

## Revisiting the Irish Constitution and De Valera's Grand Vision

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The current Irish Constitution – Bunreacht na hÉireann – was enacted in 1937. It became the personal mission and central ambition of Éamon de Valera, the then President of the Executive Council (Prime Minister), to draft this new constitution. He set three central goals for this project. Firstly, to establish the basic law of Ireland independent of outside influence, in contrast to the existing constitution, which he saw as a British invention and one that was additionally compromised, in his view, by being linked to the Anglo-Irish Treaty. Secondly, he set about establishing a constitution that was less pliable and not subject to amendment by parliament or law, a move away from the British model and towards the American model. Thirdly, he wished to make a definitive statement on the meaning of Irish identity and thus set course for the unfolding of a new Ireland. In this article I explore each of these three goals in de Valera's grand mission, drawing out the implications and context of each and projecting the need for review in the light of a very different Ireland with very different demands.

### I - Introduction

Éamon de Valera is considered the father of the Irish Constitution. This designation is justified in terms of the commitment he devoted to the project as head of government and also in terms of his ideological commitment to it. In the latter respect, De Valera's engagement with the Irish nationalist cause had a long pedigree. He was involved in the Easter Rising of 1916, the subsequent struggle for independence both electorally and militarily, and in the ensuing civil war on the Anti-Treaty side. Following a period of political isolation caused by his policy of abstention, in 1926 he re-engaged with constitutional politics by founding a new political party, Fianna Fáil. As soon as he entered Dáil Éireann<sup>1</sup> he began to challenge the existing constitutional arrangements and when he took power in 1932, he set about dismantling them. Within a short time he was engaged in devising a new constitution to replace the one adopted following the Anglo-Irish Treaty.<sup>2</sup> Anthony Giddens contextualises the mission of nationalism in a way that is particularly apt for de Valera's project: "[n]ationalism helps naturalise the recency and the contingency of

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<sup>1</sup> Dáil Éireann is the lower house of the Irish parliament under the current bicameral system. In the period of independence and under the last period of the constitution of Saorstát Éireann Dáil Éireann was the single chamber of elected deputies.

<sup>2</sup> For further contemporary discussion on this see: A. Bromage, "Constitutional Developments in Saorstát Éireann and the Constitution of Éire: I, External Affairs" (1937) 31 (5) *American Political Science Review* 842 and A. Bromage, "Constitutional Developments in Saorstát Éireann and the Constitution of Éire II: External Affairs" (1957a) 31 (6) *American Political Science Review* 1050 [hereinafter Bromage]. With reference to the Saorstát Éireann Constitution, Bromage refers to the articles using Latin numerals. However, Arabic numerals were used in the original text.

the nation-state through providing its myths of origin.”<sup>3</sup> His contention on the utility of nationalism in underpinning the foundations of the nation state is key to our understanding of Éamon de Valera's mission as a politician and statesman. It is clear of many facets of his long political life, from the revolutionary commandant of the Irish Volunteers in Boland's Mills, Dublin during the 1916 uprising to his retirement as President of Ireland in 1973, that he was concerned to, in Giddens words, naturalise and remove any contingency that may have surrounded the Irish state. De Valera achieved this goal by successfully marrying his national vision with a mass political movement, Fianna Fáil. In the words of Flynn: “the impact of the national ideal is due not to its ‘set of ideas’ alone but to a combination of these ideas with the rise of affiliated popular politics.”<sup>4</sup> One of de Valera's most significant achievements was the drafting and adoption of a new Irish Constitution in 1937.

In Parts II and III of this article the dismantling of the 1922 Constitution will be examined, with particular attention paid to the differences between it and its 1937 successor. Part IV examines de Valera's wish for the 1937 Constitution to be a statement of national identity. In Part V, the influence of nationalism, conservatism and Catholicism in the drafting of the 1937 Constitution will be considered. Parts VI and VII return to the envisaged role of the 1937 Constitution of establishing a collective national identity and notes the problematic nature of such an attempt. The article concludes in Part VIII.

## **II – Discarding the Free State Constitution**

Bunreacht na hÉireann – The Constitution of Ireland – was enacted by the people of what now constitutes the Republic of Ireland – then known as Saorstát Éireann – in a plebiscite on July 1, 1937. Having been so adopted it came into force on December 29 of the same year. It replaced the Irish Free State Constitution adopted in December 1922. The Irish Free State Constitution was approved by Dáil Éireann, acting as a constituent assembly on October 25, 1922 and was passed by the British parliament on December 5 of the same year. The Constitution was enacted in a curious form. The *Constitution of the Irish Free State (Saorstát Éireann) Act 1922* consisted of a preamble, three brief sections and two schedules – the first being the text of the Constitution, the second that of the Treaty.<sup>5</sup> The

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<sup>3</sup> A. Giddens, *The Nation-State and Violence* (Cambridge: Polity Press, 1985) at 221.

<sup>4</sup> M. Flynn, *Ideology, Mobilization and the Nation* (New York: Macmillan, 2000) at 4.

<sup>5</sup> J. Casey, *Constitutional Law in Ireland* (Dublin: Sweet & Maxwell, 1987) at 11 [hereinafter Casey (1987)].

Treaty referred to is the Anglo-Irish Treaty of 1921 that was signed between a delegation representing the first Dáil and the British government. The British saw it as a settlement of the “Irish Question,” a view not shared by many people in Ireland, especially nationalists. It paved the way for the creation of the Irish Free State with dominion status similar to Canada within the British Commonwealth and a devolved parliament for Northern Ireland within the United Kingdom. This meant a *de facto* partition of the island, which remained an issue of contention, with various levels of resonance, for Irish nationalists at least until the signing of the Good Friday/Belfast Agreement in 1998,<sup>6</sup> which attempted to address the relationships “within Northern Ireland, between North and South, and between these islands.”<sup>7</sup>

Within ten years, the Saorstát Éireann Constitution had undergone substantial change through no less than sixteen amendments – some of which substantially altered its character. It had been seriously weakened through the ease of its amendment by ordinary legislation. The Constitution was initially in force for an eight-year period, but “by means of the Constitution (Amendment No. 16) Act of 1929, made an amendment to Article 50 itself, extending the time period during which constitutional amendments could be made by ordinary legislation by another eight years.”<sup>8</sup> This point was emphasised by Casey who argued that “for the whole of its lifetime the Constitution was flexible ... subject to alteration by the will of a parliamentary majority.”<sup>9</sup> While this may now seem excessively flexible, given the experience of Bunreacht na hÉireann, it was firstly enacted in a period when Ireland’s political climate had not yet settled and was not hugely different from the British constitutional experience. This Constitution had many flaws and by the time it was replaced in 1937 had been amended twenty-seven times and bore little resemblance to the original document. From the outset de Valera’s “political strategy remained to dismantle the Treaty settlement and re-write the Free State constitution.”<sup>10</sup> As stated above, the Anglo-

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<sup>6</sup> See full text of the agreement at: <http://www.dfa.ie/uploads/documents/anglo-irish%20agreement%201985.pdf>

<sup>7</sup> Good Friday/Belfast Agreement, Declaration of Support, section 3. For discussion on post-Agreement national identity formation see: O. Muldoon, K. Trew, J. Todd, N. Rougier and K. McLaughlin, “Religious and National Identity after the Belfast Good Friday Agreement” [2007] 28 (1) Political Psychology 89.

<sup>8</sup> M. Cahill, “Ireland’s Constitutional Amendability and Europe’s Constitutional Ambition: The Lisbon Referendum in Context - Part II/II” [2008] 10 German Law Journal 1191 at 1202.

<sup>9</sup> J. Casey, “Changing the Constitution: Amendment and Judicial Review” in B. Farrell, ed., *De Valera's Constitution and Ours* (Dublin: Gill & Macmillan, 1988) at 153 [hereinafter Casey (1988)].

<sup>10</sup> D. Keogh and A. McCarthy, *The Making of the Irish Constitution 1937* (Dublin: Mercier Press, 2007) at 41 [hereinafter Keogh and McCarthy].

Irish Treaty was included as one of the Constitution's schedules "[i]n the event of any conflict between the Treaty and the Constitution, the Treaty was to prevail."<sup>11</sup> In April 1932, just over a month into his first term of office, de Valera<sup>12</sup> had already begun this process through the introduction of the *Constitution (Removal of Oath) Bill 1932*, which although it had passed all stages in the Dáil by May, was delayed in the Senate and was not passed for another twelve months. In three clauses it "first deleted the oath itself, the second removed section 2 of the Constitution Act, the repugnancy clause, and the third removed the restriction on amendments to the constitution."<sup>13</sup>

Kelly details some of the weakness of the 1922 Constitution, which eventually led to its replacement: "[t]he position now was that the Oireachtas had an absolute control of the Constitution, being able to amend any part of it by a simple Act, and to extend apparently indefinitely, the period during which this might be done."<sup>14</sup> The addition of the special powers Article 2A in 1931 gave this article precedence over all subsequent articles, in 1924 in *R. (Cooney) v. Clinton*<sup>15</sup> the Court of Appeal held that any Act found to be inconsistent with the Constitution would take precedence over the Constitution itself, as it would be deemed to be a constitutional amendment.<sup>16</sup> In other words this was upholding the concept of the sovereignty of parliament, rendering the Constitution a virtually useless document. In effect, it might even be unintentionally amended by ordinary legislation that happened to conflict with the provisions of the Constitution; this is precisely the opposite to the provisions of the current Constitution.<sup>17</sup> Further problems manifested themselves in *State (Ryan) v. Lennon* when part of the judgment questioned the power of the Oireachtas<sup>18</sup> to amend the Constitution at will. The Supreme Court judged to:

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<sup>11</sup> D. Morgan, *Constitutional Law of Ireland* (Dublin: Round Hall Press, 1985) at 23 [hereinafter Morgan].

<sup>12</sup> In the February 1932 General Election Fianna Fáil won 72 seats, five seats short of an overall majority, but de Valera formed a government with the support of the Labour Party.

<sup>13</sup> Keogh and McCarthy, *supra* note 10 at 46. See also Bromage, *supra* note 2 at 847.

<sup>14</sup> J. Kelly, *Fundamental Rights in the Irish Law and Constitution*, 2nd ed. (Dublin: Allen Figgis, 1967) at 4 [hereinafter Kelly (1967)].

<sup>15</sup> [1935] I.R. 245.

