Predecessors (1679-1948) 75-85 (1949).

12 *See* J. Kelly, Fundamental Rights in the Irish Law and Constitution 4-6 (2d ed. 1967).

13 H. Laski, A Grammar of Politics 156 (4th ed. 1951).

not accustomed, namely the force of constitutional guarantees of human rights. The same provision, it may be said in anticipation, obtains in the 1937 Constitution of Ireland. Time might have been expected to heal the strangeness of the jurisdiction of a constitutional court; yet forty years after the coming into force of the first constitution it was still possible to say: "The most recent Irish Constitutional decisions illustrate particularly the problems which may spring from the no longer unusual hybrid of a written constitution which is to be interpreted by judges trained in and administering a basically English common law system."[14]

The idea behind the provisions of Articles 65 and 66 (which state that the judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the constitution and that the Supreme Court shall have final appellate jurisdiction from all decisions of the High Court) was to set up the judiciary, on the American model, as a separate organ of government. But, in practice, although "of the main elements of the Constitution, only the judiciary survived unscathed"[15] by the series of amendments and changes between 1922 and 1937, the influence of the courts was slight:

> The most remarkable contribution of the Constitution of the United States to political theory was the conception of the Judiciary as an independent branch of Government side by side with the Executive and the Legislature. The existence of a written Constitution led the Constituent Assembly to establish a Judiciary competent to give legal interpretation. . . . In the United States the place assigned to the Judiciary turned out to be greater than its founders foresaw. In the Irish Free State the tendency is in the opposite direction. Critics in America claim that the judges are legislating under the guise of enactment; in the Free State that the Executive unduly subordinates judicial control.[16]

There have been several studies of the constitutional cases decided by the courts under the 1922 Constitution which bear out the small practical influence of the fundamental rights articles contained in that document.[17] One might have anticipated, given the extensive literature about natural rights in Europe and America since the eighteenth century, that the rights in the constitution would have been taken very seriously. But, in fact, it is difficult to discover in the judgments of the courts any far-reaching interpretation of such rights in contrast with the positive law. One remarkable exception is a judgment delivered by the Chief Justice of the Irish Free State in 1935 when the Supreme Court was called upon to decide the constitutionality of the amendment adding a new article to the constitution (the Article 2A already mentioned, setting up a special tribunal with power to impose the death sentence). In his opinion, which was overruled by his fellow judges, Chief Justice Kennedy said:

> The Constituent Assembly declared in the forefront of the Constitution Act (an Act which it is not within the power of the Oireachtas to alter, or amend

14 Abrahamson, *Current Constitutional Interpretation in Ireland,* 12 INT'L & COMP. L.Q. 312 (1963).
15 A. DONALDSON, *supra* note 2, at 154.
16 N. MANSERGH, THE IRISH FREE STATE, ITS GOVERNMENT AND POLITICS 57 (1934).
17 *See* A. DONALDSON, *supra* note 2, at 147-152; J. KELLY, *supra* note 12.

> or repeal) that all lawful authority comes from God to the people; and it is declared by Article 2 of the Constitution that "all powers of government and all authority, legislative, executive and judicial, in Ireland are derived from the people of Ireland . . ." It follows that every act, whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God. From this it seems clear that, if any legislation of the Oireachtas (including any purported Amendment of the Constitution) were to offend against that acknowledged ultimate Source from which the legislative authority has come through the people to the Oireachtas, as, for instance, if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative. I find it very difficult to reconcile with the Natural Law actions and conduct which would appear to be within the legalising intendment of the new Article 2A.[18]

This judgment, as has been mentioned, was a minority one.[19] The view that prevailed among the judges was the old positivism expressed in the opinion by Mr. Justice Fitzgibbon:

> They [the prosecution] assert that there are certain rights, inherent in every individual, which are so sacred that no Legislature has authority to deprive him of them. It is useless to speculate upon the origin of a doctrine which may be found in the writings of Rousseau, Thomas Paine, William Godwin and other philosophical writers, but we have not to decide between their theories and those of De Lolme and Burke, not to mention Bentham and Locke, upon what Leslie Stephen describes as "a problem which has not yet been solved, nor even are the appropriate methods agreed upon," as we are concerned, not with the principles which might or ought to have been adopted by the framers of our Constitution, but with the powers which have actually been entrusted by it to the Legislature and Executive which is set up.
>
> "The Declaration of the Rights of Man and of Citizens" by the National Assembly of France on October 5th, 1789, that "liberty, property, security and resistance to oppression are the natural and imprescriptible rights of man" cannot be invoked to overrule the provisions of a statute enacted in accordance with the provisions of a written Constitution.
>
> When a written Constitution declares that "the liberty of the person is inviolable" but goes on to explain that "no person shall be deprived of his liberty *except in accordance with law,* then, if a law is passed that a citizen may be imprisoned indefinitely upon a *lettre de cachet* signed by a Minister or, as we have seen even by a Minister's clerk, the citizen *may* be deprived of his 'inviolable liberty' but, as the deprivation will have been 'in accordance with the law' he will be as devoid of redress as he would have been under the regime of a French or a Neapolitan Bourbon."[20]

This, the minimizing view of fundamental rights, is not far removed from the prognostication made by the British Attorney-General, Sir Douglas Hogg

18 The State v. Lennon, [1935] Ir. R. 170, 204-05.

19 It may be noted that the 1937 Constitution (Article 34.4.5) forbids the pronouncement of a minority opinion, or even the disclosure that there was a minority opinion, whether assenting or dissenting, in such cases. This rule has recently been criticized as suppressing "minority opinions which might gain favour in years to come"—this particularly in view of the Supreme Court's decision that it will not be bound by its own precedents. *See* J. KELLY, *supra* note 12, at 33.

20 The State v. Lennon, [1935] Ir. R. 170, 230-31.

(later the first Viscount Hailsham) when asked in the British House of Commons in 1922 about the effect of the provision (Article 7) in the Irish Constitution concerning the inviolability of the dwelling—"There are two or three Articles which propound political doctrines which really have no legislative effect and do not alter the effect of the Constitution one iota."[21] This was, perhaps, the view of a politician rather than the detached judgment of a lawyer. But that it was uncomfortably close to the truth may be gauged from the support—even some judicial support—found in the 1920's for the doctrine of "implicit amendment" of the constitution. This asserted that ordinary legislation which, even if it did not purport to be "an Act to amend the Constitution," must be held to prevail over those constitutional provisions with which it was inconsistent.[22]

It remains to be seen whether the situation was changed by the new Constitution of Ireland which came into force on December 29, 1937.

III. The Constitution of 1937

A. *The Historical Background*

The way had been prepared for the new constitution by the successive amendment of the old one, particularly since the change of government bringing Mr. De Valera to power for the first time in 1932. Mr. De Valera's policy was to remove all traces of the treaty of 1921 and all monarchical symbols (such as the Oath of Allegiance to the English monarch, and the office and function of the Governor-General) from the constitution.[23] There was to be retained only the tenuous connection with the British Commonwealth provided by the recognition of the British Sovereign for the purposes of external association. These, and other constitutional changes, were consolidated in a new written constitution, in the drafting of which Mr. DeValera played a leading part. This constitution was debated in the Dail (Parliament) and submitted to the people in a special referendum in July, 1937. It came into force in the following December and is still the constitution of Ireland.

