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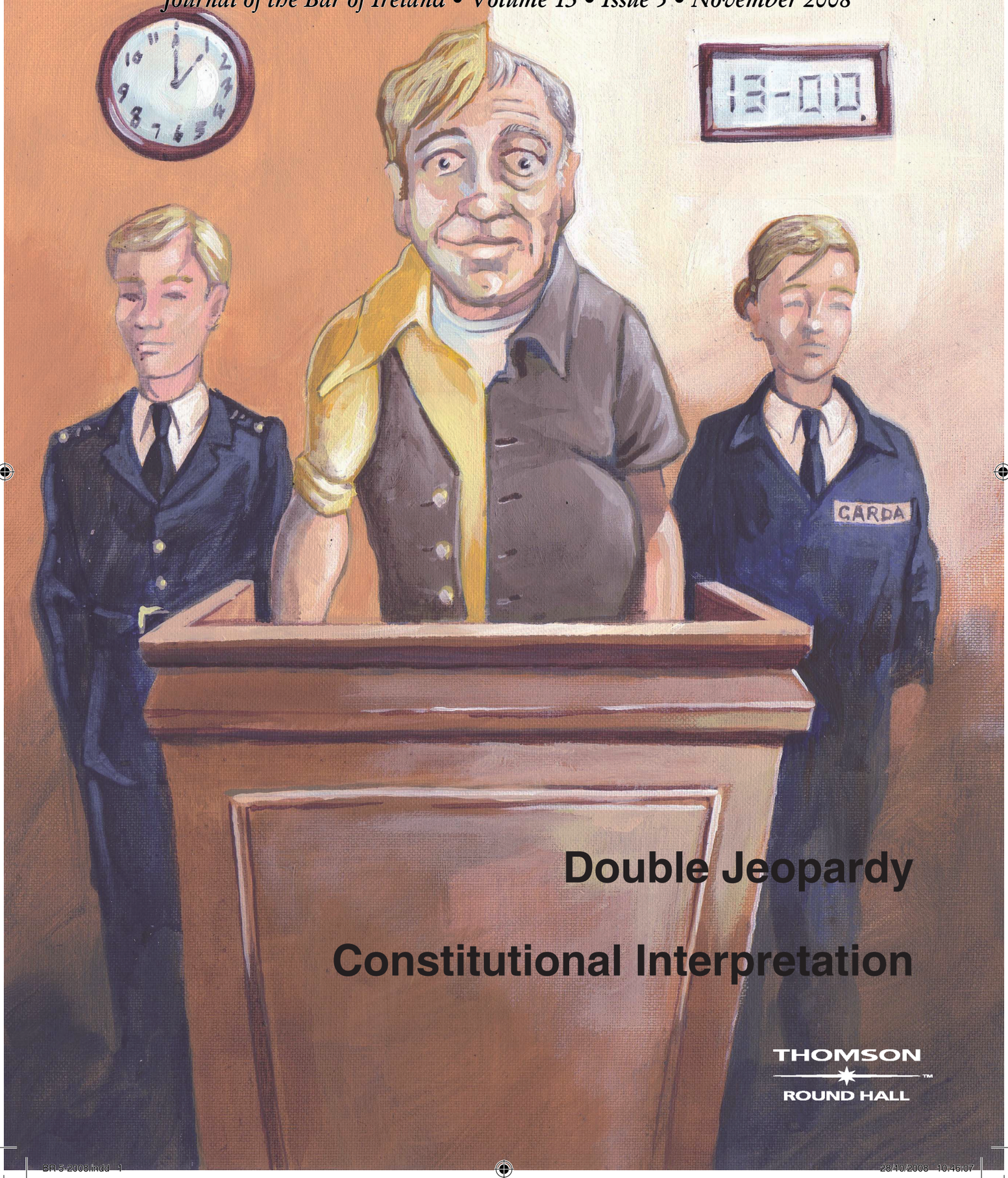

Double Jeopardy

Constitutional Interpretation

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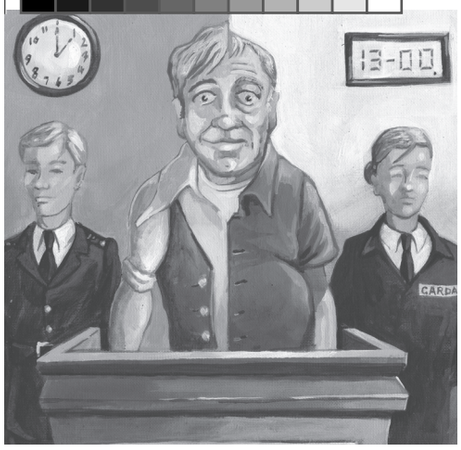

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Character Evidence in criminal trials

Theresa Lowe BL

It is a very common feature of a plea in mitigation that the defence will call character witnesses who will testify as to the good character of the accused. What is not so common is the calling of character witnesses during the course of a criminal trial prior to the case going to the jury. While uncommon, the defence is at all times entitled to adduce this evidence and in certain circumstances, it is the appropriate course for the defence to take.

History

The admission of evidence of the good character of an accused can be traced back to the seventeenth century in the case of *R v Turner*[1]. It was regularly admitted by the end of the eighteenth century and in the leading case of *R v Rowton*[2] Cockburn C.J. stated:

> "The allowing evidence of a prisoner's good character to be given has grown up from a desire to administer the law with mercy, as far as possible. It sprung up in a time when the law was, according to the common estimation of mankind, severer than it should have been."

While the law may be regarded as less severe in the 21st century, such evidence is now admissible in favour of the accused in any criminal proceedings and can be adduced by examination in chief of the accused or witnesses called by the defence, or elicited on cross examination of prosecution witnesses, a co-accused or witnesses called by him.[3]

Thus, the defence is entitled to elicit that evidence from the prosecuting Garda and prosecution witnesses, from an accused person during examination-in-chief, from the co-accused or witnesses called by him and there is also an entitlement to call character witnesses if the defence chooses to do so.

The Criminal Justice (Evidence) Act of 1924 anticipates the defence giving evidence of good character. Section 1(f)(ii) provides that the accused may be asked about his bad character and/or about any previous offences which he may have committed, or been convicted of, or been charged with, if he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

That legislation is in place for over eighty years. Therefore, it is well established that the defence can put before the jury evidence of good character.

Purpose of calling character evidence

The purpose of calling character witnesses to give evidence during the trial is primarily to show that the accused is less likely to have committed the offence because he or she is a person of good character. Such evidence goes to his or her innocence of the offences charged and also to his or her credibility. This evidence is generally led by the defence and put before the jury for the dual purpose of convincing them that the accused is unlikely to have committed the offences alleged and further to bolster the credibility of the accused if he or she gives evidence or made pre-trial statements denying the commission of the offence.[4]

Thus, where evidence of good character is given on behalf of an accused, it goes to his or her innocence of the offences charged and his or her credibility, if he testified during the proceedings or made exculpatory pre-trial statements.

In *People (Attorney General) v Bond,*[5] the trial judge had permitted the cross-examination of the accused as to previous convictions on the basis that the defence had attacked the character of prosecution witnesses. Haugh J. explained that this evidence was admissible only to show that the accused was a person whose evidence might not be worthy of credit. It had, however, wrongly been used to show that the accused had probably committed the offences with which he was charged. The trial judge should have explained that *"it went to his credit and should on no account be used to show the probability of his guilt."*[6]

Who can be called as a character witness?

- Persons who are aware of the accused person's standing in the community.[7] Typical character witnesses are previous or current employers, a spouse can be called to give character evidence[8] and in general, persons of good standing in the community.

1 (1664) 6 St. Tr. 565.
2 (1865) 10 Cox C.C. 25 at 30; [1861-73] All E.R. 549 at 552.
3 McGrath, Evidence. (2005) 465
4 McGrath, Evidence. (2005) 466
5 [1966] I.R. 214
6 (223)
7 *R. v. Rowton* (1865) 10 Cox C.C. 25 at 30; [1861-73] All E.R. 549 at 552.)
8 Peter Charleton, P.A. McDermott, M. Bolger, Criminal Law (1999) 189

What kind of good character evidence may be given?

- When evidence of good character is given, it should be directed to that part of the man's character which is relevant.[9] So, if the charge is theft, evidence of the accused person's character for honesty is relevant as is his character for violence where the charge is one of assault.
- The rule at common law is that evidence of character is confined to evidence of general reputation and not evidence of disposition. Since the decision in *Rowton*, it has been the rule that witnesses as to character must testify to the reputation of the accused and not to specific good acts or individual's opinions as to character. That approach was approved in this jurisdiction in *People (DPP) v Ferris* [10] Therefore, the only evidence of good character that may be adduced by a witness called by the defence or elicited in cross-examination is evidence of the general reputation of the accused and not evidence of disposition.[11]
- While evidence of (a) opinion or (b) particular acts or examples of conduct should be excluded, [12] in practice, the rule is ignored[13] and such evidence is often admitted. However it should be noted that this practice is an indulgence by the court. Evidence is often given by a witness who says he knows an accused person well and holds a high opinion of him or her. Where the charge is one of theft, an employer may give evidence that he has employed the accused for a number of years and that money never went missing in all of the time that the accused had charge of the cash. While such evidence is generally not objected to, it is however, admitted as an indulgence to the accused as it is technically inadmissible.[14]
- The *Rowton* rule is difficult to apply where character evidence is elicited by the defence in cross-examination of prosecution witnesses and in cases where evidence of good character is given by the accused himself.[15] In relation to the accused person's own testimony, the limitation to evidence of general reputation does not apply [16]. It would be impossible for an accused to give evidence as to his or her reputation, as he or she cannot know what other members of the community think of him or her, when he or she is not present.[17] Therefore an accused, when giving evidence of his own good character, may give evidence of specific acts or instances tending to show that he is of good character.[18]

Nature of the questions

The witness is asked a series of questions designed to elicit relevant information about the accused. The form of questioning is limited in these circumstances. There are certain matters that cannot be canvassed by Defence Counsel.

Examples of inappropriate questions might be, by way of example, an attempt to elicit the witness's immediate reaction on hearing about the particular charge or charges. It would also be imprudent to ask a witness if they believe the accused to be capable of committing the alleged offence.

Judges Directions

There are no authorities here regarding Judges directions in relation to character evidence. However, other jurisdictions can provide some guidance in this area. In Commonwealth jurisdictions, the trial judge is required to give the jury a direction as to the use that can be made and the weight to be attached to this evidence. In *Berrada,*[19] it was held that the judge should give a clear direction as to the relevance of the defendant's good character: failure to do so amounts to a major defect in the summing up[20] but in *R v Vye*[21] it was held that two directions – the **credibility** and **propensity** directions are required to be given;

> (1) A direction as to the relevance of his good character to a defendant's **credibility** is to be given where he has testified or made pre-trial answers or statements. A direction must be given even where he has told lies during the course of the investigation[22] or where he has made "mixed" statements containing both admissions and self-exculpatory explanations.[23]
>
> (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence (that is **propensity**) is to be given, whether or not he has testified or made statements.[24] The decision of the Court of Appeal in *Vye* was subsequently approved by the House of Lords in *Aziz*[25] but a gloss was added in that a trial judge is not required to give directions as to the good character of the accused where the claim to good character is

9 per Lord Denning *Plato Films Ltd. v Speidel* [1961] A.C. 1090, 1140, May , Criminal Evidence, 5th edition 138.
10 unreported, CCA, June 10, 2002 pp. 10 – 12.
11 McGrath, Evidence, (2005) 467)
12 *R. v. Rowton* (1865) 10 Cox C.C. 25 at 30; [1861-73] All E.R. 549 at 552.
13 (as noted by the Criminal Law Revision Committee in 1972 in their Eleventh Report: Cmnd. 4991, para. 134.)
14 May , Criminal Evidence, 5th edition, 7-08 at page 139.
15 Blackstone's Criminal Practice, (2003), F13.12 at page 2183.
16 *R v Dunkley* (1926) 28 Cox C.C. 143 at 147-148.
17 Phipson, Evidence (14th Ed., 1990) 8-14
18 *R. v McNamara* (No. 1) (1981) 56 C.C.C. 193 at 348.
19 (1990) 91 Cr. App. R. 131
20 May, Criminal Evidence, 5th edition, at page 142
21 [1993] 3 All ER 241
22 *Kabariti* (1991) 92 Cr. App. R. 362; *Durbin* [1995] 2 Cr. App. R. 84.)(May 7-14 at page 142)
23 *Aziz* [1995] 2 Cr. App. R. 478, HL.(May 7-14 p. 142)
24 McGrath, Evidence, (2005) 467 – 468.
25 [1995] 2 Cr. App.R. 478.

spurious.[26] This point is discussed in greater detail below.

