A Discourse Perspective on *Bunreacht na hÉireann*

A Discourse Perspective on *Bunreacht na Éireann*:

A Sound Constitution?

By

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"It is true that the Constitution is a legal document, but it is a fundamental one which establishes the State and it expresses not only legal norms but basic doctrines of political and social theory".

O'Higgins, C.J., 1976

TABLE OF CONTENTS

LIST OF FIGURES AND TABLES

ACKNOWLEDGMENTS

The idea of writing a book about the Irish Constitution dates back a few years, during a period of research leave at the National Library of Ireland, as ever a source of inspiration. We all agree that constitutions play a fundamental role in the legal order of the countries where a founding charter was drafted and adopted. Likewise, it is well known that constitutional texts have already been investigated by a wide range of scholars including political scientists and legal theorists. However, I was eager to know more about the language of Ireland's *Bunreacht* as well as its presence in Irish public discourse over the 80 years of its existence. In an attempt to design and complete a research project aimed at combining a variety of approaches within an original work, this volume took shape after crucial research periods at the National Library of Ireland (January 2018, 2019 and 2020) and the Boole Library at University College Cork (October 2018 and September 2019). I would like to express heartfelt gratitude to the staff of both libraries and to that of my own university library (*Biblioteca Umanistica*, University of Modena and Reggio Emilia), which also provided materials highly relevant to this project.

CHAPTER ONE

THE CONSTITUTION OF IRELAND (*BUNREACHT NA HÉIREANN*): A PRELIMINARY OVERVIEW

1.1 What this book is

There is undoubtedly something fascinating about constitutions. As a set of fundamental principles that form the basis of a polity, they are commonly designed to determine how that polity is to be governed. For this reason, constitutions tell us something about the shared values cherished by nations who adopt them. With the exception of authoritarian regimes, where constitutions exist yet only nominally, the founding charters drafted in liberal-democratic communities have a normative character. They are intended to govern the political process, while at the same time reflecting the traditions, culture and standards of a country. As such, a constitution tends precisely to be judged "by the extent to which it gives a comparatively clear account of the governmental system as it actually operates, together with a fair idea of the aims which governments do in fact pursue and of the limits" within which governments elect to confine themselves (Chubb 1991, 6).

As we know them, constitutions are a product of the modern world. As Chubb (1991) points out, the seventeenth century was the period in which the idea of a document building a framework of government began to be entertained. As a by-product of liberalism and its disdain for the concentration of absolute power and its arbitrary nature, constitutions were then to develop in Western Europe and North America in the attempt to define and delimit government. The term "constitutionalism" itself ought to be set against the background of the deep-seated belief that the rule of law should be implemented on the basis of principles enshrined in a fundamental law along the following lines: first of all, the separation of powers; secondly, the notion that governments should not simply enforce the law, but also abide by it themselves.

In Federalist Paper No. 50, James Madison (1787, 285) argued that "in framing a government", the "great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government". This reference to "the people" adds a further feature to modern constitutionalist views, namely the requirement that sovereignty lie in the hands of citizens. Taken together, popular sovereignty and liberal doctrines have formed the core of constitutionalism since the eighteenth century. They therefore served as a basis for the normative constitutions enacted by European countries, to which the Republic of Ireland has been no exception.

By reason of their significance for the countries where they are in force, constitutions may be approached from various perspectives: one is political theory, as in the last few paragraphs, while another is legal theory, in order to account for the system of checks and balances introduced by a charter. In this book, a different angle is taken on the matter. As its object of study, the Constitution of Ireland will be investigated from a discourse perspective. This means that, to begin with, its language is analysed. Secondly, its impact on the Irish public sphere is assessed at different levels. In particular, the volume fields the following research questions: (1) Why has the Constitution (in Irish, the first official language of the State, *Bunreacht na hÉireann*) been such a key document for the Republic?; (2) What was (/is) the impact of the Constitution on Irish public discourse at both a popular and a specialised level?; and, more specifically, (3) How was the Constitution represented and "argued" by the Irish press upon its enactment?; (4) How has it entered the argumentation of Irish judges across the decades, as they have been required to pronounce on the compatibility of proposed legislation with its norms?

The first of these questions is addressed in this chapter, which aims at providing a brief account of the specificity of *Bunreacht na hÉireann*, its constitutive elements and even its controversial aspects. The rest of the book discusses the remaining three questions by combining analytical insights of different kinds, and from both a quantitative and a qualitative point of view. The integrated approach adopted here is therefore intended to explore the relationship between the text of the *Bunreacht* and the polity it has been designed to serve, by using tools other than those customarily developed for the study of fundamental laws so far.