The referendum was to give reality to the statement in the preamble to the constitution that "We, the people of Eire . . . do hereby adopt, enact and give to ourselves this Constitution" and, at the same time, to avoid the difficulty that had arisen in deciding the source of the jurisdiction—the Irish Constituent Assembly or the British Imperial Parliament—for the enacting of the constitution. As already seen, the Act of the Irish Parliament, sitting as a Constituent Assembly, giving force to the 1922 constitution acknowledges that "all lawful authority comes from God to the people." The preamble to the 1937 constitution is much more explicit and, while it excited admiration in certain quarters when it was

21 J. KELLY, *supra* note 12, at 15.
22 *Id.* at 5.
23 *See* H. FRANZEN, *supra* note 4, at 329-37; Grogan, *Irish Constitutional Development*, 40 STUDIES 323 (1951). *See also* A. DONALDSON, *supra* note 2, at 88-89: "In the space of four years Mr. De Valera's government had virtually transformed the Irish conception of Dominion status. . . . In the view of the Irish government, the only links between Dublin and Westminster were tenuous ones, and these were entirely of Irish manufacture."

first published, it has recently been the subject of criticism as being unacceptable to some of the citizens. It runs:

> In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our nation, and seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations, do hereby adopt, enact and give to ourselves this Constitution.[24]

In a leading case in 1939, involving habeas corpus, the late Mr. Justice Gavan Duffy said: "The Constitution, *with its impressive Preamble,* is the Charter of the Irish People, and I will not whittle it away."[25]

B. *Fundamental Rights in the 1937 Constitution*

One of the most striking features of the 1937 constitution is that "it possesses a comprehensive and detailed Bill of Rights, plus some analogous fundamental provisions—the Directive Principles of Social Policy, borrowed from the Spanish Republican Constitution of 1931."[26] The rights are contained in articles 40-44, the Directive Principles of Social Policy in article 45. The directive principles are "intended for the general guidance of the Oireachtas (Parliament)" and their application in the making of laws is the exclusive function of the Parliament and is expressly removed from the cognizance of the courts. It is otherwise with the fundamental rights which can be, and have been, the basis for challenging the constitutionality of legislation. The rights are as follow:

> Article 40—All citizens shall, as human persons, be held equal before the law . . . The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen . . . . 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. No citizen shall be deprived of his personal liberty save in accordance with law . . . . The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with

24 Messineo, *La Nuova Costituzione Irlandese* in 88 CIVILTÀ CATTOLICA 239-241 N. 2097, having described the Constitution as "tutta imbevuta di spirito cristiano e tale di dover riscuotere l'adesione di ogni cattolico sincero e di ogni patriota spassionato a causa dell'assoluta independenza e piena sovranità da essa rivendicata nel fatto e nel diritto" goes on to speak of the Preamble: "Questo magnifico preambolo perfettamente intonato all'insegnamento cattolico in quanto alla dottrina, segna politicamente un passo in avanti nella conquista delle piena ed assoluta independenza nazionale. Non vi si trova infatti menziona alcuna ne della Gran Bretagna, ne del suo re, ne della communità dei popoli di lingua inglese. Il popolo irlandese si da una nuova costituzione in modo del tutto autonomo, per sua spontanea determinazione, nel piene esercizio della sua libertà e sovranità."

25 The State v. Lennon, [1940] Ir. R. 136.

26 McWhinney, *The Courts and the Constitution in Catholic Ireland,* 29 TUL. L. REV. 69 (1954).

law. The State guarantees liberty for the exercise of the following rights, subject to public order and morality
i. the right of the citizens to express freely their convictions and opinions . . .
ii. the rights of the citizens to assemble peaceably and without arms . . .
iii. the right of the citizens to form associations and unions . . .

Article 41—The State recognises the Family as the natural, primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law . . . . No law shall be enacted providing for the grant of a dissolution of marriage. . . .

Article 42—The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide according to their means for the religious and moral, intellectual, physical and social education of their children . . .

Article 43—The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property. . . .

Article 44—The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence and shall respect and honour religion. The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens. The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. The State guarantees not to endow any religion. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status. . . . Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes. . . .