<sup>16</sup> Kelly (1967), *supra* note 14 at 5.

<sup>17</sup> S. Ó Tuama, "Judicial Review under the Irish Constitution: More American than Commonwealth" (2008) 12 (2) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/122/art122-2.pdf>> (date accessed: 27 October 2011) [hereinafter Ó Tuama].

<sup>18</sup> The Oireachtas is the national parliament of Ireland, consisting of the Presidency and the two houses: Dáil Éireann (House of Representatives) and Seanad Éireann (Senate).

limit the meaning of ‘amendment’ in Article 50 to its ordinary and natural meaning of improvement, variation in detail, or the remedying of defects. It does not extend to repeal. If it did, Article 2 could be deleted and the whole basis of the Constitution removed. The power should not be construed so as to permit of the repeal of the whole Constitution.<sup>19</sup>

This echoed a similar argument by Wheare that: “[i]f she [the Irish Free State] can repeal section 2 of this Constituent Act the way is clear, legally, for amendments of the constitution repugnant to the Articles of Agreement.”<sup>20</sup> However, Wheare doubted that this was possible on the basis that: “[n]o provision exists in the Constituent Act itself for its own amendment” and secondly that the constituent assembly “has itself passed out of existence.”<sup>21</sup> He reinforced this point with reference to “the abolition of the oath of allegiance” questioning the competence of the Free State Parliament to amend its Constitution or as de Valera subsequently proposed to go so far as to replace it with a new constitution: “it is very doubtful whether the powers conferred upon the Irish Free State by the Statute of Westminster do extend so far as to give to it legal power to amend its constitution in any respect which contravenes the Article of Agreement scheduled to its own constitution.”<sup>22</sup>

After gaining an overall majority, De Valera’s mission continued after he won an overall majority in a snap election in 1933. He “abolished the two remaining symbols of imperial power: the Privy Council appeals and the office of governor general.”<sup>23</sup> A question of legality now hung over many of the political changes wrought by the De Valera administration. Tied as they were to his political agenda any question of legality or legitimacy would have to be removed. The 1922 Constitution too had the taint of British approval, which was anathema to everything for which Fianna Fáil stood.<sup>24</sup>

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<sup>19</sup> [1935] I.R. 185.

<sup>20</sup> K. Wheare, *The Statute of Westminster 1931* (Dublin: Clarendon Press, 1933) at 113.

<sup>21</sup> *Ibid.* at 113.

<sup>22</sup> *Ibid.* at 114.

<sup>23</sup> Keogh and McCarthy, *supra* note 10 at 49.

<sup>24</sup> Keogh claims that historically this has been overstated, but nonetheless it was a significant symbol in the Irish political culture of the time and its significance, whether or not based on historical fact, would not have been lost on an astute populist leader like Éamon de Valera. See also D. Keogh, “The Constitutional Revolution” in F. Litton, ed., *The Constitution of Ireland 1937-1987* (Dublin: Institute of Public Administration, 1987) [hereinafter Keogh (1987)].

### III - Drafting and Adopting a New Constitution

The first steps in drafting a new constitution began in April 1935 – Keogh gives a detailed account and analysis of this entire period, but for our purposes it is important to note that Éamon de Valera was its chief architect, closely aided by civil servants John Hearne and Maurice Moynihan in particular.<sup>25</sup> Some assistance was also elicited from two Roman Catholic priests, John Charles McQuaid, of the Holy Ghost order, and later Archbishop of Dublin and a Jesuit priest Edward Cahill. However, Keogh cautions against giving too much emphasis to the role of the Catholic Church, stating that it “has little foundation in fact”<sup>26</sup>:

De Valera, Moynihan and Hearne were all people of wide culture. They were wholly free of the stridency associated with certain vociferous elements in the Irish Catholic Church in the 1930s. All three had broad intellectual horizons. None were the victims of then fashionable ideological phobias.<sup>27</sup>

The fruit of de Valera's work was contained in the new Constitution entitled *Bunreacht na hÉireann* – this translates directly into English as the “basic law of Ireland.” It was finally approved by Dáil Éireann on June 14, 1937 and put before the electorate on July 1. The mechanism for adopting this new Constitution was meticulously planned, as Morgan points out in order that the new Constitution “should not be cast as an amendment of the 1922 Constitution, but rather should involve a complete break with it. Thus the process for enactment of the new Constitution was carefully designed to avoid contamination by the 1922 Constitution or its creation, the Dáil”.<sup>28</sup>

De Valera sought the approval of the Irish people to remove all the ambiguities of authority and sovereignty that pertained to the Free State Constitution. Firstly, the Dáil in Kelly's words “merely ‘approved’ the draft.”<sup>29</sup> It was clear that de Valera sought the approval by the people by stating that: “[i]t is not a Bill. This is not going to be enacted by

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<sup>25</sup> For details see Keogh (1987), *ibid.* and Keogh and McCarthy, *supra* note 10.

<sup>26</sup> Keogh and McCarthy, *ibid.* at 94.

<sup>27</sup> D. Keogh, “Church, State and Society” in B. Farrell, ed., *De Valera's Constitution and Ours* (Dublin: Gill & Macmillan 1988) at 106.

<sup>28</sup> Morgan, *supra* note 11 at 27.

<sup>29</sup> Kelly (1967), *supra* note 14 at 7.

this Parliament. This Parliament, I think, could not enact it ... we are going back to the sovereign authority, to the Irish people.<sup>30</sup> De Valera was also wary of the “opinions” of the courts in terms of the capacity of the Oireachtas to “pass Acts in relation to the terms of the Treaty ... We are not going to risk a Constitution like this ... being enacted here and being operated with such possible views held by the Courts.”<sup>31</sup>

De Valera’s elaborate plan for adopting the new constitution met with a less than ecstatic response from the electorate. Morgan estimates that just 38.6% of the electorate actually voted in favour of Bunreacht na hÉireann, 29.6% voted against and 31.8% either abstained or spoiled their votes.<sup>32</sup> This rather lukewarm endorsement may be explained by Cox’s hypothesis that trust is a key factor in encouraging people to vote: “voting turnout in the 1999 European Parliament elections is strongly and significantly correlated with general confidence in political institutions.”<sup>33</sup> While Cox is discussing a very different period, the 1990s, her assumptions have validity for Ireland in 1937.

Changing the national constitution is a big step. Citizens would need great confidence in the political elites proposing such changes to be fully committed to the project. The numbers who voted for or against the Constitution are likely to have been predominantly citizens who might today be described as the core voters of the two polarised political camps: those proposing the new Constitution (Fianna Fáil Anti-Treaty side) and the main opposition (Fine Gael formerly Cumann na nGaedheal Pro-Treaty side). The Constitution (685,105) received 86,065 more yes votes than the Fianna Fáil’s first preference (599,040) in the General Election held on the same day, only five constituencies rejected the Constitution and in all five Fianna Fáil was in the minority. Keogh and McCarthy believe this “must be mainly attributed to the legacy of the Civil War.”<sup>34</sup> It was a time of deep political uncertainty in Ireland. It had only recently emerged from a civil war (1921-1922). Fianna Fáil had not been founded until 1926, bringing a bloc of former abstentionist Sinn Féin members into constitutional politics. They formed their first government in 1932 and only gained an overall majority in 1933. On top of this, it was a

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<sup>30</sup> 67 Dáil Debates 416.

<sup>31</sup> *Ibid.*

<sup>32</sup> Morgan, *supra* note 11 at 29.

<sup>33</sup> M. Cox, “When Trust Matters: Explaining Differences in Voter Turnout” (2003) 41 (4) *Journal of Common Market Studies* 757 at 768.

<sup>34</sup> Keogh and McCarthy, *supra* note 10 at 210.

period of economic depression, not helped by an economic war with Britain. There were political pressures from a recalcitrant IRA and from the Blueshirt movement from 1933 to 1935. In addition, there were rumours of an army coup and plenty of anti-communist rhetoric from the Roman Catholic Church.<sup>35</sup> The once solid Cumann na nGaedheal had been subsumed into a new party, Fine Gael, in 1933 aided by the Blueshirts, officially known as the Army Comrades Association. Ireland was not alone in experiencing political turmoil; fascist movements were already on the move on the continent and even in Britain. Cronin sums up the mood in the new Irish State by stating that “[c]oupled with the ground swell of militancy among the young, there was an increasing questioning of the merits of democracy by several of Ireland’s thinkers.”<sup>36</sup>

The Irish State itself was just 15-years old; it was still deeply divided and far from settled. It is not surprising then that there might be less than ecstatic popular support for a new constitution. Nonetheless, it received the necessary majority to be adopted. Whatever reservations accompanied its birth, it was in time accepted by the overwhelming majority of the citizens of the state and the political and legal elites. The much more recent second divorce referendum in November 1995, which lifted the constitutional ban on divorce, succeeded by just over nine thousand votes after a divisive campaign.<sup>37</sup> However, as a political issue divorce disappeared from the national radar, which seems to indicate an acceptance of the popular will, even if the margin is very narrow. In the case of abortion, the most recent referendum in March 2002 saw a defeat of the Government Bill by just 10,000 votes, thus leaving the decision of the *X* case<sup>38</sup> and the Eighth Amendment in place. Abortion has not been as visible an issue since, but it certainly has not receded from view like divorce.

Returning to the issue of the legitimacy of Bunreacht na hÉireann, it should be acknowledged that while de Valera guided his new Constitution through the Dáil and won referendum approval it did not close the case with the finality he was hoping. Even from the

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<sup>35</sup> See E. Dunne, “Catholic Lay Organisations in Dublin in the 1920s and 1930s” (1994) 48 *Archivium Hibernicum* 107.

<sup>36</sup> M. Cronin, “The Blueshirt Movement: 1932-5: Ireland’s Fascists?” (1995) 30 (2) *Journal of Contemporary History* 311 at 313.

<sup>37</sup> See L. Marshall, “What God Has United Man Will Now Divide: Divorce Referendum Changes Law of 60 Years” (1996-1997) 6 *Ga. J. Int'l & Comp. L.* 505. The full referendum results can be found at: <http://electionsireland.org/results/referendum/refresult.cfm?ref=1995R>.