1.2 *Bunreacht na hÉireann*: A short history

From a historical point of view, it would be quite incorrect to say that *Bunreacht na hÉireann* was Independent Ireland's first constitution. After 26 of Ireland's 32 counties won Independence in 1922, the newly-formed Irish Free State adopted a Constitution, i.e. *Bunreacht Shaorstáit Éireann* [Constitution of the Irish Free State] (Cahillane 2011). Its origins lay in the Anglo-Irish Treaty of December 1921 and the imminent British threats of war immediate and terrible (Kee 2000 [1972]), should the Irish people decline to accept the terms of agreement and the Constitution itself as urged by the then Secretary of State for the Dominions, Winston Churchill.

The British pressure was apparent from those articles that secured the appointment of a Governor-General as the representative of the Crown, and included the introduction of an Oath of Allegiance to HM King George V, his heirs and successors. In addition, *Bunreacht Shaorstáit Éireann* declared the Free State to be part of the British Commonwealth of Nations, while it instituted the *Seanad* as an upper house designed to guarantee effective representation to the Protestant minority. Finally, the opening section of the Act establishing the Constitution clearly stated that, if any of its provision were, "even after the British government's officers had scrutinised the document with a fine-tooth comb, in conflict with the Anglo-Irish Treaty", that provision would be deemed void and inoperative (Gallagher 2005, 73).

Soon after Independence (1923), the Free State joined the League of Nations. Between 1926 and 1929, moreover, it championed the cause of independence at imperial conferences, thereby making a meaningful contribution to shaping policy that was to result in the Statute of Westminster in 1931. A far-reaching effect of the Statute was to remove nearly all of the British Parliament's authority to legislate for the Dominions and, consequently, turn these into largely sovereign nations. It was a crucial step in the development of the Dominions as separate States in their own right.

The year 1932 would then turn out to be a political turning point for the emerging State, when Eamon de Valera's *Fianna Fáil* party first came to power. De Valera was to become a prominent figure in twentieth-century Irish politics, serving for many years as *Taoiseach* [Prime Minister] and twice as the Irish President. A former doctrinaire republican and anti-Treaty militant, he was resolutely opposed to the Constitution, which he saw as an imposition rather than a document in line with the aspirations of a free and proud people. When his party was returned with

the majority it needed to form a new government supported by the Labour Party, it began by furthering a protectionist agenda, whereby "self-sufficiency became the ultimate objective of Irish economic policy" (Press 1986, 74). A year later, after the *Seanad* delayed provisions to abolish the Oath, de Valera dissolved the *Dáil* (the State's lower House) to seek a strong popular mandate to use democratic means to dismantle the Free State's Dominion status.

In the 1933 general election, *Fianna Fáil* won enough seats to form a government without Labour support, so that de Valera was in a position to pursue his radical agenda more comfortably. Even after he ensured the abolition of the Oath of Allegiance along with the office of Governor General and the *Seanad* itself, he "remained adamant that if the Irish people wanted a truly legitimate basic law then it would have to come ultimately from themselves" (Keogh and McCarthy 2007, 62). His concerns were as much with the current Constitution's main contents as with the circumstances in which the document had been drafted. Content-wise, de Valera saw it as a flimsy paper barrier that could hardly prevent the government of the day from eroding civil liberties as it pleased. With regard to its genesis, he genuinely believed that Ireland's national sentiments jarred with a Constitution that ultimately went back to a Treaty he had never recognised as legitimate.

In 1934, therefore, he set up a constitutional committee, and during the *Dáil* debate on the abolition of the *Seanad* of 1936, he said his hope was to have a draft document ready by the following autumn. The impulse to abolish the *Seanad* seems to have been the catalyst to initiate the process as the committee duly published a report. This was followed by the draft heads, before the project was fully implemented and completed with the circulation of a draft to the cabinet and government departments. This was then debated in the *Dáil* and submitted to the people for approval. The plebiscite was held on the same day as a general election, and the new Constitution was approved by 57% of the electorate, a somewhat narrow margin due to a vote largely splitting along political lines (Daly 2020). *Bunreacht na hÉireann* came into force on 29 December 1937.

1.3 *Bunreacht na hÉireann*: Distinctive aspects

In the Republic of Ireland as well as in many other countries, respect for the law and its binding force are crucial to the effective and equitable operation of democratic government. In the Irish jurisdiction, the law judges are called upon to interpret and apply is essentially threefold. First of all, the common law and equity, which can be broadly defined as law

resulting from judicial decisions accumulating over the years; secondly, statute law, which refers to legislation enacted by the *Oireachtas* [Parliament]; finally, and perhaps most importantly, the Constitution, which has a higher legal status than other legal sources, with one notable exception: as in other European Union Member States, EU law takes precedence over national law.