This, it may be agreed, is a comprehensive list of rights; and jurists, and others interested in legal and constitutional philosophy, have found much of interest in the terminology and the qualifications used in the formulation of the various rights. The framers of the constitution, after all, had the experience of the eighteenth and nineteenth centuries to guide them, from Rousseau's *Contrat Social* and the French *Declaration des droits de l'homme et du citoyen*, John Locke's *Second Treatise of Civil Government* and the American Declaration of Independence to the cascade of constitutions and declarations of rights that, in the nineteenth century and through to the twentieth, have been inspired by those documents. One thing shown by experience was that the formulation of fundamental rights was important—an eloquent general declaration is not necessarily capable of being given effect in the practical organization of life in society. But the difficulty of reconciling the rights of the individual with those of society is

ineluctable and some compromise is necessary. The particular compromise made by the Irish constitutional declaration has been praised by one continental observer as presenting a happy mean between the opposite extremes of liberalism and statolatry. The same writer describes the constitutional recognition of values antecedent to positive law as a unique triumph of natural law over the materialistic and positivistic conceptions found in modern jurisprudence.[27]

These assessments were oversanguine and failed to do justice to the sources of inspiration of the constitution. "It has been noted that the intellectual streams from which the Constitution in general draws its inspiration are divergent. As well as the influence of the political teaching of St. Thomas Aquinas and the Papal Encyclicals, which affects everything in it, there is also the philosophical influence of the tradition of liberal democracy, as well as the impact of the practical turn of mind of the English constitutional lawyers, whose work has so profoundly coloured Irish legal thinking."[28] But it was not surprising that different expectations should have been formed for the fundamental rights in the constitution than had been the case with the fundamental rights in the 1922 constitution. Another continental observer, H. Fransen, took a much less sanguine view of the fundamental rights in the constitution, suggesting that they possessed no political or legislative significance, especially as the most important of them were subject to what, in practice, amounted to unlimited legal exception. The same writer went on to suggest that the articles in question had been included simply as a gesture to traditional constitutional formulae.[29]

That was, perhaps, too pessimistic a prognostication. The truth, no doubt, lies somewhere between the extremes. The 1937 constitution was neither the unqualified triumph of natural law on the one hand, nor was it merely an obeisance towards the conventional constitutional formularies on the other hand. What exactly it was, and how far the fundamental rights it enshrines were effective, can only be discovered from the experience of the period of almost thirty-five years that has elapsed since it came into force.

C. *The Interpretation of the Fundamental Rights*

The 1937 constitution resembles the 1922 constitution in that the ordinary courts, the High Court and the Supreme Court, have jurisdiction to decide in cases of legislation alleged to be repugnant to the constitution. There is in addi-

27 Messineo, *supra* note 24, at 246: "Il vero ordine sociale non puo risultare se non dal contemperamento armonioso dei diritti individuali e dei diritti dello Stato in una sintesi superiore che non disconosca ne sopprime uno dei termini della relazione ad esclusivo beneficio dell'altro. Ad ottenere questa sintesi superiore secondo le esigenze della dottrina cattolica mira la Costituzione irlandese, tenendosi lontana dagli estremi opposti del liberalismo e della statolotria moderna, a quello succeduta per reazione. . . .

"In nessuna costituzione si trova un cosi espressa riconoscimento de una categoria di valori e diritti che precedono il formarsi dello Stato e sono superiori ad ogni sua legge. E il trionfo del diritto naturale sulle concezioni materialistiche e positivistiche delle moderne correnti giuridiche, che lo negano o lo deridono come un residuo de vecchie filosofie ormai sorpassate delle scienze. . . ." *See also* Grogan, *The Constitution and the Natural Law,* 8 CHRISTUS REX 207 (1954); J. NEWMAN, STUDIES IN POLITICAL MORALITY 421 (1962).