<sup>38</sup> *Attorney General v X. and Others* [1992] I.R. 1.

beginning reservations were expressed about the values in the new Constitution, most notably perhaps in relation to the position of the Roman Catholic Church<sup>39</sup> and the position of women.<sup>40</sup> Whitty argues that in the period from 1922 to 1937 a combination of Roman Catholic social teaching and political ideology was deployed to reduce the political contribution of women in Irish society.<sup>41</sup> Whitty notes that “[d]uring this period, Roman Catholic social teaching on the role of women began to be incorporated into Irish law and was consolidated in the Irish Constitution of 1937.”<sup>42</sup> De Valera contributed to this view of the role of women in Irish society, which attempted to unravel their contribution to the revolution and indeed the centrality of women to the “Celtic identity.”<sup>43</sup> The new Constitution enshrined the special place of the Roman Catholic Church in Article 44.2<sup>44</sup> while not going so far as to establish it as the State church:

44.1.2° 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.

This, together with its strong Roman Catholic flavour, was not likely to win over the hearts and minds of minority religions. On the issue of the special position of the Catholic Church, Hogan points out that the leaders of the minority churches were “aware of the earlier suggestion to give exclusive recognition to the Catholic Church, and in these circumstances were willing to accept the draft Article 44, as they doubtless felt that little more could be expected.”<sup>45</sup> The circumstances also included the context of the preceding period that had seen “a movement to enshrine Catholic principles as part of the law of the land.”<sup>46</sup> Speaking

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<sup>39</sup> For a discussion on religion under the constitution see: G. Whyte, “Religion and the Irish Constitution” (1996-1997) 30 *J. Marshall L. Rev.* 738.

<sup>40</sup> Keogh and McCarthy, *supra* note 10 at 183-189.

<sup>41</sup> N. Whitty, “Law and the Regulation of Reproduction in Ireland: 1922-1992” [1993] 43 (4) *University of Toronto Law Journal* 851.

<sup>42</sup> *Ibid.* at 852-3.

<sup>43</sup> L. Stevens, S. Brown, and P. Maclaran, “Gender, Nationality and Cultural Representations of Ireland” (2000) 7(4) *European Journal of Women's Studies* 405.

<sup>44</sup> This was removed in 1973 following a referendum in which a majority approved the Fifth Amendment of the Constitution Act, 1972.

<sup>45</sup> G. Hogan, “Law and Religion: Church-State Relations in Ireland from Independence to the Present Day” (1987) 35 (1) *American Journal of Comparative Law* 47 at 55 [hereinafter Hogan (1987)].

<sup>46</sup> *Ibid.*

of this aspect of the 1937 Constitution Hogan says that “[t]hey certainly did nothing to promote reconciliation among various traditions, North and South.”<sup>47</sup>

At the time of enactment it seems to be the case that the people were somewhat ambivalent towards the overall project and may well have been guided more by political affinity than either support or opposition to the Constitution *per se*. It may well also be the case that while the detail was not debated extensively, the proposed Constitution would have had relatively receptive hosts in a still largely rural and conservative population. In hindsight it is easy to make extrapolations on the impact of, say, the conservative Roman Catholic ethos of the Preamble, or the bill of rights, or even the break with the British constitutional model, but these must be put in the context of widespread ignorance of the issues by the electorate. Even Éamon de Valera would not have foreseen the full impact of his Constitution as a catalyst in Ireland's drift towards the American constitutional model.

#### **IV - A New Beginning, but Along Familiar Lines**

Despite the semblance of creating a bright new beginning, Bunreacht na hÉireann incorporated many features of the 1922 Constitution, what Kelly described as “re-bottling of wine which was by then quite old and of familiar vintages.”<sup>48</sup> Chubb contends that de Valera borrowed liberally from the Free State Constitution, which had sustained the fledgling years of the new State in that “Bunreacht na hÉireann to a large extent retained what had been in the Irish Free State Constitution or had evolved in practice in the tense, formative years of the state.”<sup>49</sup> Not only did Éamon de Valera adopt the system of government almost intact, but he even borrowed many of the original elements of the 1922 Constitution, albeit dressed in a reformulation of the language. He did initiate major changes, however, some of which began to mature long after his political career had ended and indeed were most likely not part of his vision of the new Ireland.

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<sup>47</sup> *Ibid.*

<sup>48</sup> J. Kelly, *The Irish Constitution*, 2nd ed. (Dublin: Jurist, 1984) at xxvi [hereinafter Kelly (1984)].

<sup>49</sup> B. Chubb, “Government and Dáil: Constitutional Myth and Political Practice” in B. Farrell, ed., *De Valera's Constitution and Ours* (Dublin: Gill & Macmillan, 1988) at 94.

For Kelly the “Fundamental Rights” provisions “represent one of the most conspicuous novelties of the 1937 Constitution by comparison with that of 1922.”<sup>50</sup> He acknowledges both the existence of human rights provisions in Articles 6-10 of the 1922 Constitution<sup>51</sup> and that the drafters of the Irish Free State Constitution were the first “in the history of the British Commonwealth” to expressly document “such propositions of fundamental law.”<sup>52</sup> However such propositions were not nearly as elaborated as the 1937 “Fundamental Rights” nor as effective because “when the legislature did encroach upon fundamental liberties, the constitutional guarantees were found to be useless.”<sup>53</sup> The 1937 Constitution’s bill of rights places and protects the civil liberties of the individual beyond the powers of the Oireachtas to amend or restrict them. In short, only the people of Ireland through a referendum can change these rights provisions as opposed to the system inherited from the British where parliament is sovereign.<sup>54</sup> Perhaps lessons learned through the general weakness of the 1922 document prompted the framers of the 1937 Constitution to safeguard the new Constitution from being too easily amended. Both Kelly and Chubb emphasise this point. Kelly states that “judicial review of legislation in the light of constitutional declaration ... seemed downright unreal to him.”<sup>55</sup> In addition, Chubb claims de Valera “did not think that it was desirable to have the courts thwart the Oireachtas” and would not have envisaged the level of judicial activism which arose subsequently as he “took a very narrow view of the functions and role of the courts.”<sup>56</sup> It should be stated too that this somewhat naïve view emerges in part from the tight rein kept on the document during its drafting. It was not the outpouring of a deep reservoir of an intellectual and informed polity, as much the best efforts of three intelligent, determined and committed individuals.

In any case, the new Constitution is well-protected and is not easily amended. In Casey’s words: “since 25 June 1941 the constitution has been a rigid one.”<sup>57</sup> Therefore, it is substantially different in this regard than the Irish Free State Constitution in practice.

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<sup>50</sup> G. Hogan and G. Whyte, *J.M. Kelly: The Irish Constitution*, 4<sup>th</sup> ed. (Dublin: Butterworth LexisNexis, 2003) at 1245 [hereinafter Hogan and Whyte (2003)].

<sup>51</sup> Kelly (1967), *supra* note 14 at 14.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* at 16.

<sup>54</sup> *Ibid.* at 163-173.

<sup>55</sup> *Ibid.* at 20.

<sup>56</sup> B. Chubb, *The Constitution and Constitutional Change in Ireland* (Dublin: Institute of Public Administration, 1978) at 51.

<sup>57</sup> Casey (1988), *supra* note 9 at 153.

Article 50 of the Irish Free State Constitution allowed for the amendment of the Constitution, in a way very similar to that of the 1937 Constitution. For the first eight years of its existence it “could be amended by way of ordinary legislation”<sup>58</sup> however, the *Constitution (Amendment) (No. 16) Act 1929* extended that to sixteen years and “[a] unanimous High Court and majority of the Supreme Court upheld the extension for the period for amending the Constitution by ordinary legislation.”<sup>59</sup> In doing so, it vested all authority for amending the Constitution with the Oireachtas. In his dissenting judgment, in *State (Ryan) v. Lennon*, Chief Justice Kennedy highlights that this was “for [an] indefinite time and scope of amendment, even to the exclusion of the people from all voice,”<sup>60</sup> and held that the Act was “invalid and the amendment of the Constitution contained in it inoperative, null and void.”<sup>61</sup> His however was a minority view. The Free State Constitution had become pliable, the people had been excluded from the process of amendments and with Article 2A it had introduced within its scope “the antithesis of the rule of law.”<sup>62</sup> The 1937 Constitution in that sense put right two aspects of the constitutional framework envisaged by the 1922 drafters *viz* a bill of rights and a constitution which could not be amended without reference to the people.

While Bunreacht na hÉireann is not as difficult to amend as the U.S. Constitution, which Forbath argues is too rigid, “amendment rules need not be *remotely* as obdurate as ours,”<sup>63</sup> it is nonetheless a two-stage process, which requires both parliamentary and popular majorities:

[f]irst, every proposal must be passed in the form of a bill, expressed to be ‘An Act to amend the Constitution,’ which shall not contain any other proposal and which must be initiated in the Dáil. Secondly true to the idea of ‘Sovereignty of the People’ the proposal for an amendment must be approved by a majority at a referendum.<sup>64</sup>

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<sup>58</sup> M. Forde, *Constitutional Law in Ireland* (Dublin: Mercier Press, 1987) at 9 [hereinafter Forde].

<sup>59</sup> *Ibid.* at 10.

<sup>60</sup> [1935] I.R. 170 at 212.

<sup>61</sup> *Ibid.* at 219.

<sup>62</sup> *Ibid.* at 198.

<sup>63</sup> W. Forbath, “The Politics of Constitutional Design: Obduracy and Amendability - A Comment on Ferejohn and Sager” (2002 – 2003) 81 *Tex. L. Rev.* 1965.

<sup>64</sup> Morgan, *supra* note 11 at 31.

The inherent conservative and paternalistic ethos of Irish political life in 1937, the remnants of which are still active, disallowed the possibility of full popular participation in the proposal of amendments to the Constitution. Although the 1922 Constitution had in its initial stages the possibility of the electorate initiating change, in its closing period it had in Farrell's words become "a thing of shreds and tatters," which de Valera could amend "by simple act of the single parliamentary chamber dominated by his party"<sup>65</sup>—this power was now vested not in the Oireachtas, but in the Dáil. However, McGuinness and Hogan, members of the *Constitution Review Group*, argue that it was correct to dispense with the popular initiative of the Saorstát Constitution.<sup>66</sup> While their argument is strong it must be put in context. They are not arguing for a new dispensation, so much as re-working the current one.