Form of words

There is no need for the direction on either the credibility or propensity limb to be given in a particular form of words although "you must take into account" is a better expression than "you are entitled to".[27]

Where co-accused is of bad character

Where a defendant of good character is tried with a co-defendant of bad character, it was held in *Vye* that the defendant of good character is entitled to a direction as to the relevance of good character. The dilemma is in relation to the other defendant and whether the judge should make any comment at all in relation to him. In *Vye,* Lord Taylor C.J. said any comment about the defendant with bad character will depend on the circumstances of the individual case;

> "In some cases, the Judge may think it best to tell the jury they … must not speculate and must not take the absence of information as to [the defendant's] character as any evidence against [him]. In other cases the Judge may … think it best to say nothing about the absence of evidence as to [that defendant's] character.[28]

Where accused has no previous convictions but is guilty of criminal behaviour

In *Aziz,* the House of Lords held that a trial judge has a residual discretion whether to give a direction in the case of a defendant without previous convictions but who is shown during the trial to have been guilty of serious criminal behaviour. Lord Steyn stated:

> "Prima facie the direction must be given …. [however] … a judge should never be compelled to give meaningless or absurd directions … . A sensible criminal justice system should not compel a judge to go through the charade of giving [good character] directions in a case where the defendant's claim to good behaviour is spurious".[29]

If it makes no sense to give good character directions, the judge may in his discretion dispense with them.[30]

Defence counsel's duty to adduce character evidence

It is important to note that if counsel does not adduce any evidence of good character, the judge is not required to raise it in his summing up.[31]

In *Thompson*[32] the privy council held that where the issue of good character is not raised by the defence, the judge is under no duty to raise it and if it is intended to rely on the good character of the accused, the issue must be raised by calling evidence or putting questions on the issue to the witness.

Where accused has one previous conviction

Where a defendant has an isolated conviction for an offence which is of a different nature to the one before the court, the judge in his discretion may decide that he is to be treated as being of good character. In *Pigram,*[33] the defendant who was charged with handling stolen goods, had a previous conviction for criminal damage. The Court of Appeal held that the trial judge should have told the jury that the previous conviction was irrelevant and should have treated him as being of effectively good character.

Appeal

In Canada, failure on the part of a trial judge to direct a jury that good character evidence is relevant to the issue of guilt or innocence amounts to a misdirection.[34] There is no Irish authority on that particular point but having regard to the guarantee of a trial in due course of law under Article 38.1, the presumption of innocence and the guarantee of the right to a fair trial under Article 6 of the European Convention of Human Rights – it would be surprising if a similar obligation did not exist.[35] At the very least, it is an area where there is scope to requisition the judge and upon refusal, to make a good case that it ought to be part of our jurisprudence.

Conclusion

The decision to call character witnesses needs very careful consideration. In the case of accused persons who have no previous convictions (or an isolated conviction for a different type of offence) and who have a good reputation in the community – it may be a sensible tactic on the part of the defence to adduce such evidence. Obviously, putting one's good character in issue has its risks if the accused has previous history. A major disadvantage to the accused giving any evidence of good character is that by doing so he will lose the protective shield afforded to him by s.1(f) of the Criminal Justice (Evidence) Act 1924, leaving himself open to cross-examination as to his previous convictions and bad character.[36]

If character evidence, presented as part of the defence's case becomes increasingly common in criminal trials, the concern would be in relation to assumptions that may arise if character witnesses are not called. What is clear is that the defence is entitled at all times and not merely post plea or conviction, to call such evidence. ■

26 McGrath, Evidence, (2005) 468
27 *Miah and Akbar* [1997] 2 Cr. App.R. 12 at 22.
28 (1993) 97 Cr. App.R. 134 at page 140
29 at 488-499
30 May , Criminal Evidence, 5th edition, 7-15, at page 143
31 *Prayag*, The Times, July 31, 1991, May 7-14 at page 142
32 [1998] 2 W.L.R. 927
33 [1995] Crim. L.R. 808
34 *R. v Elmorosi* (1985) 23 C.C.C. (3d) 503; *R. v Boles* (1978) 43 C.C.C. (2D) 414
35 McGrath, Evidence, (2005) 468-469
36 McGrath, Evidence. (2005), 467

The Incoherence of Historicism in Irish Constitutional Interpretation*

David Langwallner BL

> *"We must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. … The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."*[1]

1: Introduction, Themes and Argument

This article purports to deal with the doctrine of historical interpretation and the allied United States doctrine of "original intent" to assess whether it is a valid mechanism for assessing Irish Constitutional cases.[2]

In substance, the nuanced conclusion will be reached that historicism and original intent are neither coherent nor useful in assessing what the scope of a given constitutional right means today and the use of such doctrine leads to rule by the dead hand of history. However, guidance derived from the original principles of the Constitution, as interpreted by successive generations of judges, is acceptable in determining the nature and extent of rights available and in stipulating specific provisions which provide for constitutional certitude. The text is after all the legacy of our forefathers through successive amendments to which we should be broadly faithful. Thus it follows that the original text, the gift of our forefathers, as amended, should be followed where it is specific and clear textually but that language must be adapted and interpreted in the light of ever shifting contemporary meanings and different social contexts.

2: The Historical Approach In Irish Constitutional Law: A Brief Survey

An initial early reference to historicism in Irish constitutional interpretation is the construction of the Constitution in accordance with the state of affairs, legal and other at the time of its enactment. This was first asserted in *re Article 26 and the Offences against the State (Amendment) Bill, 1940* [3]by the Supreme Court. The court said that at the time of the enactment of the Constitution, several Acts permitting the detention of persons were in force. The framers of the Constitution, who chose not to prohibit such legislation, knew their existence and effect. The court was therefore bound to give this considerable weight in view of the fact that many Articles of the Constitution unambiguously prohibit the Oireachtas from passing certain laws.

The admissibility of this cannon of construction was again asserted in *Melling v. Ó Mathghamhna*[4] by the Supreme Court in the context of the definition of what constitutes a *"minor offence"* in the context of Article 38. O' Dalaigh CJ indicated that one should look at the statute roll of Saorstat Eireann for what is a minor offence. However, in *Conroy v. The Att. Gen.*[5] the Supreme Court when considering the same issue said while it proposed to consider *"the state of the law when the Constitution was enacted and public opinion at the time of that enactment*" these were but *"secondary considerations"*.

Thus, even early on there were dissenters from the wholesale usage of the historical method of interpretation of the constitution.

The state of public opinion and mores in 1937 have also been admitted by the courts as relevant in construing the Constitution (albeit to very uncertain effect) to determine whether a pre 1937 law was carried over by Article 50. In *McGee v. The Att. Gen*[6]. O'Keefe J in the High Court upheld s.17 of the Criminal Law (Amendment) Act 1935, which prohibited the importation of contraceptives, even for the importer's own personal use. He contended that public opinion as mirrored (he assumed) in the Oireachtas debates on the Act where the section was adopted without a division, showed that the public was not in favour of a right to privacy, which allowed such an importation.

However, In *McGee*[7], the Supreme Court explicitly rejected historicism and said that it was the public mores of today and not of 1937, which were relevant. As Walsh J, opined referring to the values declared in the Preamble:

> "It is but natural that from time to time the prevailing ideas of [prudence, justice and charity] may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time"[8]

It must be stressed that *McGee* institutes the concepts of

* I would like to thank Dr. Oran Doyle in particular and David Prendergast and Donal Coffey for various suggestions they have made both at the time this paper in more rudimentary form was presented to the Irish Jurisprudence Society and since. I might add that they are not in any way responsible for the views expressed herein. The text herein is a condensed version of an article that first appeared in The Independent Law Review.

1 Oliver Wendell Holmes on interpreting the Constitution. *State of Missouri v. Holland* 252 U.S. 416 (1920).
2 As will become clear the United States as a matter of linguistic convention have termed historicism original intent or variants of same which are discussed later.
3 [1940] IR 470.
4 [1962] IR 1
5 [1965] IR 411
6 [1974] IR 287,
7 Op. Cit at 5.
8 [1974] IR 284 at 319.

justice, prudence and charity, derived from the preamble, as a counterpoint to historical interpretation. [9]

In summary, historically the judicial practice with regard to the relevance to the intention of the framers or ratifiers or the state of affairs or public opinion at the enactment of the Constitution has been uneven and contradictory at best.

However, there has been a recent revival of the historical method of constitutional interpretation evidenced in particular in *Sinott v. Minister for Education*[10] Murray J. quotes the literal rule and also mentions the fact that prevailing concepts of justice, prudence and charity evolve as society changes and develops. However, the learned judge indicates that the constitution cannot be divorced from its historical context. The judge argues that primary education in the pre-1922 and post 1922 educational system was understood as ordinarily and naturally referring to the education of children and reasons that the state's obligations to provide for free primary education pursuant to Article 42.4 extends to children only. In Hardiman J's judgement, the learned judge endorses the historical method of constitutional interpretation and states that it was beyond dispute that the concept that primary education was something that might extend throughout life was entirely outside the contemplation of the framers of the constitution in 1937.

Kelly has discovered, it is submitted correctly, an ambivalence of approach in *Sinott* between the historical approach and the need to update the constitution in accordance with changing values of justice, prudence and charity[11] and the recent *Curtin v. Dail Eireann*[12] seems to commit the Supreme Court to the position that they will select which of these alternate approaches suits in a given context.

The historical context of particular language may, in certain cases, be helpful. This is not to say that taking into account the historical context of certain provisions of the Constitution excludes its interpretation in the context of contemporary circumstances.

Thus, in essence, the historical approach is useful but the judges should also realise that the constitution has to be adapted to changing social circumstances which amounts to a kind of pick and mix or *a la carte* constitutional interpretation.[13]

Even more recently in *Zappone and Gilligan v. Revenue Commissioners*[14] Ms. Justice Dunne in deciding that the right to marry did not encompass a same sex union, patently rejected a living approach to constitutional interpretation in favour of a framer's intention approach.[15] She pointed out that the *McGee living instrument* approach concerned the determination of unenumerated rights and "*natural rights antecedent to positive law*" as opposed to rights not otherwise identified in the Constitution.[16] The process of considering the Constitution as a living instrument is not one which is available to the interpretation of the Constitution itself, the learned judge contended, as opposed to the interpretation of legislation.

The learned judge then in effect utilised the historical approach to interpretation which she had referenced earlier and concluded:

> "I accept that the Constitution is a living instrument as referred to in the passage from the judgment of Walsh J. relied on by counsel for the plaintiffs but I also accept the arguments of Mr. O'Donnell to the effect that there is a difference between an examination of the Constitution in the context of ascertaining unenumerated rights and redefining a right which is implicit in the Constitution and which is clearly understood. In this case the court is being asked to redefine marriage to mean something which it has never done to date."