28 J. NEWMAN, *supra* note 27, at 417.

29 H. FRANZEN, *supra* note 4, at 348-49. *See also* J. KELLY, *supra* note 12, at 14-15.

tion a provision (in article 26) for the referring by the president of a bill to the Supreme Court for a decision on whether or not it conflicts with the constitution. There is no special constitutional court; but it can no longer be said that the the judges of the High Court and the Supreme Court are inexperienced in determining constitutional matters. There is some reason for thinking that Mr. De Valera, who had such a large part in the drafting of the constitution, envisaged the fundamental rights articles more as providing guiding lines for the legislature than as giving the basis for the judicial review of legislation.[30] And, as a matter of fact, the legislature could suspend the constitution for all practical purposes by appealing to article 28 which provides that "Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas (Parliament) . . . for the purpose of public safety . . . in time of war or armed rebellion." Such a time may be declared a "national emergency" and it includes such time after the war or armed conflict as may elapse until the Parliament passes a resolution that the "national emergency" has ended. Such an emergency resolution was passed on September 3, 1939, and, despite some desultory debate in the Dail, has not since been rescinded. Admittedly there is at present no emergency legislation in force which depends for its validity on this resolution. But should legislation be introduced, stated to be for "the purpose of securing the public safety and the preservation of the state in time of war or armed rebellion" it would, in virtue of article 28.3.3, be immune from review by the courts.

Finally, as has been noticed already, the various provisions of the fundamental rights articles are qualified in various ways — the right of assembly "peaceably and without arms" (article 41), freedom of conscience and religion "subject to public order and morality" (article 44) and, in particular, freedom of the person and inviolability of the dwelling "save in accordance with law" (article 40). These qualifications, in theory (as Fransen pointed out) and in the view of some judges, give the legislature untrammelled power over the fundamental rights in the constitution.

Yet, when all this is borne in mind, experience has shown that the fundamental rights articles do mean something and will, on occasion, be upheld by the courts in order to invalidate legislation. Some have found the extent of the courts' activity disappointing:

> It must be said at the outset that the Supreme Court's work to date has been rather less daring and innovatory than one might have expected, granted the break with the past represented by the Constitution of 1937 and especially the novel character and comprehensive provisions of the Bill of Rights. The Supreme Court is, of course, a private-law court as well as a constitutional court of review. An overwhelming proportion of its work in fact is non-constitutional, and the Court's members appear to be selected on a basis of strict professional attainments. These factors have frequently combined, elsewhere in the Commonwealth, to produce a narrow, rather inflexible approach to constitutional interpretation, with emphasis on harsh construction and reading down of the constitutional provisions in question. The Irish Courts in this respect purport to follow a strictly legalistic ap-

30 *See* J. KELLY, *supra* note 12, at 15-30.

> proach to constitutional interpretation, though offsetting the effects of this is the very fulness of the drafting of the Irish Constitution. . . .[31]

Others, even those critical of the entire conception of fundamental rights antecedent to and above positive law, have recognized that the idea of judicial review has grown in importance:

> What has been the record of the Irish Courts since 1937 in relation to the Fundamental Rights Articles? The frequency with which the Supreme Court or the High Court has been called on to consider these Articles has been progressively increasing, and the number of statutory provisions declared unconstitutional since 1937 is not inconsiderable. There is, then, every reason to think that the High Court and the Supreme Court have treated the Fundamental Rights Articles as something more than mere "headlines" to the legislature.[32]

This changed state of affairs is attributable, according to Professor Kelly, to factors like changes in the personnel of the judiciary since 1937, and the enhanced stability of the articles because of the fact that, since 1941, the constitution has been, unlike its predecessors, incapable of amendment except by referendum of the people.