If one were to propose a model where the population is seriously engaged in opinion-formation and will-formation *vis-à-vis* the Constitution, citizenship, rights and law, then an alternative view would have to be adopted. Currently, while the electorate must approve of all amendments they do not, save through the process of public discourse, have an input into the formulation and proposal of an amendment. The key point here is the relationship between what Frey and Stutzer call the "classe politique" and the citizenry.<sup>67</sup> They point out that "[i]n many countries, the Supreme Court or, even worse, the parliament, has the power to decide whether a referendum is admissible."<sup>68</sup> What is at play here is the right of the citizenry to engage in democratic processes around all the key policy and constitutional matters that concern them, even when they are "threatening the position of the politicians' cartel."<sup>69</sup> Objections to popular initiative emerge from the perspective of the "classe politique" mainly about the competence and capacity of ordinary citizens to initiate and decide on complex political and constitutional issues.

Popular initiative is not entirely novel in Irish constitutional terms as Articles 47 and 48 of the Irish Free State Constitution allowed the potential for citizens to petition in

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<sup>65</sup> B. Farrell, "From First Dáil through Irish Free State" in B. Farrell, ed., *De Valera's Constitution and Ours* (Dublin: Gill & Macmillan, 1988) at 30 [hereinafter Farrell].

<sup>66</sup> D. McGuinness and G. Hogan, "The Popular Initiative in the Saorstát Constitution" in *Report of the Constitution Review Group* (Dublin: The Stationery Office, 1996).

<sup>67</sup> B. Frey and A. Stutzer, "Direct Democracy: Designing a Living Constitution" in R. Congleton and B. Swedenborg, eds., *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (Boston: MIT Press, 2006) 39 [hereinafter Frey and Stutzer].

<sup>68</sup> *Ibid.* at 48.

<sup>69</sup> *Ibid.* at 49.

respect of both ordinary legislation and constitutional amendment. Kohn points out that it reflected both the “democratic radicalism of its framers” and “the post ... [World War I] Constitutions of the new Continental Republics.”<sup>70</sup> These were progressive measures. In the case of ordinary legislation, excluding Money Bills or where both Houses of the Oireachtas made exception for “public peace, health and safety,”<sup>71</sup> Article 47 allowed for a “substantial minority”<sup>72</sup> – two-fifths of the Dáil to refer legislation to the electorate, the popular initiative required “a petition signed by not less than one-twentieth of the voters then on the register of voters.”<sup>73</sup> Article 48 included provision “for the Initiation by the people of proposals for laws or constitutional amendments” in this case “on the petition of not less than seventy five thousands voters,” provided “not more than fifteen thousand” were from one constituency.<sup>74</sup> The model was, in Kohn’s view, “an easy tool for obstructionist tactics,”<sup>75</sup> a valid criticism given the numbers required for popular initiative. It never came into force as the provision was removed in 1928 following an effort by Fianna Fáil to have the Oath removed. They succeeded in raising a petition of 96,000 voters, but they were outmanoeuvred by the Government who were able to remove the provision<sup>76</sup> under the terms of Article 50, which allowed for the Constitution to be amended through ordinary legislation in its initial eight years.<sup>77</sup> Three points need to be made. Firstly that the drafters of the Free State Constitution showed a more positive view of the role of democracy than did the drafters of the 1937 Constitution. Secondly the provisions may have been, in Kohn’s words, too “venturous an innovation in the still unsettled conditions of the country”<sup>78</sup> and thirdly, the Free State Constitution drafters could have been more nuanced in terms of balancing the need for democracy with safeguards to prevent the provisions being exploited by either committed minorities or permanent majorities.

In the meantime, both society and democratic theory have moved on considerably. Frey and Stutzer show enough empirical evidence to indicate that popular initiative is both

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<sup>70</sup> L. Kohn, *The Constitution of the Irish Free State* (London: George Allen & Unwin, 1932) at 238 [hereinafter Kohn].

<sup>71</sup> *The Constitution of the Irish Free State (Saorstát Eireann) Act 1922*, Article 47.

<sup>72</sup> Kohn, *supra* note 70 at 238.

<sup>73</sup> Art. 47, Constitution of the Irish Free State.

<sup>74</sup> Art. 48, Constitution of the Irish Free State.

<sup>75</sup> Kohn, *supra* note 70 at 244.

<sup>76</sup> *Constitution (Amendment No. 10) Act (No. 8 of 1928)*.

<sup>77</sup> For more in-depth discussion on this see Kohn, *supra* note 70 at Chapter VIII, “Referendum and Initiative.”

<sup>78</sup> *Ibid.* at 240.

desirable and feasible.<sup>79</sup> They support citizens' "right to start constitutional changes via popular initiatives, with the courts and parliament having only minor, and clearly delineated, possibilities of intervention with respect to the issues proposed,"<sup>80</sup> recognising that this also requires the development of a civic culture to support such a move.<sup>81</sup> Frey and Stutzer hold that this has to be a gradual development "so that a *learning process* can take place between the citizens, parliament and government."<sup>82</sup>

Rules clearly need to be in place to moderate such powers, but an outright ban makes assumptions about the nature of democracy and the role of the citizen that are difficult to sustain. The democratic process underpins the legitimacy of the Constitution to the extent that from its adoption to its amendment citizens are the ultimate authority. This mechanism gives the Constitution immunity from challenge. However, citizens are not trusted to really participate in formulating a system of law to regulate their society and state. Habermas uses the term "guarantees of participation" in his argument for a more comprehensive set of rules for citizen participation in the political system: "they must no longer be interpreted merely as injunctions but positively, as guarantees of participation, if they are to fulfill their original function in a meaningful way."<sup>83</sup>

#### **IV - A Statement of National Identity**

Kirchheimer perfectly captures the historical import of the 1937 Irish Constitution in the nationalist identity project as envisaged by Éamon de Valera by stating that "[i]t is the purpose of all constitutions which seek to constitute a turning point in political development, to proclaim a specific programme of action in whose name the organization of a new social order is to proceed."<sup>84</sup> There is little doubt, but that Éamon de Valera, as chief architect of Bunreacht na hÉireann, envisaged the new Constitution as making a powerful statement regarding the future direction of Irish society. In particular, he saw it as the historic breaking point from the last remaining symbols of British dominance in the political

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<sup>79</sup> For more in-depth analysis see Frey and Stutzer, *supra* note 67.

<sup>80</sup> *Ibid.* at 76.

<sup>81</sup> *Ibid.* at 76-7.

<sup>82</sup> *Ibid.* at 77 [emphasis in original].

<sup>83</sup> J. Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: Polity Press, 1989) at 227.

<sup>84</sup> O. Kirchheimer, "Weimar – and What Then? An Analysis of a Constitution" in F. Burin and K. Shell, eds., *Politics, Law and Social Change: Selected Essays of Otto Kirchheimer* (West Sussex: Columbia University Press, 1969) at 72 [Kirchheimer].

affairs of Ireland. Here was a leader emerging from and steeped in a nationalist struggle for independence. His agenda was, in that regard at least, a charismatic one, manifesting “... its revolutionary power from within, from a central *metanoia* [change] of the followers' attitude.”<sup>85</sup>

In Kirchheimer's terms, a constitution is an instrument which makes a political statement about the perceived development of a given society or political entity.<sup>86</sup> It is evident that Bunreacht na hÉireann encapsulates a series of provisions which outline the mechanics of the political machinery of the State. This, however, is but one facet of the Constitution or any constitution. It is absolutely explicit from Kirchheimer's formulation that the political element is but a sub-section of the social-political order.<sup>87</sup> A constitution does not set out merely to establish a political framework, as it constitutes just part of the whole social-political context. The future shape of the social order of the society and state is to be influenced by the constitution. The political order is designed to best ensure the perpetuation of the perceived social order. In other words the social and political order are seen as complementary. They operate in tandem, toward the social reproduction of the society within the vision of the framers of the constitution and by extension those who adopt and accept it, in this case – “the people of Éire.”<sup>88</sup>

There is an assumption that the constitution represents the views of the people in that it constitutes a statement by the people, and is therefore representative of their collective identity. It is part of the project in hand to explore the relevance of this assumption. It is certain that de Valera's strategy of having the Constitution adopted in a plebiscite was calculated to establish its legitimacy as the collective will of the people of Ireland, even if that plebiscite was confined to that part of Ireland then known as Saorstát Éireann. A constitution is drawn up, and Bunreacht na hÉireann is no exception, taking account of the perceived identity of the people it will serve. “We are part of the story we tell” is Cornell's synopsis of the idea.<sup>89</sup> In drafting Bunreacht na hÉireann de Valera was

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<sup>85</sup> M. Weber, *Economy and Society* (Vol. 2), G. Roth and C. Wittich, eds. (University of California Press: 1978) at 1117.

<sup>86</sup> See Kirchheimer, *supra* note 84.

<sup>87</sup> *Ibid.*

<sup>88</sup> See Bunreacht na hÉireann, Article 1. The word “Éire” translates as Ireland, see also R. Fanning, “Mr. de Valera Drafts a Constitution” in B. Farrell, ed., *De Valera's Constitution and Ours* (Dublin: Gill & Macmillan, 1988) 33 at 41 [hereinafter Fanning].

<sup>89</sup> D. Cornell, “Should a Marxist believe in Rights?” (1984) 4 (1) *Praxis International* 45 at 45.

ostensibly engaged in the role of cementing the perceived collective identity of the people of Ireland. He makes this clear by way of reference to Article 1<sup>90</sup> in his Fianna Fáil Árd Fheis<sup>91</sup> address in October 1937:

[i]f there is anybody who thinks that the national liberty and right of our people could be better expressed than it is in the first article of the Constitution, let them say so. I, at any rate, am quite satisfied to stand over this article, and I would be very glad indeed at the hour of my death to stand over it.<sup>92</sup>

He was also, in his own view, building a bridge, as he saw it, to the Gaelic order and the continuity of the notion of an Irish nation. His reference to the Irish language later in this same speech underlines this aspiration: “Davis said the language was a more secure protection than fortress or river. The best way to preserve the philosophy of life, to preserve the distinctive and spiritual and cultural life, of the people is the language. It is the best way to keep pure Irish tradition.”<sup>93</sup>

De Valera’s overall nationalist vision as reflected in his new Constitution included “a belief in the natural unity of the island of Ireland, a conception of Irish national identity arising from this territory as distinctive, and an ideal of sovereign self-determination of the island as a political unit.”<sup>94</sup> The political climate, in addition to the inheritance of a bitter civil war and the partition of the island of Ireland made the very idea of such a unified collective identity of the people of Ireland impossible on at least three levels. Firstly, there was the political reality that part of the island of Ireland did not fall within the remit of the Constitution. Secondly, the Unionist population did not share this vision and thirdly, not all nationalists on either side of the border shared de Valera’s vision of the Irish nation. Nonetheless, placing his document before the people of the twenty-six counties, contradictory though this may be in the light of his own views of what constituted the “Irish nation,” solved a problem for him in his task of creating, for the people of Ireland, a

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<sup>90</sup> Article 1 of Bunreacht na hÉireann states that “[t]he Irish Nation 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.”