Despite the primacy of EU law, the Constitution of Ireland has constantly been regarded as both the fundamental law of the land and a kind of higher law for several reasons. One is that the *Bunreacht* is superior to all other types of national law, whether public or private: accordingly, it "controls the statute law and the common law, to the extent that where either of these conflict with the Constitution they are unenforceable and void. In the case of any such conflict arising, the courts must apply the superior" law, i.e. the Constitution itself (Walsh 1988, 191). One more reason is that the Constitution may not be altered or repealed "in the manner of ordinary legislation, for besides the approval of both Houses of the *Oireachtas*, such changes require the consent of the majority of the electors at a referendum" (Chubb 1991, 1).

Bunreacht na hÉireann opens with a clear and solemn declaration of independence and right to self-determination, as is the case with many other constitutional texts: "The Irish nation," so Article 1 goes, "hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions" (2018 [1937], 4).[1] Such an assertion was largely predictable from a text designed to mark out a basic law that was a sharp departure from its antecedent.

More contentious, nonetheless, was the early version of Articles 2 and 3. The original wording of Article 2 was that the national territory of Ireland consisted "of the whole island of Ireland, its islands and the territorial seas" (1937, 4). The effect of this bold assertion might appear to

[1] It is important to note that in this chapter, more than one version of the Constitution is referred to. On the one hand, the passages taken from the *Bunreacht* in its current form are dated as *(2018 [1937])*, in order to highlight that the most recent edition of the Constitution was used, while at the same time acknowledging the year of its enactment. On the other hand, the extracts from the earliest version are simply dated as *(1937)*. Finally, on the only occasion the Constitution of the Irish Free State Act is quoted from, the relevant passage is dated as *(1936 [1922])*, because a 1936 edition of the 1922 document was used. In the rest of the volume, only the *Bunreacht* in its current form is cited. As a result, no information is reported other than the specific articles from which examples are taken.

have been mitigated by the text of Article 3, which stated that the laws enacted by the *Oireachtas* would only apply to the area to be identified with the Irish Free State and have the same extra-territorial effect. However, the purpose of this proviso was itself defeated by the premise that this would be the case "[p]ending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory" (1937, 4).

As was to be expected, the two articles caused considerable irritation in those in Northern Ireland holding a Unionist viewpoint opposed to a nationalist view of the Irish nation. Upon the signing of the Good Friday Agreement of April 1998, the claim that the national territory of the Republic of Ireland was inclusive of Northern Ireland was dropped and replaced by the acknowledgment that the six counties of the North form part of the United Kingdom of Great Britain and Northern Ireland and are subject to a separate jurisdiction. As we will see in Chapter 4, when Article 2 is taken as an example during our analysis of the language of the *Bunreacht*, the focus of the new provisions is less on a definition of the national territory than on the people of Ireland, their close ties to the land and the recognition of the "diversity of their identities and traditions" (2018 [1937], 4).

While the first part of the Constitution is mainly concerned with the sovereignty of the people as the source of all legal authority and describes the institutions of the State (Byrne et al. 2014), the second part of it mainly deals with the fundamental rights of persons. In this important respect, the Irish Constitution differs from the British model: "that is the fact that it incorporates what is sometimes called a 'bill of rights', in other words a set of statements about citizens' fundamental rights and liberties, which the parliament is not entitled to cut down" through ordinary legislation (Kelly 1988, 163). Many of the fundamental rights are contained in Articles 40-44, even though other articles confer equally important rights.

On the one hand, some rights are explicitly recognised and asserted: among these, to mention but a few, the right to an inviolable dwelling not to be entered forcibly, save in accordance with law (Art. 40.5); the right to educate children, subject to limited rights of the State (Art. 42); the right to own private property (Art. 43) and, most notably, that not to be deprived of one's liberty save in accordance with law (Art. 40.4). This last provision is a cornerstone of the rule of law in free and democratic countries, and jurists refer to the cardinal principle it embraces as *habeas corpus*. Although the term is not mentioned in the Constitution, the wording of Article 40.4 lends substance to it. It is the mechanism triggered

to both challenge the legality of a detention and discover any flaw or irregularity in it. As Professor Kelly (1994 [1961], 897), a most respected authority on the *Bunreacht*, pointed out,

> [t]he form taken by the procedure is, briefly, that the party complaining of unlawful detention applies ex parte for, and as a rule automatically gets, a[n] initial order directed to the person alleged to be detaining him–typically, the governor of a prison–and calling on that person to appear and justify the detention. If, on that appearance, that person fails to justify the detention, the initial order is made absolute and the person the subject of the application is ordered to be released. If on the other hand the lawfulness of the detention is established to the Court's satisfaction, the initial order is 'discharged'.

As Byrne et al. (2014, 726) observe, few of these rights "are absolute in nature" and to a certain extent, it is incumbent on courts in constitutional judicial review "to determine the precise meaning of the general limits placed on such rights".