The problem with this analysis is the historical approach is surely less not more apt for textual existing provisions of the Constitution. If we accept the view, which will be developed in detail later, that we should show respect to the language of the text as developed by subsequent generations, then historicism is not applicable. The obligation should be to develop the meaning of the text in light of the way language changes and adapts to specific social circumstances. In contrast where the rights are unspecified, there is arguably an obligation to defer to "framers intent" and that by their non inclusion in the rights (as amended), the unspecified rights are in effect non justiciable or should never have been developed.[17]

Kelly has an interesting disquisition on the inapplicability of "original intent" in an Irish context and makes the point that unlike the US practice, the drafting of the Irish Constitution took place in private and subsequent Dail Debates marred by squabbling do not reveal the intention of the drafters. The intentionalist approach, the authors indicate, is at odds with a legal tradition which focuses on the words of the text rather than the supposed intention of the drafters. The fact that the constitution was enacted by plebiscite and subsequently amended through a series of referenda strongly suggest it is the objective meaning of the text rather than the supposed intention of the drafters which should carry more weight.

Kelly, in short, can be brought in to support the idea, argued for in this article, that it is the objective meaning and words of the text rather than the intention of the drafters that is important. It might be added that this textual meaning is plastic and evolves as society changes and evolves.

Finally, it might be mentioned that in utilising the historical approach the courts do not go the extra step and make any quantifiable attempt to work out what precisely

9 The use of justice, prudence and charity as an interpretative schema has its faults in that the language is derived from the preamble, a point I will dwell on later in the paper.

10 [2001] 2 IR 545.

11 Kelly: The Irish Constitution [Tottel Publishing] 4th Edition [2004] at 22.

12 Op Cit at 13.

13 In this context it might be noted that there is also the arbitrary non use of historicism when the courts randomly choose not to use historicism. For example would the outcome in *C.C v. Ireland*, Unreported, Supreme Court, 23rd May 2006 be different if historicism had been used? I am grateful to Dr. Doyle for this point.

14 Unreported, High Court, Judgement of 14th December 2006.

15 At Page 121 of her judgement.

16 At 126 of her judgement.

17 This theme is developed in more detail in the longer version of this piece in the independent Law Review.

was the intent of the enacters, ratifiers or framers in 1937. Although there is at times reference to contemporary statutes or Dail Debates there is no real attempt to ascertain what people (enacters, framers or ratifiers) in 1937 thought words meant. There's no reference at all to contemporary sources.

3: The Historical Approach in Irish Constitutional Law/Initial Critical Conclusions

There are a number of critical and philosophical objections to the approach of the Irish Courts. First, there is a lack of clarity in the Irish jurisprudence distinguishing between different types of historicism, all are melded together. Thus for example there is a different historicism if you adopt "framers intent" (assuming we can identify same) "ratifiers intent" (assuming we can identify same) or public opinion and public mores (again assuming we can identify same with any clarity). Such distinctions have been well etched in the writings in the United States. Second, the usage and preference for historicism as opposed to the utilisation of another approach is entirely random and inconsistent though this is subject to the caveat that recently, there has been a marked favouritism shown to the historical approach. Third, specifically with respect to the *Zaponne* case, that case in particular accepts the dubious argument that the constitution should not be embraced as a living instrument where textual rights are involved. It must be emphasised that failing to recognise that textual rights can be interpreted in a living fashion does not make sense. What was bequeathed to us by our forefathers was a text with guidance which successive generations need to re-interpret to meet their own challenges and needs.

Fourth, the politics of historicism need to be drawn out. Philosophically and politically it can be related to a conservative position that defers to executive decisions. Of course it is no accident that historicism, as in *Sinottt* for example, is closely married to judicial deference and separation of powers.

Finally and most importantly of all, why should we truly care what framers, ratifiers or public opinion thought in 1937? Of what relevance is the dead hand of history to a contemporary constitutional text?

4: Originalism and Original Intent: A Critical Analysis of The Intellectual Debate in The United States

The issue of historicism has been vibrantly discussed in the United States and welcome clarity and guidance can be derived from that. Before we undertake a survey of those writings we might note the following distinctions drawn in what, in definitional terms at least, has become a complex intellectual discussion.

(i) *Old Originalism* or *Original Intent* from the 1980's is linked to the intention of the founding fathers or a subtle shift to meet objections, the ratifiers.

(ii) *New Originalism* (if I can term it thus) or *Original Meaning Originalism* or *Original Public Meaning* focuses on the original public meaning and to one jurist[18] *writteness o*f the Constitution which might be clear but leaves a measure of indeterminancy and thus discretion for future generations.

(iii) Recently a further distinction is drawn by one new originalist[19] between *Original Meaning* and *Original Expected Application*. The argument is whereas *Original Expected Application* binds us to the intention of our forefathers *Original Meaning* gives us a text which we show attention and fidelity to and which provides a blueprint for future generations.

The parameters of the United States debate now need to be probed in more detail. In essence the original version of *Originalism (*now termed *inter alia Old Originalism*) contended that in order to construe the constitution, judges should search for the intention of the founding fathers. The view was a rejection of what was perceived as the judicial activism of the Warren and Burger courts and was initiated by Reagan's Attorney General, Edwin Meese, who argued for *"Original Intention" to put decisions back on the proper path of the intention of the founding fathers and respect democratic principles*.[20]Thus, it is important to stress that from the outset, originalism is associated with conservatism political principles. There was a subtle shift in nuance in such theorists from O*riginal Intent* to *Original Understanding* or *Original Meaning* to deal with the objection that it was the ratifiers, not the framers intention, that was important but even at the time there were powerful intellectual objections.

For example, Brest argued that we cannot share in the mental states of founding fathers or ratifiers because they might have conflicting mental states and their intentions are in detail unknowable. Further, and crucially, it seems to me, the founding fathers or ratifiers have no future intention of the state affairs and social circumstances after they lived and which the Constitution was presumably designed to cope with.[21]

Later, H. Jefferson Powell added a further criticism which is that the founding fathers did not believe that looking to the framers intention was an appropriate strategy but that it was the public words of the text that were binding.[22]

In reaction to these criticisms, the *Original Intent* movement shifted its position. Spurred on by Justice Scalia and members of Reagan's justice department, the movement now began to argue it was not the intention of the founding fathers or ratifiers that was important but the publically shared meanings of the text.

18 Barnett.

19 Jack Balkin whose views are discussed in detail later.

20 There were many speeches but representative of his views is Edwin Meese III Construing The Constitution, 19 U.C Davis L. Rev 22 (1985). The bible of the movement was by a judge; Bork, The Tempting of America(1990) who was an unsuccessful republican nominee to the Supreme Court not least for his view that original intent did not encompass the abortion right adumbrated in *Roe v. Wade* 410 US 113 (1973).

21 Paul Brest, The Misconceived Quest for The Original Understanding 60 B.Y.L.Rev 204 (1980).

22 H Jefferson Powell, The Original Understanding of Original Intent 98 Harv. L.Rev 22 (1985).

The *New Originalism* (or *"Original Meaning Originalism")* [23] has as its central idea that the meaning of the constitution is the original public meaning of the document or its conventional semantic meaning including the meaning as changed by amendment. Such theorists then began to look at dictionaries and documents of public record to ascertain what the citizen of the time thought on constitutional matters. They believed that such searches would discipline courts from engaging in judicial activism.

This view was commenced as indicated by Justice Scalia[24] and most recently has been advocated by Barnett and Whittington.[25] Such theorists are not univocal but also seem to contend that original public meaning of the constitution may not be clear in all circumstances and that because of constitutional indeterminacy, constitutional practice requires interpretation and construction. Thus, there are gaps, or to borrow the words of Hart, there is an open texture in the Constitution. Thus they allow that construction comes on the scene when the original meaning runs out. However, there is widespread disagreement as to what to do when the text runs out. Barnett contends that into that open texture a judge should resolve a case in a manner which is justice enhancing. Whittington contends that a court should defer to political branches. Two potentially opposite conclusions.

It must be emphasised that such theorists do not adequately address the scale of indeterminacy. A constitution is replete with abstract concepts and ideas that fall to be interpreted by successive generations. One cannot deny that the Constitution does not have specific words which are unambiguous, and which merit following, only that much of the rights driven language is inherently plastic and capable of multiple interpretation. If we trawl through the preamble for instance we find such concepts as "*Justice, Prudence and Charity*" or "*True Social Order*" or "*Dignity*" or "*The Common Good*" a concept that indeed pervades the constitutional text as a whole. In short, even by confining our analysis to the preamble the Constitution is replete with abstract ideas and concepts that are inherently malleable from an interpretative standpoint.

Barnett has recently argued that following the *writteneness* of the text (it does not need emphasising that we also have a written text) in some fashion legitimates the use of the states coercive power and the legitimacy of judicial action. That ultimately it defers to a theory of popular sovereignty in that the people gave their permission to that written text (which in this jurisdiction they extend frequently by referendum) with the government acting as agents of the people.

It might be noted that there are other recent defences of *Originalism* apart from the *Writtenness* argument. Whittington defends *Originalism* on popular sovereignty grounds and Solum makes the important distinction between *Descriptive Originalism* and *Normative Originalism.*[26] According to this distinction, as a purely descriptive matter, original public meaning is simply what a text does mean according to the Gricean[27] theory of language, which Solum thinks is the best available theory of meaning in this context. Whether and to what extent judges or others *ought to* adhere to this meaning is what Solum calls "*Normative Originalism."* [28]

Now all of this is very interesting but how can we be certain as to what constitutes the original semantic or public meaning of a document given the Babel of conflicting voices and motivations at the time of enactment? Further, those theorists concede that the original semantic or public reading runs out. Surely, to reiterate, a constitution is mostly though not exclusively, composed of language and ideas of great abstraction whereby the original semantic ideas (assuming we can reconstruct same) is only useful in marginal cases?[29]Finally, why should we bother even looking for an original semantic or public meaning when we are faced with present day problems? There is an immediate philosophical objection to *Old* and *New Orginalism* and that is that a text is a living instrument read through the prism of contemporary observers and for the purposes of advancing modern day concepts of justice. Even if we can ascertain an *Original Intent or Meaning* why, to adopt Solum's classification, should we normatively choose to follow it?

As Dworkin indicates:[30]

> "fairness cannot explain why people now should be governed by the detailed political convictions of officials elected long ago when popular morality, economic circumstances and almost everything else was different."

Further, Dworkin elaborates:

> "Strong historicism ties judges to historical concrete intentions even more firmly; it requires them to treat these intentions as exhausting the Constitution altogether. But this is tantamount to denying the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman's time imagination and interest stopped.

23 It should be noted at this juncture to note that the definitional categorisations remind one of the debate in The Life of Brian between the representatives of the Judean Peoples Front and The Peoples Front of Judea!

24 Representative of his views is Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989)

25 Randy Barnett, Restoring the Lost Constitution (Princeton University Press 2003); Keith Whittington, Constitutional Interpretation (University Press of Kansas 2001); Keith Whittington, Constitutional Construction (Harvard University Press 2001) .

26 Larry Solum, October 30th 2007, Semantic and Normative Originalism, Comments on Brian Lieter's Justifying Originalism in The Legal Theory Blog.

27 Grice provided, and developed, an analysis of the notion of linguistic meaning in terms of speaker meaning (according to his initial suggestion, 'A meant something by x' is roughly equivalent to 'A uttered x with the intention of inducing a belief by means of the recognition of this intention').

28 Larry Solum, October 30th 2007, Semantic and Normative Originalism, Comments on Brian Lieter's Justifying Originalism in The Legal Theory Blog.

29 In this context one might introduce the Dwokinean idea of hard cases and the interpretative obligation of judges. To the extent that Dworkin commits himself to the position that most cases are hard cases and involve interpretation then surely most constitutional cases are hard cases that involve judges searching for contemporary resolutions to deal with the abstract language of the document.