<sup>91</sup> Árd Fheis is the term used for annual party conferences.

<sup>92</sup> É. De Valera, “Árd Fheis Address October 17, 1937” in M. Moynihan, *Speeches and Statements by Éamon de Valera* (Dublin: Gill & Macmillan, 1980) at 330 *et seq.*

<sup>93</sup> *Ibid.*

<sup>94</sup> K. Hayward, “The Politics of Nuance: Irish Official Discourse on Northern Ireland” (2004) 19 (1) *Irish Political Studies* 18 at 21.

Constitution which represented their collective identity.<sup>95</sup> He was engaged in what Oommen describes as an act of fathoming the psychological depths of the people, “nationalist ideologues and political leaders have plumbed the emotional attachment of people to mobilise them in collective actions”.<sup>96</sup>

A key point explored by Bell is that nationalism is a narrative of three generations – past, present, and future.<sup>97</sup> However, it is never fixed and final; it is always in a state of flux not only in terms of its own self-identification, but also in relation to the wider context of other national identities. Éamon de Valera was a political leader and a participant in the project of Irish nationalism. The collective memory of the Irish people in 1937 extended back over some very turbulent decades, but the interpretation of that memory was not seamless, but rather understood from differing perspectives. However, that memory was part of the clay from which de Valera could shape his vision of Ireland. Bell says “memory seems to have claimed Truth’s valorized position as a site of authenticity, as a point of anchorage – albeit an unsteady one – in a turbulent world stripped of much previous meaning.”<sup>98</sup> It must be accepted as Bell outlines, that there is a clear distinction between memory and myth. Bell neatly defines nationalist myth as “a story that simplifies, dramatizes and selectively narrates the story of a nation’s past and its place in the world.”<sup>99</sup>

That was the task de Valera addressed in the fuller context of his political career. He was trying to narrate the Irish national story into the future, even if as Fanning suggests in a somewhat negative way that “[t]he dynamic that impelled him in his constitutional designs had less to do with inaugurating a brave new world than with bringing an old and – from de Valera’s perspective – unhappy world to a close.”<sup>100</sup> The Constitution in that story could act as a constant against all weathers, like a lighthouse, beaming out a simple clear message linking the three generations of the story. As Fanning makes clear, “de Valera saw the 1937 Constitution more as an end than as a beginning.”<sup>101</sup> De Valera needed the

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<sup>95</sup> See generally the 1937 Dáil Debates on the Constitution.

<sup>96</sup> T. Oommen, *Citizenship and National Identity* (London: Sage, 1997) at 23 [hereinafter Oommen].

<sup>97</sup> S. Duncan and D. Bell, “Mythscape: Memory, Mythology, and National Identity” (2003) 54 (1) *British Journal of Sociology* 63 [hereinafter Duncan and Bell].

<sup>98</sup> *Ibid* at 65.

<sup>99</sup> *Ibid.* at 75.

<sup>100</sup> Fanning, *supra* note 88 at 34.

<sup>101</sup> *Ibid.* at 33-4.

memory of the people, a myth to construct a longer-term memory, and a document endorsed by the people to guide the future of the story. Before dismissing his ambition as destined to failure, one needs to bear in mind the historical moment in which he was acting and, secondly, from our own time appreciate how religious texts manage to anchor fundamentalists to an ageless and unchanging narrative.

### **V - Nationalism, Conservatism and Catholicism**

In essence, the electoral convenience of a partitioned island and the popular support for his own party was sufficient to present him with a Constitution which, although representing the views of a minority of the people of Saorstát Éireann, could still be legally considered the legitimate Constitution of the people of Ireland and, as such, a statement of their collective identity and a manifesto of their political ambitions. This in Oommen's terms is a dangerous and confusing act, because it conflates the concept of nation and state (the sort of problem which gave rise to Nazism). Oommen states that "the unintended consequence of it is that the population of a state ought to be homogeneous and its citizens should be nationals."<sup>102</sup> This, by extension, means that those who do not fit into this categorisation "should shed their cultural identity and assimilate themselves."<sup>103</sup> This is the sort of objectionable agenda which Southern Unionists faced within the new Ireland, as did Travellers and other ethnic, religious and cultural minorities. It is also a dilemma, which many of the majority found unpalatable especially as the dissonance between a conservative Catholic Church and an increasingly permissive culture began to unfold in subsequent decades; a position well articulated in particular by the women's movement. It is worthy to note that Dr. Garret FitzGerald, as Taoiseach, launched a "Constitutional Crusade" in the early 1980s, which addressed many of these concerns.<sup>104</sup> In a radio interview he stated his desire to lead "a republican crusade to make this a genuine republic,"<sup>105</sup> part of which was to make the state less sectarian and to remove the territorial claims contained in Articles 2 and 3 of the Constitution. That crusade never seriously got off the ground, but in describing how he was outmaneuvered, FitzGerald could later reflect on both the essence of his objections and indeed Fianna Fáil, describing it as "a time-bomb ticking away at the heart of

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<sup>102</sup> Oommen, *supra* note 96 at 19.

<sup>103</sup> *Ibid.*

<sup>104</sup> For more discussion on this see G. FitzGerald, *All in a Life* (Dublin: Gill and Macmillan, 1991) at 376 *et seq.*

<sup>105</sup> *Ibid.* at 378.

the narrow and exclusive form of Catholic nationalism to which Fianna Fáil traditionally ties its fortunes.”<sup>106</sup>

That timebomb was set before the conception of Bunreacht na hÉireann and its roots are not the exclusive property of any Irish political party, but it was certainly close to the core of Fianna Fáil's *raison d'être*. Even in the early days of power, de Valera's government exuded a very strict conservative moral tone and a persistent anti-intellectualism. Carlson sums up that mood well:

Eamon de Valera ... saw Ireland as having a spiritual mission. The cultural isolationism that Shaw feared was, in effect, de Valera's ideal ... High on the list of evils were books and periodicals, both of which were regarded as potentially threatening to the racial purity of the state.<sup>107</sup>

It needs to be noted however, that much of the legislation incorporating Roman Catholic social mores predated de Valera's first term in power, so in that regard he was not setting out on a new *modus operandi*, but continuing what Ó Drisceoil calls “a general process of ‘Catholicization’ that became the primary element in the forging of a separate Irish identity.”<sup>108</sup> In fact, as Hogan points out, this seems to have been at least one point of agreement between the opposing sides in the Civil War, as “the principal opposition party, Fianna Fáil, did not object to the gradual incorporation of the Catholic moral code into the law of the land.”<sup>109</sup> As Graham notes, racial and religious purity were obviously important considerations in the “radical Gaelic nationalism” which helped form de Valera's vision of the world. The Constitution “defined the reality of de Valera's twenty-six-county state, its homogeneity more important than the lost lands of the north.”<sup>110</sup> It also needs to be noted that the coalition of interests went far wider than de Valera and Fianna Fáil. Both Liam O'Flaherty and Samuel Beckett fell victim of the Censorship Board, and were not sparing in their analysis of the entire business. O'Flaherty suggested that “soutaned bullies ... hurl the accusation of sexual indecency at any book that might plant the desire for civilization and

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<sup>106</sup> R. Smith, *Garret: The Enigma* (Dublin: Aherlow Publishers, 1985) at 24.

<sup>107</sup> J. Carlson, ed., *Banned in Ireland* (London: Routledge, 1990) at 8-9 [hereinafter Carlson].

<sup>108</sup> D. Ó Drisceoil, “‘The Best Banned in the Land’: Censorship and Irish Writing since 1950” (2005) 35 *The Yearbook of English Studies* 146 at 146 [Ó Drisceoil].

<sup>109</sup> Hogan, *supra* note 45 at 51.

<sup>110</sup> B. Graham, “Heritage Conservations and Revisionist Nationalism in Ireland” in G. Ashworth, ed., *Building a New Heritage: Tourism, Culture and Identity in the New Europe* (London: Routledge, 1994) at 138 [hereinafter Graham].

freedom in the breasts of their wretched victims”.<sup>111</sup> Beckett’s more involved critique saw an outcome where “[s]terilization of the mind and apotheosis of the litter suit well together. Paradise peopled with virgins on the earth and with decorticated multiparas.”<sup>112</sup>

The Censorship Board, established under the *Censorship of Publications Act 1929* was more than assiduous, as Keogh highlights, with the formidable statistic that by 1943, 1,700 books had been banned.<sup>113</sup> Ó Drisceoil points out that censorship hit “[m]ost of the leading writers of modern fiction from Britain, America, and continental Europe ... leading cynics to dub the Register of Prohibited Publications an ‘Everyman’s Guide to the Modern Classics.’”<sup>114</sup> However, the Board was even harsher with Irish literature; Ó Drisceoil quotes a memo from the Department of Justice admitting that it was “especially prone to ban books by Irish authors,”<sup>115</sup> so that “[t]he list of banned Irish authors in the 1930s and 1940s reads like a ‘Who’s Who’ of Irish literature.”<sup>116</sup>

Prior to the enactment of Bunreacht na hÉireann, de Valera had dismantled much of what he found objectionable in the 1922 Constitution.<sup>117</sup> At best this was an identity statement of exclusion. He now was engaged in an identity statement of inclusion. The Irish identity which he aspired to create was, he felt, neglected by the 1922-32 government in that the high hopes and aspirations of newly independent Ireland were not harnessed; rather it was a case of business as usual. Keogh and McCarthy contend that when de Valera entered the Dáil as leader of the new Fianna Fáil his “[l]ong-term political strategy remained to dismantle the Treaty settlement and re-write the Free State constitution.”<sup>118</sup> This and the quest for self sufficiency, maintenance on the land of as many families as possible, the Economic War, *etc.* all formed constituents of an integrated whole which strove towards an anti-materialist rural, self sufficient, Gaelic Ireland – in this context the systematic dismantling of the old Constitution and the drafting of a new one were

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<sup>111</sup> L. O’Flaherty, “The Irish Censorship” (1932) 1 (2) *The American Spectator*, as cited and reprinted in Carlson, *supra* note 107 at 140.