On the other hand, Article 40.3, which will be highly relevant to our study of judicial argumentation in Chapter 6, has constituted an additional source of rights over the past few decades. In the 1950s, barely twenty years since the Constitution was enacted, fundamental rights had been asserted by Irish courts only in a minority of cases. A turning point in the country's judicial history was Cearbhall Ó Dálaigh's appointment to Chief Justice of the Supreme Court in 1961, along with Justices Brian Walsh and John Kenny to the Supreme Court and High Court, respectively. These judges epitomised a judicial generation that was to bring about nothing short of a revolution in Irish constitutional jurisprudence. In Kelly's own words (1988, 167-168),

> [t]he most spectacular conquest of that revolution was the recognition–which an earlier generation of judges would have though fantastic–that the Constitution implicitly protected an indefinite range of citizens' rights over and above those specifically enumerated in one or other article, and that the courts were entitled to identify such latent rights, whenever the occasion arose, by reference to their understanding of a standard such as 'the Christian and democratic nature of the State'.

The "latent rights" Kelly wrote about were to go down in history as "unenumerated rights", since there is no comprehensive list of the rights generated under the general terms of Article 40.3. The way such striking development unfolded was through cases such as *Ryan v. Attorney General* [1965] IR 294 and *McGee v. Attorney General* [1974] IR 284.

The proceedings in the former were instigated by Mrs Gladys Ryan, who challenged the constitutionality of the Health (Fluoridation of Water Supplies) Act, 1960. Mrs Ryan was a member of a group opposing the new practice of adding sodium fluoride to the public water supply. Briefly, a Consultative Council appointed by the Government had presented a report in which the addition of limited amounts of the substance to water supplies was said to contribute substantially to reduce tooth decay. As a result, the Act was introduced to enable local authorities to add specified quantities of sodium fluoride to public water supplies throughout the State. Although the report was based on the most recently available scientific evidence on the matter, Mrs Ryan brought an action against the State. In particular, she alleged that this treatment of the water supply constituted a serious infringement of her (and her children's) right to "bodily integrity", on the grounds that she and her family would henceforward be obliged to consume water containing a substance that may have posed public health risks.

Interestingly, the Constitution says nothing about "bodily integrity", which her counsel associated with a right to be free from any action imposed by the State resulting in harm to anyone's life or health. By contrast, the *Bunreacht* defends and guarantees "the personal rights of the citizen" (Art. 40.3.1). Within such a framework, Mrs Ryan's counsel pointed out that a thorough understanding of the phrase "personal rights" implied going far beyond traditional civil liberties such as freedom from arbitrary arrest, freedom of speech and of the press and others. Personal rights, they insisted in spite of the difficulty in pleading their client's case, should also include the right not to have potentially poisonous water forced upon you by the State.

In what would be seen as a landmark judgment, Justice Kenny acknowledged that the water fluoridation introduced by the Act was by all means harmless. Yet he agreed with Mrs Ryan's counsel that citizens' personal rights are not limited to the letter of the constitutional text. Remarkably, he added that it would be a matter for the High Court to bring to light and enforce such unspecified rights, no matter if that involved occasionally militating against Acts of the *Oireachtas*. Chief Justice Ó Dálaigh's Supreme Court also concluded that water fluoridation might even be beneficial, but it reiterated Justice Kenny's point of principle, "thus making Mrs Ryan's case into a sort of floodgate for assertions of personal rights claimed to be latent in the Constitution" (Kelly 1988, 168).

The distinct echo of the assertion of unenumerated rights also reverberated in a sequence of cases concerning various aspects of sexuality and the right of privacy, as could be appreciated from *McGee v. Attorney*

General. The plaintiff, Mrs McGee, was a married woman who had been advised by her doctor that any further pregnancy would pose extreme danger to her life. For this reason, she and her husband decided to use a method of contraception. Based on her doctor's advice, she opted for spermicidal jelly, which should have been imported into the State. However, this was impounded by the Revenue Commissioners in accordance with the Criminal Law Amendment Act, 1935, which laid down that importation of contraceptives was a criminal offence. In its judgment, the Supreme Court upheld the plaintiff's right to import contraceptives for her own private use. The law that forbade this, the Court held, was in flagrant violation of her right to "marital privacy".

Ever since the verdict in the Ryan case, therefore, a whole string of unspecified personal rights have been upheld by the Irish courts. These include, but are not limited to, the right not to be tortured or ill-treated, the right to travel outside the State, the right of access to the courts, to legal representation in criminal cases, to fair procedures and to know the identity of one's natural mother (Byrne et al. 2014, 728). This clarifies that the range of matters covered by the protection enshrined in Article 40.3 is indeed very wide. Nevertheless, it is important to note that, like those expressly stated in the Constitution, these rights are not absolute. Conversely, they are to some extent qualified by the requirement that the State must defend them "as far as practicable" (2018 [1937], 154). As early as in *Ryan v. Attorney General*, accordingly, both the High Court and the Supreme Court were satisfied that the right to bodily integrity was protected by Article 40.3. At the same time, they ruled that the State could not be established to have failed to affirm it in the Health (Fluoridation of Water Supplies) Act, 1960, so that Mrs Ryan's challenge to its constitutionality was eventually unsuccessful.