30 Law's Empire At 364

> The Constitution takes rights seriously; historicism does not."[31]

The structuralists in this context agree with Dworkin. As Margaret Davies argues:

> "It should be clear . . . that the intention of any Founding Fathers can never be the only criterion for the interpretation of a Constitution. Even if we could gain access to the minds of such people, and even if they were somehow of one mind, the authoritative thing is the text of the constitution: if the meaning of the text is not so much a function of intention, but of context, of language and culture, then the attempt to limit meaning to the first and only understanding will be futile . . we should be focusing on asking what a good (sensible, just) meaning would be, given the current social circumstances.[32]

5: Professor Balkin Steps In

A very useful contribution to the discussion has recently been provided by Professor Jack Balkin, who has also written on structuralism.[33] Professor Balkin traces the discussion from the Original Intent doctrine of the 1980's to the New Originalist position of Original Meaning Originalism or Original Public Meaning and shows how the later change was brought about by the perceived failing of Original Intent. Balkin draws a further distinction between Original Meaning and Original Expected Application. Original Expected Application binds us to the intention of our forefathers (assuming we can assess same). Original Meaning gives us a text which we show attention and fidelity to and which provides a blueprint for future generations. Original Meaning (as defined by Balkin) is a commitment to the fidelity of the text and the principles of the text which must mean different things to successive generations as words mean different things over time and the nuances of the abstract terms and vague clauses of a constitutional text shift and change. He argues for a form of redemptive constitutionalism through the passage of history where the open ended language of the constitution delegates the application of terms to future interpreters. He argues that:

> "The whole purpose of a constitution cannot be simply to forestall political judgements by later generations on important issues of justice, to preserve past practices of social custom or judgements of political morality, or to freeze existing assessments of rights in time."[34]

Balkin argues that principles existing and embedded in the constitution can be re-interpreted by successive generations to face contemporary issues. Thus he argues that the class clause in the constitution can protect the right of homosexuals even if no one at the time of enactment of the constitution knew what a homosexual was or would not have protected them even if they did know.[35]

In sum, Balkin argues for a common project and a shared political commitment over time and later lyrically for a transgenerational political project[36]

6: Dworkin on Historicism

Ronald Dworkin, as aforementioned, has written eloquently, about historicism and particularly so around the time of the nomination of Judge Robert Bork to the Supreme Court and the publication of Bork's Tempting of America[37]. In Bork's Own Postmortem,[38] he summarises his views. Dworkin draws a distinction between the framers linguistic intentions and their legal intentions and argues that although the framers linguistic intentions fix what they said, it does not follow that their legal intentions fix what they did. In assessing the legal intentions of the framers Dworkin argues:

> "They intended to commit the nation to abstract principles of political morality about speech and punishment and equality, for example. They also had a variety of more concrete convictions about the correct application of these abstract principles to particular issues. If contemporary judges think their concrete convictions were in conflict with their abstract ones, because they did not reach the correct conclusions about the effect of their own principles, then the judges have a choice to make. It is unhelpful to tell them to follow the framers intentions."[39]

Dworkin elaborates that framers intent can be viewed on levels of generality and that we must seeks to "disentangle the principle they enacted from their convictions about its proper application in order to discover the political content of their decisions."

Dworkin concludes that:

> "There is nothing abstruse or even unfamiliar in the notion that the Constitution lays down abstract principles whose dimensions and application are inherently controversial, that judges have the responsibility to interpret these abstract principles in a way that fits, dignifies and improves our political history."[40]

In short, in our constitutional system we have to ask today what equality, the common good, social justice and due process mean? We cannot be clear as to the extent and ambit of framers intent assuming we can identify same, which is well nigh impossible.

31 Law's Empire At 369
32 Margaret Davies: Asking The Law Question (Sydney: Sweet and Maxwell: 1994).
33 I am indebted to Professor Balkin in sending me the full text of his recent paper on interpretation. Jacques Balkin: Original Meaning and Constitutional Redemption, November 5th 2007. Constitutional Commentary Vol. 24 at 100.
34 At Page 130.
35 At 158.
36 At 199.
37 Op. Cit at 23.
38 An essay contained in Chapter 14 of Freedom's Law (Oxford University Press) 1996.
39 Freedom's Law at 296.
40 Freedom's Law at 305.

7: Conclusions

The position of both Balkin and Dworkin is a welcome one, In essence they are of the view that although fidelity and respect should be shown to the principles and language inherent in the text, the text requires to be interpreted by future generations and judges. Also, a form of "historicism" or "originalism" that seeks to reconstruct legislative or forefather or public mores intention is not an apposite way of dealing with contemporary problems. It might be added that the use of such a "historicism" or "originalism" would have lead to the rejection of one of the leading cases in our Constitutional law.

In *McGee v AG*[41] a right to marital privacy was recognised leading to a right to contraceptives for marital couples. Let us suppose we do what O' Keefe J did in the High Court and use the historical method by casting our mind back to 1937 and we have the added support of the Customs and Consolidation Act 1935 to evince legislative intention. Did the plain people of Ireland of comely maidens dancing at the crossroads vote for a Constitution which recognised contraception? Did the Dail Deputy two years after the Customs and Consolidation Act believe he was enshrining a charter for contraceptive usage? What about Mr DeValera or John Charles McQuaid or the myriad of civil servants who might be considered the founding fathers of the Constitution? [42]To use the historical method or new or old "originalism", *McGee* was wrongly decided.[43] *McGee* of all decisions is one where we do not have great difficulty in reconstructing original intent.[44]

Of course, the reason the court of that period did not look backwards is that they thought that historicism fails to treat the Constitution as a living instrument that changes and evolves as concepts of justice, prudence and charity change.[45]

It is a static view that our constitutional dispensation should be ruled by the dead hands of our forefathers. Further, to reiterate, why should we care much what they individually or collectively thought, beyond the principles contained in the text that they have bequeathed to us? Moreover, how can we definitively ascertain what was the intention of people or legislators or constitutional architects in 1937 at the magical moment of constitutional creation? How can we reconstruct the Babel of different voices and interpretations to provide overall clarity? And more importantly why should we? Finally, how do we know that it was the immortal intention of the framers of the constitution or the people in 1937 that time stopped and that their intentions would bind future generations to the dimensions and contours of constitutional protection?

In short, outright "historicism" and "originalism" does not do justice to a text that needs to be revisited by present day interpreters as far as rights driven claims are involved. It might be added that the freezing of a text in permafrost does not make sense to a present generation who need to resolve practical problems that revolve around the interpretation of complex concepts and values.

In fact, historicism is the worst form of judicial deference and is in fact anti-democratic. It ties the judiciary, not to deference to a present legislator and its democratic mandate but to deference to the intentions of past legislators whose democratic mandate is long gone. Moreover, it assumes the problems of the past are those of the present and that in some rose tinted way our ancestors knew best.

Further, it might be added, the distinction drawn in *Zappone*, where the construction of the constitution as a living instrument is disapplied to textual rights does not work. Our forefathers gave us a gift of a charter of rights and principles which successive generations need to flesh out and give content to. To be ruled by their contemporary intentions is in fact to be ruled by a long dead democratic mandate.

It must be admitted, as Balkin and even Dworkin intimate, that we ought to show fidelity to the principles contained in the constitutional text, that is the gift of our forefathers and we can change those principles by amendment. In short, the constitution, as amended, is textually a reflection of our sovereignty and we should embrace its textual sacredness but that does not mean that we should not develop the scope and content of existing rights to meet present needs.

On retirement, Justice Brennan argued against "original intent" on a number of grounds. He noted that the "proponents of this facile historicism justify it as a depoliticization of the judiciary" but "the political underpinning of such a choice should not escape notice" and that a "position that upholds constitutional claims only if they were within the specific contemplation of the framers in effect establishes a presumption of resolving textual ambiguity against the claim of constitutional right.". Brennan further argues, a propos the US Constitution, but equally applicable to our own, that a constitution is not just a majoritarian document, but embodies substantive value choices that are put beyond the legislature which need to be enforced by the judiciary in modern circumstances.[46]

Brennan J concludes his telling remarks in the following fashion:

> "the genius of the constitution rests not in any static meaning" but in "the adaptability of its great principles to cope with current problems and current needs" and the "ultimate question must be, what do the words of the text mean in our time."[47] ■

41 [1974] IR 287.

42 It must be stressed that the contribution of the civil servant John Hearne has been vastly under appreciated as is made clear in Keogh and McCarthy: The Making of The Irish Constitution 1937 (Mercier: 2007).

43 In this context there is of course the argument advanced by O' Donnell S.C. and accepted by Dunne J in *Zappone* that in effect the observations on justice, prudence and charity in *McGee* are confined to unspecified rights but, in my view, that is a wrong reading of the Constitution.

44 *McGee* of course declares an unspecified right. As will become clearer later in the article unspecified rights are if anything more suitable to a modified historical approach given that they involve non textual guarantees.

45 Though whether the courts were right in creating new unspecified rights which do not mirror the intention of the principles bequeathed to us by the framers is a matter of some doubt.

46 William J Brennan Jr, "The Constitution of The United States: Contemporary Ratification," 35 Res Ipsa Loquitor 4 (Fall/Winter 1985). I am indebted to Sullivan: Constitutional Interpretation and Republican Government (2006) 26 DULJ 221 at 230-231 for these quotes.

47 See footnote 46.

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Right to fair trial – Reasonable expedition – Prosecutorial delay – Systemic delay – Principles to be applied – Delay in prosecution due to applicant's judicial review to prohibit

trial – Whether applicant entitled to bring subsequent proceedings on grounds of delay in conduct of first judicial review – Whether blameworthy prosecutorial and/or systemic delay in conduct of judicial review proceedings – Whether delay referable to conduct of applicant – Whether delay breach of right to trial with reasonable expedition – *AA v Medical Council* [2003] 4 IR 302, *SM v Ireland* [2007] IESC 11, [2007] 3 IR 283, *DPP v Byrne* [1994] 2 IR 236, *PM v Malone* [2002] 2 IR 560 and *PM v DPP* [2006] IESC 22, [2006] 3 IR 172 followed; *B v DPP* [1997] 3 IR 140, *DC v DPP* [2005] IESC 77, [2005] 4 IR 281, *SA v DPP* [2007] IESC 43, (Unrep, SC, 17/10/2007), *Barker v Wingo* (1972) 407 US 514, *DPP v Byrne* [1994] 2 IR 236, *TH v DPP* [2006] IESC 48, [2006] 3 IR 520, *Barry v Ireland* [2005] ECHR. 865, (Unrep, ECHR, 15/12/2005) and *McMullen v Ireland* [2004] ECHR 404, (Unrep, ECHR, 29/7/2004) considered – onstitution of Ireland, 1937, Article 38.1 – European Convention on Human Rights, article 6 (60/2007 – SC – 5/3/2008) [2008] IESC 7
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Supply of goods – Immovable goods – Tangible property – Contract of sale – Date of completion – Liquidation – Necessary disbursement – Expense – Date on which liability to value added tax arises – Acquisition of disposable interests – Whether value added tax payment expense in liquidation – *Shipping and Forwarding Enterprise SAFE (Case C-320/88)* [1990] ECR. I-285, *Auto Lease Holland (Case C-185/01)* [2003] ECR I-1317 and *British American Tobacco (Case C435/03)* [2005] ECR I-7077 and *In re Barrett Apartments Ltd* [1985] IR 350 applied – Value-Added Tax Act 1972 (No 22), ss 3(7), 4(2) & 19(3)(b) – Sixth Council Directive 77/338/EEC, article 5 – Held VAT accrued at date of sale (2003/558COS – McGovern J – 21/2/2008) [2008] IEHC 41
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TORT

Negligence

Duty of care – Employer's liability – Nervous shock – Psychiatric illness – Damages – Public policy – Duty to ensure accurate assessment results presented – Whether employer in breach of duty of care – Whether plaintiff entitled to damages for upset, emotional upheaval and distress – *Kelly v Hennessy* [1995] 3 IR 253 applied – Claim dismissed (2006/3870P – Clarke J – 7/12/2007) [2007] IEHC 416
Larkin v Dublin City Council

Negligence

Duty of care – Proximity – Foreseeability – Local authority – Drains – Old culvert – Damage to floor of property – Whether duty of care existed – Whether duty of care breached – Whether damage reasonably foreseeable – Whether just and reasonable to impose duty – *Glencar Exploration Ltd v Mayo County Council* [2002] 1 ILRM 481 applied; *Gaffey, a minor v Dundalk Town Council* [2006] IEHC 436, (Unrep, Peart J, 5/12/2006) followed; *Ward v McMaster* [1988] IR 337 not followed – Whether party can be liable for nuisance if damage not foreseeable – *Royal Dublin Society v Yates* (Unrep, HC, 31/7/1997) applied; *Rylands v Fletcher* (1868) LR 3 HL 330 distinguished – Appeal allowed, claim dismissed (2003/998 – Peart J – 29/2/2008) [2008] IEHC 55
Dempsey v Waterford Corporation