There have been a number of studies of the cases decided by the courts in the matter of personal, political, property, family and social and religious rights.[33] In the judgments of the various judges, there are to be found opinions and *obiter dicta* which minimize the effect of the articles on fundamental rights; this was also true of the judicial interpretation of the 1922 constitution. But what one must call a certain boldness or even a maximizing tendency in interpretation seems to have become much more prevalent since 1937. Here the influence of an Irish judge, the President of the High Court, Mr. Justice Gavan Duffy, was important, even though he failed to convince his brethren on the judiciary. It was not merely Mr. Justice Gavan Duffy's judgment in individual cases, important though these were, that was impressive; it was also his general approach to Irish constitutional law and his refusal to be bound by precedents and case-law coming from the English common law system. Speaking in the High Court in 1939, he said:

> In my opinion this Court cannot be fettered in the exercise of the judicial power by opinions of very different courts under the old regime, unless those opinions must reasonably be considered to have the force of law in Ireland so that they formed part of the code expressly retained. For the rest we must give to Irish judicial view and to judgments in England and elsewhere interpreting a similar jurisprudence, that respect which their intrinsic worth may entitle them to claim. Our new High Court must mould its own *cursus curiae;* in so doing I hold that it is free, indeed bound, to treat any such absurdity in the machinery of administration as having been imposed

31 McWhinney, *supra* note 26, at 70-71; *see also* Abrahamson, *supra* note 14.
32 J. KELLY, *supra* note 12, at 25.
33 *See* J. KELLY, *supra* note 12; Costello, *The Natural Law and the Irish Constitution,* 45 STUDIES 403 (1956); Grogan, *The Constitution and the Natural Law,* 8 CHRISTUS REX 201 (1954); A. DONALDSON, *supra* note 2, at 172-80; Abrahamson, *supra* note 14, at 312-18.

> on it as part of the law of the land; nothing is law here which is inconsistent with derivation from the People.[34]

These opinions by the President of the High Court were of great importance despite the fact that "the traditionalism of lawyers practising under a law of precedent triumphed over his application of the novel views which he propounded."[35]

The importance of those views, albeit overruled at the time, comes into sharp focus since the Supreme Court's abandonment of the rigid application of the rule of *stare decisis*. In two cases in 1964 it refused to be bound by its own precedents and in fact reversed decisions already given; the Supreme Court has, in the words of one of its judges, come to regard *stare decisis* as a policy rather than as an unalterably binding rule.[36]

Even more important from the point of view of the interpretation of human rights in the constitution is a judgment given in the High Court in 1963 by Mr. Justice John Kenny and subsequently (in the following year) upheld in the Supreme Court. The judgment had to do with the constitutionality of the Health (Fluoridation of Water Supplies) Act of 1960, which was challenged on the ground that compulsory fluoridation of the water supply was an infringement of the "personal rights of the citizen" mentioned in article 40.3.1 of the constitution. Specifically the argument was made that the addition of fluoride to the water supply (to reduce the incidence of dental caries) was compulsory medication and consequently an invasion of the personal right of bodily integrity; furthermore, it was argued that by permitting the addition of a dangerous substance to the water, the state was in dereliction of its duty to vindicate the general rights of citizens. In the course of his judgment, Mr. Justice Kenny held that "the personal rights which may be invoked to invalidate legislation are not confined to those specified in article 40 but include all those rights which result from the Christian and democratic nature of the State." He went on to concede that this view imposes on the High Court and the Supreme Court "the difficult and responsible duty of ascertaining and declaring what are the personal rights of the citizen which are guaranteed by the Constitution."

"In modern times it would seem to be a function of the legislative rather than the judicial power, but it was done by the Courts in the formative period of the Common Law and there is no reason why they should not do it now."

The Supreme Court likewise took the view that the enumeration of "personal rights" in article 40 of the constitution—i.e., "life, person, good name and property," was not exhaustive and admitted that "to attempt to make a list of all the rights which may properly fall within the category of personal rights would be difficult."[37] This judgment is clearly a pregnant one for Irish constitutional jurisprudence, greatly enlarging, as it does, the possible field for future activity of the courts in the matter of the review of legislation.