The doctrine of unenumerated rights has met strenuous objections over the years. The list of such rights has been revealed by jurisprudence to be open. It would therefore seem that any citizen feeling that a personal right unmentioned in the black-and-white text of the Constitution has been denied may still succeed in having it enforced by the courts, as long as these are persuaded that that right is in some way necessarily implied by the "Christian and democratic nature of the State". In principle, one might contend that rights such as marital privacy appear nowhere in the *Bunreacht* precisely because it was not the intention of the people in 1937 to safeguard them. On the other hand, it has been retorted that "no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts" (Walsh J. in Byrne et al. 2014, 756). It goes without saying that all sorts of difficulties may arise

in determining the nature of "prevailing ideas and concepts". This raises the fundamental issue of how to interpret the Constitution, which is discussed in the following section.

1.4 The challenges of constitutional interpretation

In *McGee v. Attorney General*, Justice O'Keeffe argued that "fundamental constitutional values could be conditioned by passage of time", and added that "no interpretation of the Constitution is intended to be final for all time" (in Hogan 1987, 175). In this matter, Walsh and O'Keeffe JJ. march in unison, as it were. Indeed, the fact that they use the exact same words–*no interpretation […] is intended to be final for all time*–reinforces the idea that constitutional interpretation may pose formidable challenges to every generation's judiciary.

In the main, written constitutions contain detailed provisions applying to elections and appointments of various kinds, which may be understood literally and unambiguously. In their capacity as fundamental laws, however, they invariably frame abstract, normative concepts to articulate principles intended to protect fundamental rights. Examples include *common good* (Art. 6.1), *public morality* (Artt. 40.6.1 and 44.2.1), *family* (Art. 41.1.1) and *natural rights* (Art. 43.1.1). By virtue of their open-ended meaning and theory-laden nature, these are the terms Clarke (2008) discusses as "essentially contested" concepts. In Clarke's view (2008, 113), their presence in constitutional text is postulated to require that

> in addition to the text as their first source of authority–Irish courts of appeal interpret the Constitution in the light of fundamental principles of justice that have been developed over centuries; that such principles are "transcendent" in the relevant sense; that the occurrence of essentially contested concepts in the Constitution is symptomatic of its normative character; and that such concepts need to be interpreted anew, in each generation, with due fidelity to the principles that they were meant to articulate.

So what are the canons to interpret such concepts, and the constitutional text more generally? First of all, a "literal or grammatical approach" has been applied by the courts and was prevalent in the 1960s and 1970s. As we will appreciate from Chapter 2 (Subsection 2.5.3), this approach is comparable to that adopted in the interpretation of legislation. Whether in a statutory or in a constitutional context, this approach can be justified on the grounds that courts stay faithful to the text of the materials

under scrutiny. As a result, they do not draw criticism for substituting personal or subjective judgment for more objective determinations.

Secondly, those judges who are sceptical about judicial activism and liberalism have echoed a sentiment expressed at times by the United States Supreme Court as well. By this approach, judges should strive to find an original understanding, as it were, of constitutional text, in keeping with the views of those who drafted it. In the Republic of Ireland, this has implied referring to well-established principles of law or the state of the law in 1937, when *Bunreacht na hÉireann* was introduced. Looking at the original framers' intentions underlies what is known as a "historical approach".

In third place, emphasis has been laid on the need to make sure that each provision is interpreted not in isolation, but in a way that contextualises it in the general constitutional order. This is known as a "harmonious approach" (Doyle 2008), which requires courts to read provisions as is consistent with the overall scheme of the constitution. It is a purposive approach geared to avoid internal inconsistency between one norm and the next. A persuasive definition of the underlying interpretive technique is provided by Costello J., who asserted that, "whilst not ignoring the express text of the Constitution," such a broad approach "would look at the whole text of the Constitution and identify its purpose and objectives", as is desirable "in protecting fundamental rights" (in Hogan 1987, 185). The harmonious approach has been observed to be identical with that pursued by the Court of Justice of the European Union as it interprets the treaties underpinning European Union law and its principles. This is suggested by Byrne et al. (2014, 759) to bear witness to the substantial influence of EU law on Irish interpretative techniques.

Fourthly, the Constitution has been approached from the angle of natural law. In Article 41.1, family is recognised by the State "as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law" (2018 [1937], 162). Behind norms such as this is the notion that citizens enjoy a number of rights by reason of their human personality. This is commonly referred to as "natural law", as opposed and superior to "positive law", namely the law of human institutions such as parliaments. The view of natural law advocates is that such rights are inalienable in that individuals may not give them away; they are imprescriptible, so that they may not be taken away by the State; and they are antecedent to positive law because they pre-date it in some pre-existing form. Examples include equality before the law, protected by Article 40.1.