Negligence

Employer's liability – Duty of employer – Duty at common law – Duty to take reasonable care – Reasonable and prudent employer – Garda Síochána – Dog handler – Hearing loss – Loud and continuous barking – Alleged failure to reduce noise level within vehicles – Alleged failure to create partition between dog handlers and dogs within vehicles – Alleged failure to insulate or sound-proof vehicles – Failure to provide hearing protection – Noise levels –Whether breach of statutory provision afforded civil remedy – Whether risk reasonably foreseeable – Whether failure to ascertain appropriate health and safety standards – Statutory duties – Applicability of Directive – Workers – Damages – Audiograms – 'Green Book' principles – *Dalton v Frendo* (Unrep, SC, 15/12/1977), *Bradley v CIE* [1976] IR 217 and *Doherty v Bowaters Irish Wallboard Mills Ltd* [1968] IR 277 considered – Safety Health and Welfare at Work Act 1989 (No 7), ss 2 and 6 – European Communities (Protection of Workers) (Exposure to Noise) Regulations 1990 (SI 157/1990), art 4 – Civil Liability (Assessment of Hearing Injury) Act 1998 (No 12), ss 1 to 3 – Factories (Noise) Regulations 1975 (SI 235/1975) – Damages assessed (2002/5340P – Quirke J – 18/1/2008) [2008] IEHC 7
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Negligence

Solicitors – Failure to initiate proceedings – Expiry of limitation period – Proceedings claiming damages in negligence against solicitors – Assessment of damages – Road traffic accident – Deaths of parents and brother – *Solatium* – Assessment of damages in respect of cost of care of plaintiff during childhood – Interest – Courts Act interest – Updating of historical figures to reflect present day values – Justice to parties – Damages awarded (2006/700P – O'Neill J – 23/1/2008) [2008] IEHC 14
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TRANSPORT

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Dublin transport authority act 2008 (parts 1, 7, 8 and 9) (commencement) order 2008
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Roads act 2007 (declaration of motorways) order 2008
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Taxi regulation act 2003 (dispatch operator licence) regulations 2008
SI 232/2008

Taxi regulation act 2003 (permitted use of small public service vehicle licences) regulations 2008
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Taxi regulation act 2003 (wheelchair accessible hackney and wheelchair accessible taxi licences – contact information and record maintenance) regulations 2008
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AT A GLANCE

EUROPEAN DIRECTIVES IMPLEMENTED INTO IRISH LAW UP TO 14/10/08

Information compiled by Clare O'Dwyer, Law Library, Four Courts

European communities (agricultural products) regulations 2008
REG/1234-2007
SI 213/2008

European communities (classical swine fever) (restriction on imports from Slovakia) (no.2) (amendment) regulations 2008
DEC/2008-419
SI 214/2008

European communities (classical swine fever) (restriction on imports from Slovakia) (no. 2) (revocation) regulations 2008
DEC/2008-553
SI 278/2008

European communities (classification, packaging and labelling of dangerous preparations) (amendment) regulations 2008
REG/1907-2006
SI 271/2008

European communities (classification, packaging, labelling and notification of dangerous substances) (amendment) regulations 2008
DIR/2006-121, REG/1907-2006
SI 272/2008

European communities (consumer information on fuel economy and CO2 emissions of new passenger cars) (amendment) regulations 2008
DIR/99-94
SI 230/2008

European communities (control of salmonella in laying flocks of domestic fowl) regulations 2008
REG/1168-2006, REG/2160-2003
SI 247/2008

European communities (energy performance of buildings) (amendment) regulations 2008
DIR/2002-91
SI 229/2008

European communities (export and import of certain dangerous chemicals)(industrial chemicals) (enforcement) (revocation) regulations 2008
REG/304-2003
SI 269/2008

European communities (feeding stuffs intended for particular nutritional purposes) (amendment) regulations, 2008
DIR/2008-4
SI 222/2008

European communities (financial checks) regulations 2008
REG/1083-2006, REG/1828-2006
SI 264/2008

European communities (harmonisation of technical requirements and administrative procedures in the field of civil aviation) regulations 2008
REG/3922-91
SI 283/2008

European communities (health of aquaculture animals and products) regulations 2008
DIR/2006-88, DEC/2004-453, DEC/2006-272]
SI 261/2008

European communities (internal market in electricity) (Electricity Supply Board) regulations 2008
DIR/2003-54
SI 280/2008

European communities (internal markets in natural gas) (BGE) (amendment) regulations 2008
DIR/2003-55
SI 239/2008

European communities (Iran) (financial sanctions) regulations (no. 2) 2008
REG/423-2007
SI 265/2008

European communities (manufacture, presentation and sale of tobacco products) (amendment) regulations 2008
DIR/2001-37
SI 255/2008

European communities (marketing of meat of bovine animals aged 12 months or less) regulations 2008
REG/700-2007
SI 245/2008

European communities (mechanically propelled vehicle entry into service) (amendment) regulations 2008
DIR/2005-64, DIR/2006-40
SI 195/2008

European communities (milk quota) regulations 2008
REG/1234-2007, REG/248-2008, REG/595-2004, REG/1468-2006, REG/1913-2006
SI 227/2008

European communities (motor insurance) regulations 2008
DIR/2005-14
SI 248/2008

European communities (passenger car entry into service) (amendment) regulations 2008
DIR/2007-35
SI 197/2008

European communities (water policy) (amendment) regulations, 2008
DIR/2000-60
SI 219/2008

Financial transfers (Iran) (prohibition) order (no. 2) 2008
REG/423-2007
SI 266/2008

Recognition of professional qualifications of dentists (directive 2005/36/EC) regulations, 2008
DIR/2005-36, DIR/2006-100, DIR/2004-38, DIR/2004-83
SI 263/2008

Waste management (batteries and accumulators) regulations 2008
DIR/2006-66
SI 268/2008

ACTS OF THE OIREACHTAS 2008 AS AT 13TH OCTOBER 2008 (30TH DÁIL & 23RD SEANAD)

Information compiled by Clare O'Dwyer, Law Library, Four Courts

1/2008	Control of Exports Act 2008 *Signed 27/02/2008*
2/2008	Social Welfare and Pensions Act 2008 *Signed 07/03/2008*
3/2008	Finance Act 2008 *Signed 13/03/2008*
4/2008	Passports Act 2008 *Signed 26/03/2008*
5/2008	Motor Vehicles (Duties and Licences) Act 2008

Signed 26/03/2008

6/2008 Voluntary Health Insurance (Amendment) Act 2008
Signed 15/04/2008

7/2008 Criminal Justice (Mutual Assistance) Act 2008
Signed 28/4/2008

8/2008 Criminal Law (Human Trafficking) Act 2008
Signed 07/05/2008

9/2008 Local Government Services (Corporate Bodies) (Confirmation of Orders) Act 2008
Signed 20/05/2008

10/2008 Prison Development (Confirmation of Resolutions) Act 2008
Signed 02/07/2008

11/2008 Electricity Regulation (Amendment) (Eirgrid) Act 2008
Signed 08/07/2008

12/2008 Legal Practitioners (Irish Language) Act 2008
Signed 09/07/2008

13/2008 Chemicals Act 2008
Signed 09/07/2008

14/2008 Civil Law (Miscellaneous Provisions) Act 2008
Signed 14/07/2008

15/2008 Dublin Transport Authority Act 2008
Signed 16/07/2008

16/2008 Nuclear Test Ban Act 2008
Signed 16/07/2008

17/2008 Intoxicating Liquor Act 2008
Signed 21/07/2008

BILLS OF THE OIREACHTAS AS AT 13TH OCTOBER 2008 (30TH DÁIL & 23RD SEANAD)

[pmb]: Description: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Information compiled by Clare O'Dwyer, Law Library, Four Courts

Arbitration Bill 2008
Bill 33/2008
1st Stage – Dáil

Biofuels (Blended Motor Fuels) Bill 2007
Bill 11/2007
2nd Stage – Dáil **[pmb]** *Deputies Denis Naughten, Richard Bruton, Fergus O'Dowd, Olivia Mitchell and Bernard J. Durkan*

Broadband Infrastructure Bill 2008
Bill 8/2008
1st Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Broadcasting Bill 2008
Bill 29/2008
Report Stage – Seanad

Charities Bill 2007
Bill 31/2007
Committee Stage – Dáil

Civil Liability (Amendment) Bill 2008
Bill 46/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Civil Partnership Bill 2004
Bill 54/2004
2nd Stage – Seanad **[pmb]** *Senator David Norris*

Civil Unions Bill 2006
Bill 68/2006
Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Cluster Munitions Bill 2008
Bill 19/2008
2nd Stage – Dáil **[pmb]** *Deputy Billy Timmins*

Competition (Amendment) Bill 2007
Bill 47/2007
2nd Stage – Dáil **[pmb]** *Deputies Michael D. Higgins and Emmet Stagg*

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad *(Initiated in Seanad)*

Credit Institutions (Financial Support) Bill 2008
Bill 45/2008
Committee Stage – Dáil

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Feargal Quinn, Shane Ross and Ivana Bacik*

Criminal Law (Admissibility of Evidence) Bill 2008
Bill 39/2008
1st Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Criminal Law (Home Defence) Bill 2008
Bill
2nd Stage – Dáil **[pmb]** *Deputies Charles Flanagan and Michael Ring*

Data Protection (Disclosure) (Amendment) Bill 2008
Bill 47/2008
1st Stage – Dáil **[pmb]** *Deputy Simon Coveney*

Defamation Bill 2006
Bill 43/2006
Report Stage – Seanad

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Electoral (Amendment) Bill 2008
Bill 38/2008
2nd Stage – Dáil

Electoral Commission Bill 2008
Bill 26/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Law Compliance Bill 2008
Bill 18/2008
1st Stage – Dáil

Enforcement of Court Orders (No.2) Bill 2004
Bill 36/2004
1st Stage – Seanad **[pmb]** *Senator Brian Hayes*

Ethics in Public Office Bill 2008
Bill 10/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil *(Initiated in Seanad)*

Finance Bill 2008
Bill 3/2008
Committee Stage – Seanad

Fines Bill 2007
Bill 4/2007
1st Stage – Dáil

Freedom of Information (Amendment) Bill 2008
Bill 24/2008
2nd Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Brendan Ryan, Alan Kelly, Michael McCarthy and Phil Prendergast*

Freedom of Information (Amendment) (No.2) Bill 2008
Bill 27/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Fuel Poverty and Energy Conservation Bill 2008
Bill 30/2008
2nd Stage – Dáil **[pmb]** *Deputy Liz McManus*

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Harbours (Amendment) Bill 2008
Bill 42/2008
Committee Stage – Dáil

Housing (Miscellaneous Provisions) Bill 2008
Bill 41/2008
Committee Stage – Dáil

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan*

Human Body Organs and Human Tissue Bill 2008
Bill 43/2008
2nd Stage – Seanad

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Committee Stage – Dáil

Immigration, Residence and Protection Bill 2007
Bill 37/2007
1st Stage – Seanad *(Initiated in Seanad)*

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
Bill 42/2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke*

Juries (Amendment) Bill 2008
Bill 25/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Land and Conveyancing Law Reform Bill 2006
Bill 31/2006
Committee Stage – Dáil *(Initiated in Seanad)*

Legal Practitioners (Qualification) (Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

Legal Services Ombudsman Bill 2008
Bill 20/2008
2nd Stage – Dáil

Local Elections Bill 2008
Bill 11/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

Mental Capacity and Guardianship Bill 2007
Bill 12/2007
Committee Stage – Seanad **[pmb]** *Senators Joe O'Toole and Mary Henry*

Mental Health (Involuntary Procedures) (Amendment) Bill 2008
Bill 36/2008
2nd Stage – Seanad **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle.*

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Nursing Homes Support Scheme Bill 2008
Bill 48/2008
1st Stage – Dáil

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn*

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** Senators *Joe O'Toole, Paul Coghlan and David Norris*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
1st Stage – Dáil

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
1st Stage – Dáil

Privacy Bill 2006
Bill 44/2006
1st Stage – Seanad

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
2nd Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Protection of Employees (Agency Workers) (No. 2) Bill 2008
Bill 16/2008
1st Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Alan Kelly, Michael McCarthy, Phil Prendergast and Brendan Ryan*

Public Appointments Transparency Bill 2008
Bill 44/2008
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Registration of Lobbyists Bill 2008
Bill 28/2008
2nd Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
1st Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Spent Convictions Bill 2007
Bill 48/2007
2nd Stage – Dáil **[pmb]** *Deputy Barry Andrews*

Student Support Bill 2008
Bill 6/2008
2nd Stage – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
2nd Stage – Dáil

Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

Twenty-eighth Amendment of the Constitution Bill 2008
Bill 14/2008
Report and Final Stages – Dáil

Victims' Rights Bill 2008
Bill 1/2008
2nd Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

Witness Protection Programme (No. 2) Bill 2007
Bill 52/2007
1st Stage – Dáil **[pmb]** Deputy Pat Rabitte

ABBREVIATIONS

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

The references at the foot of entries for Library acquisitions are to the shelf mark for the book.