<sup>112</sup> S. Beckett, “Censorship in the Saorstát” in Carlson, *ibid.* at 146.

<sup>113</sup> D. Keogh, *Twentieth-Century Ireland* (Dublin: Gill & Macmillan, 1994) at Chapter 2 [hereinafter Keogh (1994)].

<sup>114</sup> Ó Drisceoil, *supra* note 108 at 147.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.* at 148.

<sup>117</sup> The 1922 Anglo-Irish Treaty, the Oath of Allegiance and a number of other provisions were removed.

<sup>118</sup> Keogh and McCarthy, *supra* note 10 at 41.

consonant with his core political beliefs. De Valera was a devout, conservative Catholic, but not a bigot or extremist.<sup>119</sup> Yet his view of an Irish identity would have been synonymous with the culture of conservative Catholicism, although he may have ascribed to it the tag of Gaelic, a tradition which predated Catholicism and often uncomfortably co-existed with it. In essence, he was in Bell's terms developing a myth.<sup>120</sup>

While the 1922-32 administration lacked the sense of mission subsequently invoked by Fianna Fáil, they did set the scene by passing a set of repressive Catholic-inspired measures dealing with public morality, for example the *Censorship of Publications Act 1929*, new licensing laws and importantly the *Public Safety Acts*. On his return from the political wilderness, de Valera was exercised by the need to maintain good relations with the Catholic Church,<sup>121</sup> especially as "Pope Pius XI called for a worldwide program of Catholic Action as early as 1922"<sup>122</sup> and had set it as a mission of his papacy. Keogh's description of the diplomatic efforts to keep the Catholic Church on board in relation to the constitution is most informative in this regard.<sup>123</sup> Both Keogh and Morgan emphasise that de Valera was walking a tightrope.<sup>124</sup> If the Catholic Church spoke against the Constitution it would effectively derail his most cherished political project.

## **VI - The Project of Collective Identity**

The task here in analysing the import and design of Bunreacht na hÉireann is far more complex than a semantic understanding of the document and its various articles alone. As discussed above, there needs to be an understanding of the nature of a constitution. We must recognise too that a constitution is drafted and adopted at a given historical moment and in the political and social environment pertaining in that period in which it is formulated. The notion of the constitution as a statement of collective identity is particularly relevant in this regard. It must be remembered that Bunreacht na hÉireann was enacted by "the people." If, therefore, it did not agree in certain minimum respects with a

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<sup>119</sup> See Keogh (1994), *supra* note 113.

<sup>120</sup> Duncan and Bell, *supra* note 97.

<sup>121</sup> For context on this see: Keogh and McCarthy, *supra* note 10 at 57.

<sup>122</sup> I. Vallier, "The Roman Catholic Church: A Transnational Actor" (1971) 25 (3) *International Organization* 479 at 492.

<sup>123</sup> Keogh (1994), *supra* note 113 at 98-101.

<sup>124</sup> See D. Morgan, "The Future of the Irish Constitution" in N. Collins, ed., *Issues in Irish Politics Today* (Manchester: Manchester University Press, 1999).

majority of the people's own perceived collective identity then it would be unlikely to be enacted.<sup>125</sup> In the case of Bunreacht na hÉireann, Morgan<sup>126</sup> points out above that only just over a third of the people of Saorstát Éireann actually approved of the new Constitution and it should be also noted that the Fianna Fáil vote fell by four per cent when compared to the 1933 election. There were also a very high number of spoilt votes, 104,805. The response in the media reflected party loyalty, the *Irish Times* for instance holding that the general election would have “a more decisive influence on the country's future than a dozen similar Constitutions”<sup>127</sup> and afterwards questioned its legitimacy as the plebiscite had not covered the whole country. Other opposition figures from various political perspectives also questioned the legitimacy of the vote, but over time most such objections receded.<sup>128</sup>

De Valera, as chief architect of Bunreacht na hÉireann, saw his work as the culmination of a long struggle to restore the integrity of an independent people whose right to nationhood had its roots in the Gaelic order. It was, for him and his party, a new departure too; the first steps in the new Ireland where the final vestiges of colonialism and imperialism could be finally erased not just legally through this new Constitution, but also over time in the collective identity and psyche of the Irish people. We can see the Constitution not just as a legal document setting out the basic law of Ireland, but also as a narrative joining Bell's three generations of the story. Ochs points out that it is not possible to imagine a world without narratives.<sup>129</sup> In turn, each narrative contains a temporal or chronological element, but they encompass more than this time dimension: “[r]egardless of the contexts in which they emerge, the modalities through which they are expressed, and the genres laminated within them, all narratives depict a temporal transition from one state of affairs to another.”<sup>130</sup>

The plot (Aristotle – *mythos*) in a narrative is the theory, which is deployed in order to make sense of it. It is a process of placing “the problem within a sequence of cause-effect

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<sup>125</sup> See J. Spreng, *Abortion and Divorce Law in Ireland* (Dublin: McFarland & Co, 2008) at 40-57.

<sup>126</sup> Morgan, *supra* note 11.

<sup>127</sup> Keogh and McCarthy, *supra* note 10 at 194.

<sup>128</sup> For more discussion on this see Keogh and McCarthy, *ibid.* at Chapter 7, “The Passing of Bunreacht na hÉireann: Debate and Reaction.”

<sup>129</sup> E. Ochs, “Narrative” in T. van Dijk, ed., *Discourse as Structure and Process* (London: Sage Publishers, 1997) [hereinafter Ochs].

<sup>130</sup> *Ibid.* at 189.

events and circumstances.”<sup>131</sup> Narrative is essentially a sense-making process. Part of this process is challenging and re-drafting the storyline in order to present an alternative version of the event based on a theoretical stance. Berger points out that “texts require readers to fill in a lot of blank areas”;<sup>132</sup> different readers will fill in those blanks in different ways. This has been the case with *Bunreacht na hÉireann*. That process has seen some of de Valera's most cherished motifs virtually disappear, while the subsequent judicial review has shaped key aspects of the narrative in ways that he could not have anticipated. Wolfe contends that modern judicial review did not emerge until 1937 under the U.S. Constitution,<sup>133</sup> and even in 1957, Delany<sup>134</sup> concluded that the idea of judicial review was still “an unfamiliar one” under the new Irish Constitution.<sup>135</sup> However, it is important not to get too enthralled with the notion of narrative, for as Gabriel argues, this can lead to a post-modernist tendency to reduce everything “to discourse and narrative.” This has the effect of losing important insights that distinguish between “text and context, narrative and meta-narrative, fact and fantasy.”<sup>136</sup>

Nevertheless, it is clear that de Valera was not engaged in the drafting of some dry text devoid of political meaning. As Kirchheimer would frame it, he was also engaged in *Realpolitik*. He learned the lessons of both Sinn Féin, which had lost its central political role, and indeed his great adversaries in *Cumann na nGaedheal*, who ultimately failed to hold the allegiance of the electorate. Kirchheimer argues that “[e]very political system which intends to stay in power must perceive itself as a realization of a political innovation.”<sup>137</sup> *Fianna Fáil*, just five years in office, used *Bunreacht na hÉireann* to help establish itself as the legitimate arbiter of Irish identity. The Irish Identity which de Valera favoured is well captured in the following extract from his St Patrick's Day broadcast of 1943:

[t]hat Ireland which we dreamed of would be the home of a people who valued material wealth only as the basis of right living, of a people who were satisfied with frugal comfort, and devoted their leisure to the things of the spirit – a land

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<sup>131</sup> *Ibid.* at 193.

<sup>132</sup> A. Berger, *Narratives in Popular Culture, Media, and Everyday Life* (London: Sage Publishers, 1997) at 12.

<sup>133</sup> C. Wolfe, “A Theory of U.S. Constitutional History” (1981) 43(2) *The Journal of Politics* 292.

<sup>134</sup> See V. Delany, “The Constitution of Ireland: Its Origins and Development” (1957) 12(1) *University of Toronto Law Journal* 1 at 9-10.

<sup>135</sup> For more discussion on this see also Ó Tuama, *supra* note 17.

<sup>136</sup> Y. Gabriel, “The Use of Stories” in G. Symon and C. Cassell, eds., *Qualitative Methods and Analysis in Organisational Research* (London: Sage Publishers, 1998) at 156.

<sup>137</sup> Kirchheimer, *supra* note 84 at 41.

whose countryside would be bright with cosy homesteads, whose fields and villages would be joyous with the sounds of industry, with the romping of sturdy children, the contests of athletic youths and the laughter of comely maidens, whose firesides would be forums for the wisdom of serene old age. It would, in a word, be the home of a people living the life that God desires that man should live.<sup>138</sup>

Bunreacht na hÉireann stated for Fianna Fáil its political innovativeness, its affinity with the Irish collective identity and its legitimacy as chief political actor on the Irish political stage. While this was an agenda driven more by nationalist-conservative imperatives than liberal ones, nonetheless human rights played a central place in the new document, expanding or perhaps renewing the rights vision of the 1922 drafters and mirroring the idea of a bill of rights as contained in the American Constitution.

The notion of collective identity, within which de Valera worked, was problematic from the start. There was an assumption of social homogeneity, which in the context of the society of Ireland in 1937 was as unrelated to the societal reality as it patently is today. The evidence of the Preamble of Bunreacht na hÉireann leaves no doubt regarding the framers' belief in a collective identity which this Constitution was formulated to mirror. The wording of the Preamble and the image it invokes indicates an underdeveloped concept of the dialectical-historical-developmental character of society. This unhistorical or perhaps even anti-historical view of the development of society has its roots in a conservative ideology. This ideology in Ireland's case owes much to the influence of a particularly conservative Roman Catholic Church. In the context of a public sphere dominated by conservatism, in which the legitimate opposition is seen to be liberalism, Ireland suffered from a stunted concept of the historical development of society. This became manifest in public debates, such as the 8th Amendment referendum.<sup>139</sup> These airings were symptomatic of a pervasive view of the permanence of society. Berger says "the problem of legitimation inevitably arises when the objectivations of the (now historic) institutional order are to be transmitted to a new generation."<sup>140</sup>

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<sup>138</sup> É. de Valera, "Radio Broadcast, March 17, 1943" in M. Moynihan, *Speeches and Statements by Éamon de Valera* (Dublin: Gill & Macmillan, 1980) at 466-468.