The difficulties in approaching the Constitution by underlining the superiority of natural law are essentially twofold. To begin with, the full scope of natural rights may be hard to determine. In addition, current thinking about them is likely to change over time. As Byrne et al. (2014, 762) highlight, "some philosophers have criticized the natural law tradition for its lack of specificity", while the obvious connection of natural law with Christian philosophy and the Roman Catholic Church more specifically "has resulted in a negative response from philosophers who espouse a secular approach to the content of law".

In light of the diversity and complexity of the four main approaches summarised here, there might be a temptation to ask whether any particular theory or method of constitutional interpretation has been applied by Irish courts on a steadier basis. Scholars such as Hogan (1987) and Morgan (2001) appear to suggest that none in particular has. This seeming lack of consistency has been deemed "so prevalent that individual judges have from time to time adopted different approaches to this question, utilising whatever method might seem to be most convenient or to offer adventitious support for conclusions" they have already drawn (Hogan 1987, 187).

This sounds like a fairly harsh judgment, but the fact remains that the question of the approach(es) to be adopted for the interpretation of the Constitution is set to remain difficult and controversial. In order to uncover the reasons behind this, it should be borne in mind that the *Bunreacht* was in no way drafted in the same way, or with the same aim, as ordinary legislation. This is so, Morgan (1998, 114-115) explains, because the Constitution "covers an unimaginably broader span than any statute: it deals with nothing less than the organs of government and, secondly, the fundamental rights, in other words the relationship between the individual and ordered society".

At the outset, constitutional interpretation may be assumed to be the most controversial aspect worth examining in relation to the Irish Constitution. While this has been brought to the fore by scholarly research, it is arguably not the only one. Others include the conceptualisation of women, the influence of religion and the Catholic Church, and language issues, which are respectively discussed in Sections 1.5, 1.6 and 1.7 below.

1.5 *Bunreacht na hÉireann* and women

In Article 3 of the Free State Constitution, a declaration of sexual equality before the law had been made. By contrast, no corresponding article was included in the 1937 draft of *Bunreacht na hÉireann*. Such glaring

omission, it was objected, could result in a loss of the right to vote or even citizenship. This seemed to be the case especially when the conspicuous absence of the phrase "without distinction of sex*"* (1936 [1922], 34) was read in conjunction with Article 40.1. This holds that, whereas all citizens are "equal before the law", due regard is had "to differences of capacity, physical and moral, and of social function" (2018 [1937], 152). Could this not be used by any unscrupulous government, some asked, to trample on women's rights? That a close examination of the new Constitution begged the question is confirmed by the formulation of Article 41.2.1-2 (2018 [1937], 164), which reads as follows:

> 1° In particular, 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.
> 2° The state shall, therefore, 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**. [My emphasis]

The somewhat narrow conception of women as *mothers*, rather than *citizens* in their own right, along with the emphasis laid on *the home* as their natural environment, would draw intense criticism from women themselves. In a letter to de Valera published by the *Irish Press*, Louie Bennett, Secretary of the Irish Women's Workers Union, contended that the draft constitution contained points of "serious danger" for the "implications that may be given to them" no less than "for what they actually state" (in Keogh and McCarthy 2007, 186). Furthermore, she recommended that the wording of Article 41.2.1 should be changed from *her life within the home* into *her work for the home*, in open acknowledgement of the value of women's work in a broad field and for the common good.

Ms Bennett's recommendations were duly ignored, while the controversial academic Alfred O'Rahilly referred to her as "Lady Bountiful" and dismissed her claims as "hypercritical if not slightly hysterical" (in Keogh and McCarthy 2007, 186). De Valera later accepted to meet with representatives from women's organisations, the joint committee of women's societies and social workers and the National University Women Graduates' Association, among others. Even though he was pleased to let them articulate their concerns over legislation resulting from the Constitution that would discriminate against women in relation to citizenship and the franchise, the meetings remained essentially non-committal.

In their in-depth analysis of contemporary documents, Keogh and McCarthy (2007, 187) draw the attention to three papal encyclicals as the source of the principles that were eventually embraced by the *Bunreacht*. In Leo XIII's *Rerum Novarum*, first of all, the view is aired that women were unsuited for certain occupations. In Pius XI's *Quadragesimo Anno*, secondly, the Pontiff urged society to discourage women's engagement in gainful occupations beyond the domestic walls as a form of "abuse" resulting in the "neglect of their own proper cares and duties". In third place, Pius XI's *Casti Connubii* insisted that woman should be the "mistress of the home", whereas men ought to devote themselves to work. As a devout Catholic, it hardly comes as a surprise that de Valera's own words would echo the same views. In particular, while addressing the *Dáil* on 11 May 1937, these are the words he used in the matter of women in the Constitution (in Moynihan 1980, 324):