Reform of the Statute Book and Access to Legislation

Heather Mahon*

Introduction

Regulatory reform and access to legislation in Ireland have been the subject of detailed examination during the last decade with a number of reports examining and making recommendations in these areas. This has led to the implementation of programmes of statute law restatement and revision as well as a review of the how the Legislation Directory can best serve its user content in terms of content and functionality. These issues will be discussed below.

Statute Law Restatement

In May 2006, a Government decision conferred responsibility for statute law restatement on the Law Reform Commission. Statute law restatement is the administrative consolidation of an Act with its subsequent amendments, as provided for in the Statute Law (Restatement) Act 2002.[1] A restatement may exclude spent, repealed or surplus provisions, and may include Statutory Instruments. A restatement is certified by the Attorney General as an up to date statement of the Act in question as amended, and is made available in print or electronic form as a single text.[2] A restatement does not have the force of law nor does it alter the substance of the law.[3] It does not require parliamentary time or enactment. A restatement is *prima facie* evidence of the law contained in the provisions to which it relates, and shall be judicially noticed.[4] The Commission has now published its *Report on Statute Law Restatement*[5] which contains full details of its first restatement programme.

Legislation Directory

The Commission has also recently published a Consultation Paper on the Legislation Directory inviting submissions on the future development of that database.[6] The Legislation Directory (formerly known as the Chronological Tables of the Statutes)[7] is a publicly available database hosted on the electronic Irish Statute Book website at www.irishstatutebook.ie.[8] Its main purpose is to document modifications made to primary legislation by subsequent legislation. The resource provides a vital source of information which aids legal professionals, legislators and lay persons to inform themselves as to the current position of the law. In 2007, responsibility for the maintenance of this database transferred from the Office of the Attorney General to the Law Reform Commission.

Statute Law Revision

In parallel with the activities of the Law Reform Commission, the Statute Law Revision Unit (SLRU) within the Office of the Attorney General has carried out a comprehensive review of all public general statutes enacted between 1235 and 1922 to identify those which are still in force and relevant to Ireland. The Statute Law Revision Act 2007 contains a "white list" of 1,364 pre-1922 Acts which continue in force in whole or in part at the time of its passage into law.[9]

The SLRU has now embarked on the second phase of this project. It will examine Local and Personal Acts and Private Acts initially and subsequently Charters and Letters Patent and Statutory Rules and Orders. The category of Local and Personal Acts and Private Acts comprises more than 33,000 statutes. The intention is in the first instance to bring forward a Bill by 2010 which would repeal any pre-1922 Local and Personal Acts and Private Acts that are now obsolete. The SLRU is also examining a limited number of post-1922 Acts that are clearly spent and unnecessary. It is envisaged that such Acts will be formally repealed in due course.[10]

Better Regulation and the Streamlining of Legislation

The activities outlined above form part of the Government's strategy of "Better Regulation" in Ireland. In 1999, the Government adopted the recommendations in *Reducing Red*

* Project Manager/Legislation Directory, Law Reform Commission

1 The Office of the Attorney General had initial responsibility under the legislation.
2 Section 8 of the 2002 Act.
3 Section 4 of the 2002 Act.
4 Section 5 of the 2002 Act.
5 Law Reform Commission, *Report on Statute Law Restatement* (LRC 91 - 2008)
6 Law Reform Commission, *Consultation Paper on the Legislation Directory: Towards a Best Practice Model* (LRC CP 49 - 2008)
7 Following the Commission's assumption of responsibility, the Commission made the decision in late November 2007 to change this name to "Legislation Directory". This decision was taken in order to better indicate to potential users the function of this resource as a guide to legislative effects. It also marked out the new allocation of responsibility for this resource to the Commission, which in due course will lead to new innovations in terms of presentation and functionality.
8 This website is maintained by the Office of the Attorney General
9 As of 8 May 2007
10 See http://www.attorneygeneral.ie/slru/slrp.html

Tape – An Action Programme of Regulatory Reform in Ireland.[11] The report focused on the importance of regulation to continued economic growth and greater competitiveness. A key recommendation of this report was the need to make "legislation more coherent and more easily accessible to those who need it."[12] The report marked the beginning of a new national programme of regulatory reform which recognised the benefits of having "Statute Law consolidated in a form that is both easily accessible and available."[13]

In 2001, the OECD published a report *Regulatory Reform in Ireland.*[14] This report advocated the establishment of a coherent programme of statute law reform and revision in Ireland. The report also highlighted the connection between regulatory reform and continuing economic growth. In response to the OECD Report, in 2004 the Government issued a White Paper entitled *Regulating Better.*[15]

This White Paper stated that:

> "In relation to improved access for citizens to the existing stock of legislation, our programme for delivering e-Government will make provision for the accessibility of Acts, Statutory Instruments, the Chronological Tables … and related materials such as Dáil and Seanad Debates. These initiatives will be structured to complement similar developments at EU level. In addition, the programme of Statute Law Revision will outline specific targets and priorities for using repeal, consolidation and restatement to streamline existing legislation."[16]

The White Paper laid out an action plan to achieve these goals. One aspect of this plan addressed pre-1922 legislation and proposed that

> "A programme (under the remit of the Statute Law Revision Unit) will be put in place to analyse pre-1922 legislation with a view to:
> - Identifying moribund legislation and repealing it through the introduction of a Bill;
> - Re-enacting legislation that is still useful, removing anomalies in the process; and
> - Streamlining/simplifying the Statute Book as necessary."[17]

As detailed above, the *Statute Law Revision Act 2007* and the continuing work of the SLRU is a significant step towards addressing the first and third of these objectives.[18] Further, the work of the Law Reform Commission in relation to Statute Law Restatement also plays a valuable role in achieving the third objective set out above.

The Law Reform Commission's Programme of Statute Law Restatement

The Commission's Report on Statute Law Restatement proposes a First Programme of Restatement to be completed between July 2008 and December 2009. This will include:

- Freedom of Information Act 1997 (close to 100 amendments), Data Protection Acts 1988 and 2003 (over 70 amendments), Prevention of Corruption Acts 1889 to 2005 and Criminal Procedure Act 1967;
- Six suites of related legislation: Ethics in Public Office legislation (3 Acts), Firearms legislation (8 Acts), Civil Liability and Statute of Limitations legislation (13 Acts), Employment Leave legislation (7 Acts), Proceeds of Crime legislation (3 Acts) and Equality legislation (3 Acts);
- Updates to four existing Restatements carried out by the Office of the Attorney General: Sale of Goods Act 1893 and Part II of the Sale of Goods and Supply of Services Act 1980, Defence Acts 1954 to 1998 and Court Martial Appeals, Tourist Traffic Acts 1939 to 2003, and Succession Act 1965.

The Commission has also proposed the formation of a user group to assist in the development of future programmes of restatement, to represent user interests in this development process and to set standards for restatement. The group will also serve as a focal point for representations and suggestions to be brought to the attention of the Commission. It is envisaged that this group will include stakeholders in the restatement project such as the Office of the Attorney General and in particular the Office of Parliamentary Counsel, Government departments, topic steering groups such as the Criminal Law Codification Advisory Committee, members of the legal profession and the academic community, and other groups who work with legislation on a regular basis including the social partners and those representing consumer interests.

Better Regulation and Accessibility of Legislation

Another aspect of the White Paper action plan was described as "Improved Access to Legislation".[19] Adequate access to legislation is crucial and it can be contended that there is a fundamental obligation on a state, which produces large quantities of legislation, to make this legislation accessible

11 *Reducing Red Tape – An Action Programme of Regulatory Reform in* Ireland (Department of the Taoiseach, 1999). Available at http://www.betterregulation.ie
12 *ibid.* at 6
13 *ibid.*
14 *Regulatory Reform in Ireland* (OECD, 2001). Available at http://www.betterregulation.ie
15 *Regulating Better, A Government White Paper setting out six principles of Better Regulation* (16 January 2004). Available at http://www.betterregulation.ie
16 *ibid.* at 25
17 *ibid.* at 37
18 Further, a number of other re-enactment and reform Bills are before the Oireachtas or in preparation. These include the Land and Conveyancing Law Reform Bill 2006. This Bill when enacted will repeal approximately one tenth of the remaining pre-1922 statutes. See the Law Reform Commission's *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).
19 *op. cit.* at 38

to the public.[20] This can be seen to flow from the role that legislation plays in governing the relationship between state and citizen. One of the basic principles of our legal system is that "ignorance of the law is no excuse". There are fundamental problems in requiring people to be bound by laws which they cannot reasonably be expected to find, interpret or understand.[21]

Improvements in the accessibility of the law also serve to enhance the accountability of the law. Peter Martin, one of the co-founders of the Legal Information Institute at Cornell University, has commented that:

> "Efforts to make law more accessible, more understandable, more clearly expressed are ultimately efforts to make law more effective and in a democracy, more accountable."[22]

The electronic Irish Statute Book[23] and the information provided by the Houses of the Oireachtas website[24] have both already made valuable contributions to enhancing the accessibility of statute law for the citizen. The Legislation Directory also plays a particularly significant role here.

The Legislation Directory – the Chronological Table of the Statutes

In its recent Consultation Paper, the Commission conducted a review of the current content and functionality of the Legislation Directory.[25]

The core purpose of the Legislation Directory is to detail how primary legislation enacted between 1922 and 1995 has been affected by subsequent legislative developments. This core information is contained in a listing entitled "A chronological list of the Public General Acts enacted from 6 December 1922 to 31 December 2005".[26] The Commission has noted a number of deficiencies in the compilation of this listing.

First, it is unclear for users whether an amending provision listed on this chronological table has, in turn, been subsequently amended or indeed repealed. Currently, these details do not appear in the Legislation Directory beside the Table for the Principal Act. The user has to conduct further research in this regard. The Commission proposes the inclusion of a warning on the website to alert users to this deficiency.

There is also inconsistency in the presentation of the affecting provisions. At present, the sections of an Act which contain affecting provisions are hyperlinked, however, the schedules of Acts that contain similar provisions are not. This presents a significant navigational barrier.[27] The Commission proposes to examine the current structures within the Legislation Directory to ascertain if these deficits can be remedied.

There is currently no facility to view secondary legislation made under an enabling power in primary legislation. The Commission is taking steps to address this deficit in respect of legislation enacted after 31 December 2005.