<sup>139</sup> The 8th Amendment Referendum of 1983 enacted the so-called "pro-life" clause which was included in the Constitution as Article 40.3.3°.

<sup>140</sup> P. Berger and T. Luckmann, *The Social Construction of Reality* (Dublin: Penguin Press, 1967) at 93.

## **VII - Convention and Catholicism**

The traditionalist conservative view of the cyclical nature of society roots the perceived prevailing social order in an historical permanence. This social order is inextricably intertwined with a perceived collective identity. This collective identity in turn is seen as being hewn from the peculiarly rural Irish Catholic (even if unstated) version of the Judaeo-Christian tradition. An important constituent of this is an anti-urban worldview, which attempts to eliminate the development of a public sphere. The opening words of the Preamble of Bunreacht na hÉireann set the tone for the cultural identity under which it sees its citizens:

[i]n 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.<sup>141</sup>

The following paragraphs of the Preamble emphasise the Constitution's role as a collective intergenerational statement. It makes clear that the Constitution speaks on behalf of dead generations – “our fathers.” It is written in the present tense and makes references to the future of “our Nation.” It thus includes in the collective identity members of the “Nation,” past, present and future, echoing Bell's narrative of nationalism.<sup>142</sup> It is also clear that “the Most Holy Trinity” and “our Divine Lord, Jesus Christ,” are essential elements in the identity of the people. The Preamble of Bunreacht na hÉireann therefore makes unequivocally clear that it speaks for “the people of Éire,” “our nation,” “our fathers,” “ourselves.” In other words, it purports to speak for what is seen as an inter-generational homogenous collectivity. In the period of its enactment these assumptions were not exposed to extensive debate in a public sphere, even if raised in the Dáil Debates.<sup>143</sup> That is not to imply that there were no counter-perspectives, but the issue of identity was a problematic one. Graham gives an excellent account of the bifurcation of the Irish nationalist identity project, being theoretically committed to “comprehensiveness, inclusiveness and non-sectarianism,” but being also emotionally concerned “to free itself from the ‘oppression’ of the English and Scottish settlers.”<sup>144</sup> In the fragile context of a newly empowered Fianna Fáil, with a strong nationalist agenda, opening up too many questions about identity would

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<sup>141</sup> *Preamble*, Bunreacht na hÉireann.

<sup>142</sup> Duncan and Bell, *supra* note 97.

<sup>143</sup> See for instance the contribution of F. MacDermot to the constitutional debates in the Dáil, 4 June 1937, 67 Dáil Debates 1923-24.

<sup>144</sup> Graham, *supra* note 110 at 137.

be counterproductive as: “[n]ationalism as a form of political modernization seeks legitimacy through a simple, clear and direct, unmediated relationship with its public.”<sup>145</sup> It was more prudent to propose the statement as given, rather than have it examined too closely. The security of the State itself was fragile, the economy weak, emigration and unemployment high, much of Europe was in turmoil and Fianna Fáil was still just a “slightly constitutional” party.<sup>146</sup> Indeed, “Seán Lemass would go so far as to describe the party, as late as 1928, in a famous phrase, as ‘slightly constitutional.’”<sup>147</sup> In Ireland, most debate on identity is of more recent origin. Today identity has to negotiate an increasingly diverse society in which variables like gender, religion, ethnic and national consciousness play a part unimaginable in 1937. The identity dimensions of Bunreacht na hÉireann are important, but we need to acknowledge that those aspects of the constitution have been diluted with the passage of time. Its centrality to Irish law and human rights by contrast has become more deeply embedded, notwithstanding the influences of international law.

Habermas’s route to the emergence of a constitution contrasts dramatically with the approach taken by de Valera. For Habermas, a constitution needs to emerge through public discourse premised on a set of binding, rational laws and through social integration aimed at achieving collective goals and on delivering sustainable expectations.<sup>148</sup> For him, three questions must be answered. Firstly, how can competing preferences be reconciled? Secondly, who are we and who do we want to be? Finally, how should we act in terms of justice? These are the questions with which the Irish State has struggled. Éamon de Valera answered all three, to his own satisfaction, in his Constitution and political utterances. However, that project needs to be addressed anew in the contemporary climate, based on the types of assumptions expounded by Habermas rather than de Valera. The journey on which de Valera embarked was one about drawing the Irish people towards consensus. It was a charismatic project, built both on the certainties to which he subscribed and on his vision for a new Ireland.

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<sup>145</sup> J. O’Carroll, “Culture Lag and Democratic Deficit in Ireland: Or ‘Dat’s Outside de Terms of D’agreement” (2002) 37 (1) *Community Dev. J.* 10 at 14.

<sup>146</sup> J. Lee, *Ireland: 1912-1985* (Cambridge: Cambridge University Press, 1989) at 167 [hereinafter Lee].

<sup>147</sup> *Ibid.* Lemass was one of de Valera’s ablest lieutenants and would later succeed him as both leader of Fianna Fáil and Taoiseach.

<sup>148</sup> For more discussion on Habermas’s views see for instance: J. Habermas, *The Theory of Communicative Action (Vol 2)* (Cambridge: Polity Press, 1992) and J. Habermas, *Between Facts and Norms (Faktizität und Geltung)*, William Rehg (trans.) (Cambridge: Polity Press, 1996)

De Valera's model was to provide a world vision based on his imputation of the identity statement that the people of Ireland could make, built on a foundation of history and myth about the traditions and their genesis, and reaching forward towards the further evolution of this identity in line with the founding vision. This was interlaced with a Constitution also safeguarding rights and the rule of law. It may now look naïve, but it must be borne in mind that he was a traditionalist hewn in the Roman Catholic and Irish nationalist schools. He had been active in three successive bloody conflicts from 1916 until the end of the Civil War. As Farrell points out "the 1930s were a dangerous decade for democracy"<sup>149</sup> and de Valera had "a classical opportunity to establish a dictatorship."<sup>150</sup> He was not tempted to take that opportunity. Nonetheless, equally in difficult political times and having been socialised in a very different political climate de Valera could not be expected to take the approach proposed by Habermas that "[d]iscourses for achieving self-understanding require that the cultural traditions formative of one's own identity be dealt with in a manner at once anxiety-free, reflexive, and open to learning."<sup>151</sup> Like all political actors, de Valera was hemmed in by compromises, but we could argue that he might have found more inclusive and expansive formulae.

### **VIII - Concluding Comments**

The challenge today is not just about fixing those parts of Bunreacht na hÉireann we find objectionable or deficient. It is about attempting to imagine a process of constitution-building that is less concerned with stasis and more oriented to being able to accommodate change and securing the rights and interests of present and future generations.

Elkins *et al.* identify "inclusion, flexibility, and specificity"<sup>152</sup> as three key elements which assist in the acceptance by the citizenry of a national constitution and its long-term viability (endurance). From the outset, it should be noted that the first two sit at the very heart of how we understand democracy: inclusion coincides with Robert Dahl's idea of "inclusiveness," while flexibility as understood in this context ties in with his concept of

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<sup>149</sup> Farrell, *supra* note 65 at 207.

<sup>150</sup> *Ibid.* at 30.

<sup>151</sup> J. Habermas, *Between Facts and Norms (Faktizität und Geltung)* (West Sussex: Polity Press, 1996) at 182.

<sup>152</sup> Z. Elkins, T. Ginsburg and J. Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009) at 78 [hereinafter Elkins *et al.*].

“contestation.”<sup>153</sup> The level at which these two concepts sit at the centre of how we understand democracy is illustrated by the finding of Coppedge *et al.* that “three-quarters of what the most commonly used indicators of democracy have been measuring is variation on Robert Dahl’s two dimensions of polyarchy – contestation and inclusiveness.”<sup>154</sup>

In relation to inclusion, Elkins *et al.* claim that “[s]uccessful constitutions generate allegiance from those among later generations who do not initially consent to them, much less participate in the drafting of the texts.”<sup>155</sup> They emphasise that “[t]he passage of the constitution is important, independently of its content.”<sup>156</sup> To a large extent, de Valera achieved this goal through parliamentary debate and the use of a plebiscite in the adoption of the Constitution. Even if the popular majority was slim, it was nonetheless presented to all the electorate of the state for approval or rejection. Elkins *et al.* contend that popular engagement is essential for “constitutional durability” both at the drafting and ratification stage but also during the lifetime of the constitution itself.<sup>157</sup> This allows us to tease out the discussion somewhat. If we accept that by 1937 standards de Valera’s formula was inclusive, it does not necessarily hold that it still pertains today.

In his introductory remarks on deliberative toleration Bohman outlining the essential change that society has undergone in recent decades states that “[a]ny feasible ideal of democracy must face the unavoidable social fact that the citizenry of a modern polity is heterogeneous along a number of intersecting dimensions, including race, class, religion, and culture.”<sup>158</sup> Being inclusive in these circumstances is far more demanding than was the case in 1937. The issue here from a political perspective is that a constitution represents an agreement on certain basic rules by a political community. As a political community changes its constitution has to reflect change and revise what it can agree as the rules that order its legal and political systems. Bohman contends that it “demands more of citizens than the silent toleration of reasons and attitudes that they abhor,” for they must also seek

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<sup>153</sup> R. Dahl, *Polyarchy: Participation and Opposition* (Yale: Yale University Press, 1971) at 4.

<sup>154</sup> M. Coppedge, A. Alvarez, C. Maldonado, “Two Persistent Dimensions of Democracy: Contestation and Inclusiveness” (2008) 70 (3) *The Journal of Politics* 632 at 632.

<sup>155</sup> Elkins *et al.*, *supra* note 152 at 78.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.* at 91-2.

<sup>158</sup> J. Bohman, “Deliberative Toleration” (2003) 31 (6) *Political Theory* 757 at 757.