> With regard to women, they are mentioned in two articles. But why are they mentioned? They are mentioned to give the protection which, I think, is necessary as part of our social programme, and I am prepared to go with that programme before the country. I do not care what criticism comes from anybody on the basis of it. We state here [Article 41.2] that mothers in their homes give to the State a support which is essential. Is there anybody who denies it? Is it not a tribute to the work that is done by women in the homes as mothers? […] In regard to labour and in regard to work, our aim ought to be–we may be too slow in arriving at it, but no country has apparently done it yet–that **the breadwinner**, **who is normally and naturally** in these cases, when he is alive, **the father of the family**, should be able by his work to bring in enough to maintain the whole household and that women ought not to be forced by economic necessity to go out and either supplement his wages or become the breadwinners themselves. [My emphasis]

It is a fact that women played no part in framing the Constitution. Of the 152 TDs (Irish MPs) who might have had a chance to comment on the draft, only three were women. However, none of them contributed in any meaningful way to the debate on the draft. By reading through the extensive quote from de Valera's speech earlier on, one may agree with Scannell (1988, 123) that he was neither a feminist nor by any extent consciously anti-women: rather, "his views reflected those of most people in Irish society at the time", while they "certainly accorded with those of nearly all of the deputies who spoke in the Dáil".

Indeed, by looking at the wording of Article 41.2.1-2 and at the same time taking de Valera at his word, the text of the *Bunreacht* is open to two interpretations. The first is to consider the opening paragraph of the Article

as a tribute to the work undertaken by women in the home in their capacity as mothers. Consistent with this, the second paragraph would then read as offering women constitutional protection from the *economic necessity* of working outside the home, therefore looking with sympathetic eyes at subjects such as widows, unmarried mothers and women incurring vast expenses to care for ill or disabled children. On the other hand, a second interpretation of Article 41.2.1-2 is that it perpetuates a most deplorable form of sexual stereotype. To begin with, it implies that life within the home is women's natural vocation. In addition, it refers to the duties of women as full-time wives and mothers while failing to mention or impose any duties on fathers.

Regrettably, Irish constitutional history appears to provide evidence that the second interpretation became the preferred option. Hence, Scannell (1988) shows that lawyers for the State attempted to justify tax discriminations against married women precisely on the basis of Article 41.2, and they succeeded in invoking the article to justify social welfare discriminations against deserted husbands obliged to take children into full-time care. For decades after the Constitution came into force, the position of women in Irish society remained virtually unchanged. In many cases, women were relegated to domesticity and powerlessness, while legislation based on the notion that their rights were somehow inferior to those of men made its appearance on the statute book. Notwithstanding the constitutional safeguards for marriage and motherhood, the *Oireachtas* seemed determined to keep women in the home by fair means or foul. As Scannell (1988, 127) forcefully argues,

> [c]ontraception was effectively illegal. The economically powerless home-maker was denied access to free legal aid. No financial aid was available as of rights to unmarried mothers, deserted wives or prisoners' wives, even when they were fulfilling their 'duties' in the home. The battered wife and mother could not exclude her violent husband from the home (which was almost invariably his) except by resort to the most cumbersome procedures. If she fled the home, her husband had a right to damages from anyone who enticed her away, or who harboured her or committed adultery with her.

Despite changing perceptions about the role of women in Irish society over the last thirty years, the debate over the at times uneasy relationship between Irish institutions and women is still ongoing.[2] To a certain extent,

[2] In recent years, for instance, debate has revolved around the issue of 'consent' following the notorious rugby rape trial. Cf. *The Guardian*. 2018. "How the 'rugby

this goes back to the controversy stirred by *Bunreacht na hÉireann* and its conceptualisation of female figures as worth a passive role in social intercourse (cf. Flynn 1998). In Chapter 4, we will see that women's status was a major issue in the conflicting opinions held by Irish newspapers on the Constitution upon its enactment.

1.6 *Bunreacht na hÉireann* and the Catholic Church

In many countries, the preservation of civic order also depends on earthly sanctions against transgressors. These may be reinforced by the strongly held belief that the law is sacred in character. As Mattila (2013, 57) accurately recalls, "Moses received the Commandments straight from the hand of God. In this set of beliefs, the administration of justice lay under the protection of the Most High. In consequence, contempt for the law and justice were considered" as a form of contempt for the Almighty himself. If the sacred character of the law has generally been reflected by both language and ritual, the way this has mobilised legal language and semiotics is closely correlated with each country's legal culture. One notable example is the solemn language of preambles to laws, where the legislator is acknowledged to have been empowered by no less than God.