Further, there is no chronological list to chart the effects of Statutory Instruments. Essentially, this means that if the Statutory Instruments has been amended or repealed, there is no formal mechanism within the Legislation Directory to ascertain this information.[28]

Commencement Provisions

The Legislation Directory also contains "An alphabetical list of Acts in force, which were brought into operation either in whole or in part by Orders made on or before 31 December 2005". This listing refers to Acts which have been commenced by way of Commencement Orders. However, Acts which were commenced on enactment or have not been commenced are not recorded on this list. The user must then investigate further to ascertain into which category an Act falls. This deficit is significant as it may be essential to the user to be able to ascertain the date that an Act or a provision of an Act came into force. Conversely, the user may wish to confirm that a particular provision has not come into force.

The Commission's survey of practice in other jurisdictions indicates that the current position does not represent international best practice in the area. In the United Kingdom, the Statute Law Database incorporates "Coming into Force" information in the Legislative Tables.[29] Similar methods are used in Manitoba and Ontario.[30] The Commission regards the inclusion of comprehensive commencement information as a deliverable which should be within the remit of the Legislation Directory. It is thus proposed that the commencement status of each Act be included in a new field on each Act table for primary legislation enacted after 31 December 2005.[31]

20 Bartholomew "Statute Law Revision" (1971) 1 *Hong Kong Law Journal* 274

21 See comments by the Minister of State, Tom Kitt during discussions on the Statute Law Revision Bill 2004. Dáil Debates Vol. 608 No. 2 Col. 398 (20 October 2005)

22 Martin & Foster, "Legal Information - A Strong Case for Free Content, An Illustration of How Difficult "Free" May Be to Define, Realize, and Sustain". Available at http://www4.law.cornell.edu/working-papers/open/martin/free.html

23 http://www.irishstatutebook.ie

24 http://www.oireachtas.ie. This site contains pdf. versions of the Acts of the Oireachtas from 1997 onwards. Some Acts from 1992 to 1997 are also included at this link. This is not a complete list, however, as pdf. versions for all Acts of the Oireachtas from 1992 to 1997 are not available. It also provides access to Bills at various stages before the Houses of the Oireachtas as well as Dáil and Seanad debates. Further, bilingual versions of some Acts of the Oireachtas can be accessed at http://www.acts.ie.

25 A comprehensive review of the Commission's proposals is outside the remit of this article but a number of these are dealt with below.

26 A similar listing is available for the Private Acts entitled "A chronological list of the Private Acts from 6 December 1922 to 31 December 2005".

27 A difficulty also arises in relation to Statutory Instruments. If an affecting provision is a Statutory Instrument, then the hyperlink is to the Statutory Instrument only. The user must look for the affecting provision within the Statutory Instrument themselves.

28 The compilation of this listing is not within the remit of the Legislation Directory project transferred to the Commission.

29 http://www.statutelaw.gov.uk/

30 http://www.gov.mb.ca/chc/statpub/index.html; http://www.e-laws.gov.on.ca/navigation?file=home&lang=en

31 The Commission considers that it may be problematic to introduce the new system in respect of existing legislation as it could

Pre-1922 Legislation

The corpus of statute law applicable in this jurisdiction reflects the historical legacy of pre-Independence statute law of the United Kingdom. However, this is not reflected in the Legislation Directory. The only pre-1922 Acts listed on the database are those which have been affected by post-1922 legislation. This means that if a pre-1922 Act has not been affected by post-1922 legislation it is not included in the Legislation Directory, even though it may still be in force in Ireland. Further, if a pre-1922 Act has been affected by post-1922 legislation, the Legislation Directory will only list its post-1922 legislative history. The fact that it may have been amended pre-1922 will not be evident to the user. The aforementioned problems are compounded by the cataloguing on the Legislation Directory of pre-1922 Acts which have been affected by post-1922 affecting provisions in Tables which are separate from those for post-1922 Acts. The Commission has invited submissions on the integration of pre-Independence legislative effects to the Legislation Directory to form a united database.

General Matters

Currently, the Legislation Directory is updated sporadically rather than an ongoing basis. The Commission would like to see regular updates to the database.

The Commission would also like to consider the general presentation of the database to make it more accessible to users.

Also, the Commission has noted inconsistencies in the use of abbreviations on the Legislation Directory with the same abbreviation being used in multiple situations or the same wording being represented by more than one abbreviation. The Commission proposes the avoidance of abbreviations where possible into the future.

The Future – eLegislation

The Commission sees the Legislation Directory and Statute Law Restatement projects as part of the Government's wider eLegislation strategy[32] and it is committed to ensuring that the ongoing work in these areas will complement and be fully compatible with the development of that larger project.

However, the precise parameters of what is encompassed within "eLegislation" remains unclear as there is no uniformly accepted definition of the exact scope of eLegislation. The concept varies from jurisdiction to jurisdiction. In its purest form eLegislation initiatives appear to envisage the elimination of paper from the legislative process altogether. An eLegislation project can encompass all aspects of the legislative process from the drafting of legislation, to its progression through Parliament, to the publication of the legislation.[33]

The Commission believes that the implementation of a comprehensive eLegislation strategy would bring considerable benefits to all involved in accessing legislation. This would range from those preparing or drafting legislation and those involved in the progression of legislation through the Houses of the Oireachtas, to members of the public who require access to legislation. Ultimately, the successful implementation of eLegislation could allow access to up to date authenticated versions of consolidated legislation online.

The Commission also believes that the implementation of a comprehensive eLegislation strategy would complement the original objectives and policies set out in the report on *Reducing Red Tape – An Action Programme of Regulatory Reform in Ireland*[34] and the White Paper *Regulating Better* mentioned above.[35] ■

introduce inconsistencies into the presentation of legislation on the Legislation Directory in circumstances where legislation has been enacted but not yet commenced or remains only partially commenced.

32 Significant elements of this eLegislation strategy are already in place in Ireland. These include the electronic Irish Statute Book (eISB), the eSIs, an electronic system to allow for faster and more accurate production of Statutory Instruments in both final printed format and in an electronic format that is suitable for placing the Statutory Instruments on the eISB, and the Legislative Workbench system in the Houses of the Oireachtas, which allows the Bills Office to process bills and amendments in an XML environment.

33 Examples of advanced eLegislation strategies can be seen in Australia, Tasmania and New Zealand. These are discussed in detail in Chapter 4 of the Consultation Paper.

34 *Reducing Red Tape – An Action Programme of Regulatory Reform in* Ireland (Department of the Taoiseach, 1999). Available at http://www.betterregulation.ie.

35 *Regulating Better, A Government White Paper setting out six principles of Better Regulation* (16 January 2004). Available at http://www.betterregulation.ie

Double Jeopardy – How many trials to Babylon?

David Goldberg SC

> "When votes are equal the accused must have acquittal."
> Euripides. *Electra.*[1]

History of the Doctrine of Double Jeopardy

Juries existed in Ancient Greece and consisted of 12 men. When Orestes murdered his mother Clytemnestra, he was charged with matricide. His trial was transferred from Argos to Athens. Counsel was retained: yet he was uncertain whether he should turn. Castor, and his twin brother Polydeuces, sons of Zeus, strongly advised him to stand trial because of the likelihood of a hung jury. "…this court has been trusted by both men and gods. There you must also run the risk of trial for murder. But the voting pebbles will be cast equal and save you, you shall not die by the verdict. Loxias will take all blame on himself for having asked your mother's death, and so *for the rest of time, this law shall be established.*"[2] (emphasis mine)

Was it so?

The law of ancient Greece applied the principle of Double Jeopardy. The rule *Nemo debet non his vexari* applied in Athens if not in Sparta.[3] The doctrine is even older than Greece. It appears in the Hebrew Bible in the writing of the Prophet Nahum:

> "What do ye imagine against the Lord? He will make an utter end: affliction shall not rise up the second time. Though I have afflicted thee, I will afflict thee no more."[4]

In England, the origin of the doctrine is traced to the conflict in the late 12th century between the civil and ecclesiastical powers represented by Henry II and Archbishop Thomas à Becket.[5] English law developed on the basis that a man could plead he had previously been convicted or acquitted.[6] The classic definition of Lord Coke in his Institutes was *auterfoitz acquite, auterfoitz convicte, and auterfoitz attain*[7]. The doctrine is now encompassed in constitutional, statute, and human rights law.[8]

Although it is generally understood in its classic definition, the doctrine is sufficiently wide to encompass other sides of the argument such as *res judicata, issue estoppel,* as well as *pleas in bar.* It applies to all stages in the criminal justice process: prosecution, conviction and punishment.[9] The Australian High Court noted that:

> "Because Double Jeopardy is spoken of at different stages of the process of criminal justice and the presence of other (sometimes competing) forces means that the treatment of Double Jeopardy has not always been clearly based on identified principles, it is not possible to resolve all the apparent inconsistencies that can be identified in the application of the rule against Double Jeopardy…We do not attempt to do so."[10]

The non vexation rule applies not only to *res judicata* but also to vexatious litigation and abuse of process. This is known as the rule against Double Jeopardy.[11]

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1 Euripides, The Electra, Edited by David Grene and Richmond Lattimore, The Modern Library New York

2 *Ibid.*

3 Jones, Law and Legal Theory of the Greeks (1956) at 148. Also Demosthenes speech "Against Leptines" in 355 BC, "Now the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort." Demosthenes , trans Vance 1962 at 589, cited in *U.S. v Jenkins* 490 F2d 868 at 870 (1973) affirmed 420 US 358 (1975).

4 1 Nahum 9, 12. St Jerome drew from this the rule that God does not punish twice for the same act. See *Bartkus v Illinois* 359 US 121 at 152 (1959) Black J. Cited *Pearce v Queen* 1998 HCA 57 fn 94.

5 Friedland, Double Jeopardy at 326, cited Pearce. Kirby J at fn 95 notes "According to other writers, the acceptance of the doctrine by the common law from ecclesiastical law (derived in turn from Roman Law) was much more hesitant and intermittent and was not the result of a single event. See *Cooke v Purcell* (1988) 14 NSWLR 51 at 54-55.

6 Wells J traced the history in *R v O'Loughlin* (1971) 1 SASR 219 at 239-252.

7 By the time of Sir Matthew Hale, the spelling was changed to that by which we known the doctrine to-day: auterfoits acquit, auterfoits convict. They related to the *mesme felony ou trason, i.e* the same crime or felony of treason. What amounted to the same crime amounted to the same debate in the 17 century as it does to-day.

8 *Pearce v The Queen*, supra.

9 *Ibid.*

10 *Ibid.* McHugh, Hayne and Callinan JJ. Para 14.15. The court also noted: "That there may be cases in which the repeated prosecution of an offender in circumstances where that offender has no plea in bar available would be an abuse of process is illustrated by *Rogers v Queen*." Para 29. Rogers was a case about issue estoppel where the court held that issue estoppel has no place in criminal trials. Considered and applied here in *Lynch v Moran* 2006 IR.

11 *Ibid*, Gummow J para 53, 54. To the three concepts referred to supra, Gummow J adds a fourth, *transit in rem judicatam.* A cause of action is changed into a judgment of record. The court further notes at para. 67 "In Australia, concerns with Double Jeopardy have come to be expressed at common law in differing ways by an evolutionary process which has crossed what often in the legal system is a false divide between substance and procedure. Thus, even if a plea in bar is not available, successive prosecution may be an abuse of process.

Double Jeopardy as vexation or abuse

Despite the very narrow understanding of the doctrine in old English law, some courts nowadays are broad minded enough to recognise that there are circumstances where to continue prosecuting becomes either Double Jeopardy, vexation, or abuse.

The question is how many times can a man be tried for the same offence where two juries have twice failed to reach verdicts for the same offence. Recently, this was argued in *DS v Judges of the Cork Circuit and DPP*[12] before O'Neill J and the Supreme Court (2008).

It was always thought that a person could be retried until a result was achieved.[13] This seemed to run counter to the meaning of the word "Jeopardy". Jeopardy in modern English simply means risk, or, as the US Supreme Court have frequently described it, "running the gauntlet."[14] The term is now not always understood to mean that jeopardy attaches at the beginning of a trial and does not end until there is a verdict. Brennan J in his dissent in *Richardson v US*[15] said it required a common sense approach. "The question," he wrote "is whether a trial has ended is distinct from the question whether a new trial is permissible."[16] What that court, and also the same Court in *Arizona v Washington*[17] said was that a prosecution is entitled "to one and only one, full and fair opportunity to convict the defendant."[18]

Triple Jeopardy?