“to find the best possible, mutually acceptable solution to a problem or conflict.”<sup>159</sup> Elkins *et al.* put this as a need to “generate much debate and discussion among citizens” on the constitution.<sup>160</sup> There is public debate during controversial constitutional referenda. However, inclusion ought to also include popular initiative. The exact model of popular initiative that might be introduced would ideally emerge through public engagement. This raises a further question on whether such a debate would await the emergence of a public sphere<sup>161</sup> around it or might it be put out for discussion from an elite source, such as Garret FitzGerald's constitutional crusade<sup>162</sup> or as has been the practice around other publicly important issues, for instance on science and technology, which is part of the mission of both the Rathenau Institute in the Netherlands and the Danish Board of Technology. What is important is that citizens in a democracy have means to engage around all publicly important issues, including their constitution. Papadopoulos makes this point regarding the democratic deficit at European Union level, but it is equally pertinent in a national context.<sup>163</sup> His basic point is that “[r]eferendums by petition enable groups and interests which have no access to decision spheres, or are not well represented in them, to influence policy choice.”<sup>164</sup> In Ireland's case, it was important in 1937 as the Constitution did not apply to a single homogenous identity community, a situation which has become increasingly marked in recent decades not just through inward migration but through a wider reconfiguration of identity.<sup>165</sup> However, it would be a mistake to imagine that this would only apply to minorities or poorly represented groups. Trust is a reciprocal relationship. A constitutional context where the citizens are trusted is more likely to in turn elicit trust from the citizenry as Moehler's<sup>166</sup> research in Africa indicates. What citizens demand of democracy in a post-traditional context, given all that has happened since the

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<sup>159</sup> *Ibid.* at 758.

<sup>160</sup> Elkins *et al.*, *supra* note 152 at 79-80.

<sup>161</sup> The Public Sphere is a term developed by Jürgen Habermas, I use it here to signify that part of civil society that is engaged in public debate around a specific issue or set of issues.

<sup>162</sup> See P. O'Malley, “The Constitutional Crusade and the Question of Consent” in J. Dooge, ed., *Ireland in the Contemporary World: Essays in Honour of Garret FitzGerald* (Dublin: Gill and Macmillan, 1986) at 77-82.

<sup>163</sup> Y. Papadopoulos, “Implementing (and Radicalizing) Art. I-47.4 of the Constitution: Is the Addition of Some (Semi-)Direct Democracy to the Nascent Consociational European Federation just Swiss Folklore?” [2005] 12 (3) *Journal of European Public Policy* 448

<sup>164</sup> *Ibid.* at 453.

<sup>165</sup> For an interesting discussion on contemporary Irish identity see: G. Fagen, “Globalised Ireland, or Contemporary Transformations of National Identity” in C. Coulter and S. Coleman, eds., *The End of Irish History? Critical Approaches to the Celtic Tiger* (Manchester: Manchester University Press, 2003) at 110-121.

<sup>166</sup> D. Moehler, “Participation and Support for the Constitution in Uganda” (2006) 44 *The Journal of Modern African Studies* 275 [hereinafter Moehler].

1930s, is very different to what was expected of democracy when de Valera was shaping his Constitution. This is particularly relevant for “increasing the stake that citizens have in the document and their attachment to it.”<sup>167</sup>

Flexibility, the second criterion outlined by Elkins *et al.*, is pertinent both to an appraisal of the concerns that faced de Valera in imagining the type of constitution that would best suit Ireland, given his experience of the Saorstát Éireann Constitution, and to the contemporary demands of liquid modernity.<sup>168</sup> Creating a necessary balance between rigidity or permanence on one side and flexibility on the other, is not just a task for constitutional framers, for it is an issue that presents in different light in different times. It is a point perfectly captured by Jawaharlal Nehru at the Indian Constitutional Assembly: “[i]f you make anything rigid and permanent, you stop a Nation’s growth.”<sup>169</sup> On the other hand, as Elkins *et al.* point out, “taken to an extreme, flexibility undermines the very notion of constitutionalism as a set of stable limits on ordinary politics.”<sup>170</sup> Getting this balance right in one epoch does not necessarily mean that with the passing of time and circumstances that it will remain balanced.<sup>171</sup>

In terms of flexibility, through Article 51, de Valera allowed for amendments to the Constitution by the legislature for a period of three years after the first President had taken office, which lasted until June 1941. However, during that period he took an opposite stand on flexibility by introducing the single opinion rule. This has been heavily criticised as an unnecessary fetter on the judiciary by a number of commentators including former Supreme Court Judge, Brian Walsh who argues that it “seriously hampers the development of our constitutional jurisprudence,” pointing to the benefits of the removal of “an identical rule” from the German Constitution “to the great benefit of German constitutional jurisprudence”.<sup>172</sup> This view was echoed by the Committee on Court Practice and

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<sup>167</sup> Elkins *et al.*, *supra* note 152 at 81.

<sup>168</sup> For more detailed discussion on liquid modernity see Z. Bauman, *Liquid Modernity* (London: Wiley-Blackwell, 2000).

<sup>169</sup> Quoted in Elkins *et al.*, *supra* note 152 at 81.

<sup>170</sup> *Ibid.* at 82.

<sup>171</sup> For more discussion on this see also S. Ó Tuama, “Judicial Review under the Irish Constitution: More American than Commonwealth” [2008] 12 (2) *Electronic Journal of Comparative Law* <http://www.ejcl.org/122/abs122-2.html>.

<sup>172</sup> B. Walsh, “Foreword” in J. Casey, *Constitutional Law in Ireland* (London: Sweet & Maxwell, 1987) vii at xii.

Procedures which described the single opinion rule as “undesirable and injurious.”<sup>173</sup> Forde suggested that this rule led to “remarkably terse” judgments on constitutional matters by the Supreme Court, similar to the “French *Cour de Cassation’s* *arrets de rejet*.”<sup>174</sup> He opined that it might not be “healthy for the development of constitutional law”<sup>175</sup> as the Court has a responsibility not only to adjudicate on individual constitutional cases, but also “to explain and justify how it is shaping constitutional law.”<sup>176</sup> Elkins *et al.* speak of the necessity for “informal mechanisms of constitutional adjustment. The most obvious is constitutional review by constitutional courts.”<sup>177</sup> The Irish Constitution allows for this “informal mechanism,” in so far as “it is generally accepted that the Irish Constitution establishes a system which legitimises judicial re-interpretation of provisions in light of societal change,” but the single opinion rule removes some of its dynamism, restricting the capacity for contestation around certain publicly important issues.<sup>178</sup> Lukes, in describing the three-dimensional view of power, referred specifically to the “exclusion of potential issues from the political agenda”<sup>179</sup> as an exercise of power by individuals and institutions. Not acknowledging the existence of dissenting minority views by senior judges, on a constitutionality issue, is in fact excluding potential issues from debate, both within the legal community itself and wider society. Introducing sufficient flexibility to allow for the dissemination of minority views, rather than undermining the Constitution, could energise discussion and debate, to the benefit of the political community and legal scholars. Even now the dissenting views of Chief Justice Kennedy in *State (Ryan) v. Lennon* are important for discourse around both rights and democracy, even in the context of a different Constitution.<sup>180</sup>

Specificity, the third element in the Elkins *et al.’s* model, relates to both of the previous elements of inclusion and flexibility.<sup>181</sup> The Irish Constitution as drafted by de Valera is on the same side of the continuum as the American Constitution, in that it is not

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<sup>173</sup> Casey (1987), *supra* note 5 at 296.

<sup>174</sup> Forde, *supra* note 58 at 94.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> Elkins *et al.*, *supra* note 152 at 83.

<sup>178</sup> C. O’Mahony, “Societal Change and Constitutional Interpretation” [2010] 1 (2) Irish Journal of Legal Studies at 78. See also Ó Tuama, *supra* note 17.

<sup>179</sup> S. Lukes, *Power: A Radical View* (Dublin: Macmillan Press, 1974) at 21.

<sup>180</sup> For the full text see [1935] I.R. 170, 189-219.

<sup>181</sup> Elkins *et al.*, *supra* note 152 at 94

overly specific or prescriptive. This is in marked contrast to say the Treaty of Lisbon, which “largely replicates the innovations contained in the EU Constitution.”<sup>182</sup> Over specificity was certainly an issue for that document, putting it into the model against which U.S. Chief Justice Marshall cautioned that “it would never be understood by the public. Its nature, therefore, requires than only its great outline should be marked.”<sup>183</sup> The Treaty of Lisbon is almost the very opposite in stating that “[u]nderstanding the overall shape of the Treaty of Lisbon, and the significance of particular changes, is however no easy task, even for scholars who have lived through successive Treaty amendments”.<sup>184</sup> It is a matter of debate whether any given constitution is over specific, but the Irish Constitution can hardly be judged excessive in that regard. However, greater inclusivity carries with it the danger that it could become over specific if public pressure emerged to deal with important contemporary issues that would best be left “to ordinary law and custom.”<sup>185</sup> In a detailed examination of the Ugandan constitutional ratification process, Moehler found that the relationship between legitimacy and popular engagement is a complex one. However, one of her key conclusions has strong resonance in the Irish case *vis-à-vis* the highly contentious Eight Amendment campaign. She found that “[w]here the process and outcome leaves elites feeling polarised and antagonistic, participatory constitution-making can exacerbate rather than heal mass divisions and reduce rather than enhance constitutional support.”<sup>186</sup> The issue of abortion and the subsequent Eighth Amendment indicated how divisive issues can become, but also how pressure to hold a constitutional referendum on an important issue could go beyond essential principles and lead to the clogging of government by making permanent issues that would be best left to more easily amended legislation.

The solution to this issue is not to reduce inclusivity, nor to diminish flexibility (contestability), but to create mechanisms that allow for full democratic engagement, while safeguarding key democratic principles like the rights of minorities, including those on Bohman’s list of “race, class, religion, and culture,” but we could easily extend that list to include gender, ethnicity, disability, age and other forms of identity. The demand then is to construct ways of making decisions that are both inclusive and respectful of the views of

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<sup>182</sup> P. Craig, “The Treaty of Lisbon: Process, Architecture and Substance” [2008] 33 (2) E.L. Rev. 137 at 137. [hereinafter Craig].

<sup>183</sup> *McCulloch v. Maryland*, (1819) 4 Wheat 316 quoted in footnote 15 of Elkins *et al.*, *supra* note 152 at 84.

<sup>184</sup> Craig, *supra* note 182 at 140.

<sup>185</sup> Elkins *et al.*, *supra* note 152 at 84.

<sup>186</sup> Moehler, *supra* note 166 at 44.

others. The development and deployment of deliberative processes indicate that this is possible and the assumptions discussed above would indicate that they are also necessary.