The Irish State has been no exception to this trend. Indeed, there is no denying the influence of Catholic doctrine on the drafting of *Bunreacht na hÉireann*. This can be appreciated from a few well-known passages of the constitutional text, beginning with the Preamble itself. In particular, the opening lines read as follows (2018 [1937], 2):

> 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 Éire,
>
> Humbly acknowledging **all our obligations to our Divine Lord, Jesus Christ**, Who sustained our fathers through centuries of trial, […]
>
> Do hereby adopt, enact, and give to ourselves this Constitution. [My emphasis]

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rape trial' divided Ireland". Accessed March 2, 2020. https://www.theguardian.com/news/2018/dec/04/rugby-rape-trial-ireland-belfast-case.

The notion that the Irish people recognise God's *authority* in relation to the law is by no means confined to the Preamble. In Article 6.1, accordingly, "all powers of government, legislative, executive and judicial" are said to "derive, under God, from the people" (2018 [1937], 8). Furthermore, Article 44.1 lays down that the "State acknowledges that the homage of public worship is due to Almighty God", "it shall hold his name in reverence" and "respect and honour religion" (2018 [1937], 174). Those ready to dismiss the *Bunreacht* as having been dictated to de Valera by John Charles McQuaid, Catholic Primate of Ireland and later Archbishop of Dublin, should, however, think again.

True enough, the original version of Article 44 itself, amended though it was in January 1973, provided for the State's recognition of "the special position of the Catholic Church" (1937, 144). Nevertheless, this formulation was less proof of de Valera's subservience than the result of his mediation efforts. An earlier draft of the Article actually specified that "the Church of Christ is the Catholic Church" (Daly 2020). Cardinal MacRory, a prominent figure of the Irish Hierarchy, had objected that the "special position" was too tentative a step, while McQuaid thundered that it was manifestly inadequate. In an effort to break the deadlock, de Valera sent an emissary to Rome from where, to his genuine regret, the Pope declined to give his blessing. In fact, the Holy See clarified that anything other than a reference to the "one true Church of Christ" would be seen as amounting to heresy. Nonetheless, the Pope's eventual decision neither to approve nor to disapprove gave de Valera the bargaining leverage he sought to reassert an uncompromising stance on the matter. "Despite the protestations of MacRory and McQuaid", Daly (2020) continues, "de Valera would not yield from his 'special position', with papal neutrality enough to avoid a divisive pre-plebiscite intervention by the Catholic hierarchy".

Over the last few decades, Ireland has changed substantially. The advent of the Celtic Tiger, a period of unprecedented economic growth and material well-being between the mid-1990s and the late 2000s, has led to an increasingly secular society. Young and middle-aged people are not as religiously observant as previous generations, while the Catholic Church's credibility has been severely damaged following the revelation of child abuse by the Catholic clergy and the "system of physical and psychological terror that operated outside the official parameters of the State" (Smyth 2012, 134) epitomised by such institutions as Magdalene Laundries and Industrial Schools. What emerged from the ashes of the boom, moreover, is a more complex picture of Irish society, where the influx of immigrants from Eastern Europe has revived Irish Catholic

congregations, Orthodox Christianity is significantly present and the Muslim community is also well represented.

Even though the influence of the Catholic Church has waned considerably, the fact remains that in some parts at least, the Constitution still reflects dominant Catholic thinking on Church-State relations before the Second Vatican Council. Devoting a section to the relationship between the *Bunreacht* and the input from Catholicism as the religion of the preponderant majority of the nation is sensible for a number of reasons. First of all, the debate on the inclusion of references to God has been robust at an EU level, too, since many discussed or even countenanced the possibility of including them in the text of a European Constitutional Treaty. Secondly, "even though the religious scene is greatly changed" over the past few decades, a large number of people "continues to profess Catholicism" in Ireland, and "Catholic Church leaders will no doubt have something to say about any changes that may be proposed" to the Constitution "in regard to religious provisions" (Hannon 2008, 465).

1.7 Language and/in *Bunreacht na hÉireann*

The issue of the language of *Bunreacht na hÉireann* may not have been as fiercely debated as those of the representation of women or the influence of religion, but it deserves a passing mention in the broad overview provided by this chapter. Whether in relation to legislation or the Constitution, the Republic of Ireland's linguistic profile is bound to have an impact on drafting practices. According to Article 8.1 of the Constitution, Irish "as the national language is the first official language", while Article 8.2 describes the status of English as that of a "second official language recognised by the State" (2018 [1937], 8).

Regardless of the actual undisputed primacy of English in the country, consequently, due account must be taken of the centrality of Irish for official purposes, if nothing else. Not only has the presence of Irish in the country's public life generated heated discussion in relation to legal disputes where the use of the language in judicial proceedings has come to fore (cf. Mazzi 2018), but the *Bunreacht* itself is available both in English and in Irish. More precisely, Article 25.5.4 provides that "in case of conflict between the texts of any copy of this constitution enrolled under this section, the text in the national language shall prevail" (2018 [1937], 82). Briefly, this means that the Irish version is the authoritative one.

It is noteworthy that the Irish text of the Constitution was in preparation at the same time as the document was being drafted. This