A wider current question, which it is relevant to raise here, is that of con-

34 Exham v. Beamish, [1939] Ir. R. 336, 348-49. *See also* A. DONALDSON, *supra* note 2, at 31-32.
35 A. DONALDSON, *supra* note 2, at 32.
36 *See* J. KELLY, *supra* note 12, at 30-31.
37 Id. at 36-48.

stitutional reform. In August, 1966, an informal Parliamentary Committee, representative of all three political parties in the Dail, was set up "to review the constitutional, legislative and institutional bases of Government." The Committee published its report in December, 1967.[38] In the introduction to the report, it enumerated, amongst the basic elements of the constitution:

> The interpretation and application of the laws by judicial decision is entrusted to the courts, which are independent and subject only to the Constitution and the law; these courts also have the function of determining whether any law is in keeping with the Constitution. . . .
>
> . . . .
>
> Certain fundamental rights of the individual are guaranteed, such as personal liberty, equality before the law, freedom of expression (including criticism of the Government), freedom of assembly and association, rights relating to family, education, dwelling and property, and religious freedom. . . .[39]

When it came to its recommendations, the Committee advised that the interpretation of the "right of personal liberty" be left with the courts; and specific reference was made to the Supreme Court's decision not to be bound by its own earlier decisions and to its "less rigid attitude" with regard to the interpretation of personal rights. In the latter connection, the Committee quoted Mr. Justice Kenny's judgment.[40] Other constitutional rights considered by the Committee include the right of association (apropos of trade union law), family rights (apropos divorce and compulsory school attendance laws) and religion (apropos of the recognition of various religious bodies in the constitution). The recommendations of the Committee — none of which has yet been implemented in legislation — are unlikely to have any great effect upon the human rights in the constitution or their interpretation. But they do reflect a climate of opinion that has changed considerably since the constitution was drafted in 1937. The Committee recommends, for instance, that the constitutional recognition of the "special position of the Holy Catholic Apostolic and Roman Church" and the recognition of various other Churches in Ireland (article 44) be dropped. It also recommends that article 41.3.2, providing that "no law shall be enacted providing for the grant of a dissolution of marriage," should be replaced by a provision "somewhat on the following lines":

> In the case of a person who was married in accordance with the rites of a religion, no law shall be enacted providing for the grant of a dissolution of that marriage on grounds other than those acceptable to that religion.[41]

This caused a stir at the time but, in the end, not much debate. Various religious leaders disclaimed a desire on the part of their flocks to see divorce legislation

38 REPORT OF THE COMMITTEE ON THE CONSTITUTION 3 (1967).
39 *Id.*
40 *Id.* at 41.
41 *Id.* at 43-45.

in Ireland; and, on the other hand, the retention of the constitutional prohibition was urged by various writers on social rather than specifically religious grounds. The controversy has recently begun again, influenced in part by events in Northern Ireland (where divorce is available). The matter is now usually argued on the ground that the constitution denies a right to a minority of the citizens, whose conscience permits the availing of divorce. Whatever may be thought of this ground, there is here evidence of a changed climate of opinion, which, even if it does not directly bring about amendment of the constitution, cannot help influencing constitutional interpretation.

IV. Conclusion

The foregoing is merely an outline of one aspect of Irish constitutional development since 1922; but it is an aspect of considerable importance. The various formulations of basic rights found in the Irish constitutions of 1922 and 1937 will not surprise a Continental or American jurist; nor will the practice of testing legislation for conformity with such rights. But in the peculiar Irish historical situation, both the putting of rights into a constitution and the giving to the courts power to enforce them against the legislature were in their time important innovations. And, even though the American experience was, perhaps, decisive in recommending these innovations to the Irish constitution-drafters, it is not unrealistic to see in these drafters an important point of contact between Continental ideas of law, inspired by Roman law, and the common law system to which, for better or worse, Irish jurisprudence belongs. However that may be, Ireland seems to have definitely entered upon a period in which "both Bench and Bar are increasingly tending to fertilise Irish jurisprudence by implanting in it concrete propositions evolved from fundamental principles. . . ."[42]

42 J. KELLY, *supra* note 12, at vii.