From these decisions, we can say that Double Jeopardy, if viewed as an abuse of process, may be sufficiently broad to prohibit a third trial. This does not end the matter. It raises the issue of triple jeopardy. In *Demirock v The Queen,*[19] where an accused had spent time in jail through no fault of his own, he was deemed not to have had a fair trial, though he had "twice run the gauntlet." Murphy J dissenting in part, said that the appellant had had enough and should not "be subject to triple jeopardy". This was adopted by O'Neill J in his judgment in *D.S.*[20] He further concluded:

> "It could not ever reasonably be said, in my view, that a person could be exposed to say four or five more trials for the same offence where there had been jury disagreements in all the previous trials. As a matter of common sense and decency, reasonable people would say that at some point enough is enough."

Kirby J. in *Pearce*[21], tried to understand the foundations of the term "Double Jeopardy". The two maxims, *nemo debet bis puniri*, and *nemo debet bix vexari,* were, he said, "difficult to separate." The court adopted the passage from the US Supreme Court in *Green v Ohio*, the seminal explanation for the doctrine.[22]

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[23]

Abuse of Process?

The development of the doctrine under the guise of abuse of process is carried further by the decision in *Queen v Carroll.*[24] Again, it emphasised the dual approach of the power and resources of the State to prosecute as being much greater than those of the individual to defend. The consequence of this is that, without safeguards, the power to prosecute could become an instrument of oppression. The Australian High Court recognised that in addition to the four considerations referred to, namely, 1) the imbalance of power between prosecution and accused, 2) seriousness for an accused of conviction, 3) prosecution as an engine of persecution and 4) importance of finality, there exists the constitutional right of society to have all crimes properly investigated and where there is a person found responsible, that such individual be brought to trial before a judge and jury. If convicted, that person is entitled to a just judgment. The balance must be struck. The DPP has in the first instance the right and power under statute to prosecute. The accused is entitled to a fair trial with due process and expedition. According to *Carroll,* there is no universal rule of application: such would be an error. Nor is there any single test. There are therefore many cases which are not covered by the formal, classic definition of Double Jeopardy, yet while not within the meaning of the clause in substance, they do come within it in form.[25]

12 2007 2 IR 298.
13 In *A.G v Kelly* 1938 1 IR 109 where O'Sullivan CJ said "a man could be tried as often as necessary."
14 *Green v Ohio* 355 US 184 (1957).
15 (1984) 468 US 317.
16 *Ibid.*
17 434 US 497.
18 *Arizona v Washington* 434 US 497 (1978) 2000 AER 449.
19 1977 137 CLR 20, 38.
20 2007 2 IR 298.
21 *Pearce v The Queen* (1998) HCA 57 at para. 89 et seq.
22 *Green v Ohio* 355 US 184.
23 This case, and in particular this seminal passage has been cited by the US Supreme Court in several of its own decisions, and also laid the foundation for the decisions in the Australian High Court in *Peace*, *supra*; *Carroll* 2002 HCA 57, and *Demirock* 1997 137 CLR 20. See also the leading English case on autrefois, *Connelly v DPP* 1964 AC 1254 at 1340 where Lord Devlin said: "If I had felt that the doctrine of autrefois was the only form of relief available to an accused who had been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go." This, said Kirby J, explains the "inextricable confusion in the law of Double Jeopardy" as it developed around the pleas in bar.
24 *Supra.*
25 *Queen v Carroll* 2002 HCA 55 at paragraph 130. It notes that "To remedy these and other defects … the common law courts have applied other weapons…to make the Double Jeopardy principle more effective. …they now intervene…by staying proceedings that they consider are an abuse of their process.... In *Connolly v DPP,* the House of Lords rejected the Crown's argument that it could be trusted not to abuse its position by bringing further proceedings related to the same facts on which an accused person had been convicted or acquitted. Lord Devlin famously said: 'The

A Deadlocked Jury

In the time of Lord Coke, once a jury was enclosed, it could not be discharged until it reached a verdict. It was not until Blackstone that this rule was relaxed. A jury could be discharged for "manifest necessity." Originally this did not refer to a deadlocked jury. That did not arise until *Perez* was decided by the US Supreme Court. The *ratio* of the decision was that if the accused was not re-tried, it would defeat the ends of public justice. [26] The principle of *Perez* was again discussed by the US Supreme Court in *Wade v Hunter*[27]. The court held that "The Double Jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal, he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the Double Jeopardy prohibition is aimed." The court further took the view that failure of a jury to agree made completion of the trial impossible. If it were otherwise, it would frustrate the protection of society from crime by denying the right to try the defendant again. Therefore the conclusion was: "… that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."

This is an interesting observation but it is open to another interpretation[28]. It omits any reference to the rights of the accused to the presumption of innocence. Nor does it make any attempt to interpret the true meaning of a disagreement. The dictum of the court is understandable, as it must protect against a hue and cry if an accused was acquitted by reason of a hung jury. This is the anomaly in the legal system, not the fault of the accused. The law demands that 12 people, chosen at random from society as a jury of peers, be unanimous. This is still the law in the US and Canada, whereas in UK and Ireland a majority verdict is acceptable after an excess of two hours deliberation. The law further requires that the jury can only convict a person if it is satisfied beyond a reasonable doubt. If the jury has that doubt, they must exercise it for the benefit of the accused. The DPP in prosecuting every case asks only that the jury convict. He must prove it beyond a reasonable doubt. What is before the jury is a motion: that AB committed X. The evidence which a jury need to convict is cogent and sufficient. No such evidence is required to acquit. It is the absence of such evidence which enables the jury to acquit. When the jury vote they do so as individual jurors, yet their decision must be a collective corporate one. No juror comes into court and announces how he or she voted. The total vote is given either as unanimous, a majority, or, if deadlocked, no poll is taken. The argument is that even if some jurors are wholly convinced of guilt and sufficient others are not, that is a collective doubt.

Disagreement v Doubt

We often confuse the word disagreement and the word doubt. When Jean Buridan[29] adopted Aristotle's proposition, he posed it in this way: A donkey is in a stable where there are two bales of hay equal distance from each other and the donkey: they are both of the same quality; the donkey does not know which one to eat first because he cannot make up his mind. The donkey will starve. In such a case, we say the donkey has a doubt, but we could also say the donkey disagrees with himself. When there are seven who want to convict and five who want to acquit, or cannot decide at all, then the verdict ought to be "not guilty". In the context, the individual opinions of the jurors becomes a collective doubt because they do not accord as required by the legal rule. Therefore, the collective view of the jury is a doubt.

When the jury fail to reach a unanimous or majority verdict, it is because the evidence was insufficient to enable them to reach the verdict of "guilty" or "not guilty". All the evidence available has been adduced. The jury is not asked to determine the evidence insufficient to acquit: it is required to decide whether or not the evidence is sufficient to determine guilt. "Not guilty" does not mean "innocent"; it means the evidence was insufficient to determine guilt. Then the presumption of innocence applies. Surprisingly, this has not been referred to in a single case in any jurisdiction.

In *Arizona v Washington,*[30] the court's view that a "jury's inability to agree establishes reasonable doubt as to the defendant's guilt and therefore requires acquittal", has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial." That court very clearly took the view that such a course "accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated the laws."[31]

The US Position

There is only one response to the current state of the law, or rather the lack of it. It stems from the fear that a guilty person could be freed by a deadlocked jury and this would not satisfy public policy. Equally, the situation of endless repeat trials cannot be satisfactory. Therefore, the US Supreme Court, though not laying down any rule of limitation, did hint firmly at the "one and only one opportunity to require an

courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

26 *US v Perez* 22 US 579, 9 Wheat. 579. "The prisoner has not been convicted or acquitted, and may be put upon his defence. We think, that in all cases of this nature, the law has invested the Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." The court went on to say that it was a matter of discretion. They could not define when it was proper to interfere, but took the view that "the power should only be used with the greatest caution, under very urgent circumstances and for very plain reasons."

27 336 US 684, 688-689 (1949)

28 For a further discussion on this see M Cohen 1983 12(3) Anglo-American Law Review174 and Law Reform Commission Paper New South Wales No 12 1985 which cites Cohen.

29 14th Century French Philosopher.

30 434 US 497.

31 *Ibid.*

accused to stand trial." It seems that as a matter of common sense, two disagreements does satisfy the current position of one "full and fair opportunity."[32] These authorities strongly suggest that there is a tipping point when further prosecution becomes the "engine of persecution."[33] Yet, the US cases do not say when that occurs.

Though the Supreme Court hints at two, it does not lay down such a rule. In the case of *US v Gunter,*[34] the Tenth Circuit Appeals court held that certain decisions of the Supreme Court were not completely reconcilable. The court relied on *Perez*[35] as followed by *Wade*[36]. The court recognised that there may be "*a breaking point*" but did not believe it was reached. In *Carsey v US,*[37] a fourth retrial was prohibited on Fifth Amendment grounds. Absent again from this decision is a consideration of the meaning of a disagreement and the application of the rules.

From the analysis of this question, it emerges that there is a balancing exercise to be struck, between society's right to have all crimes properly investigated and brought to trial before judge and jury on the one hand, and the right of an accused to a fair trial with due process on the other. He is entitled to the presumption of innocence and a right not to be persecuted, or oppressed, or vexed repeatedly.

The Alternative View

The position in the US is different to that in the UK, Australia and New Zealand. These jurisdictions exercise "the Convention." This is a rule of practice of long standing. It provides that where two juries have disagreed, it is the practice to offer no evidence on a third trial. In reaching this position, a number of factors must be contained in the equation: the need for finality; fairness; proportionality; safeguard against oppression, vexation or persecution (prosecution as an instrument of tyranny); the need to avoid delay. There is one other important consideration, which is the increased risk of conviction with each trial due to the imbalance of power between State and accused. Oppression increases with each trial, and so too the difficulty of defending.

There are reasons why repeat trials are unfair. Each time a person is put on trial there is a difference: the evidence will never be exactly the same, the speeches and charge will be different. The need to audit, not just one transcript, but two, becomes extremely onerous. As with each passing trial, people get older: anxiety increases. If there are children involved, they will have seen time going by without relief. A child may think he or she will lose a parent to prison. There are families involved and the continuing trials take its toll on their well being. A family from a locality could be subject to public odium on the basis of repeat trials: there could be harassment or abuse of the children, or adults involved; it could affect employment, health and welfare. There is the question of when will it end. How long is fair? Having regard to the inadequacies of the judicial system, there will be delays.

Double Jeopardy and Delay

Delay is one vitally important feature in the equation because it could offend Article 6(1) of the European Convention on Human Rights. Under that provision, time runs from date of arrest. Each of these factors increase the element of oppression and the longer it continues, the greater the degree of vexation and persecution. It seems erroneous of the US Court in *Gunter* to suggest that two is not enough and three might be, but will not say if, or why, it might be. Also, the right to proportionality becomes a major factor in balancing the rights. How many trials is proportionate? *Demirock* and *DS* suggest two is enough.[38] If two is not enough, then why is three? If three is not enough, should it be indefinite as the court held in *Kelly*[39] in 1938? These seem to be irrational means on which to base such an important decision. The UK, Australia and New Zealand at least recognise that, if this is not strictly a Double Jeopardy argument, it is compensated for by the application of the Convention.

This point was discussed in *Frank Henworth*[40] and *Charles v The State*[41]. In the latter case, there was a nine year period between arrest and the third trial. The first trial resulted in conviction and was set aside on appeal. In the second, there was a mistrial for disagreement. An application to stay the proceedings before the third trial was refused. The defendants were convicted. Their appeal was dismissed. On appeal to the Judicial Committee of the Privy Council, the appeal was allowed. The Council held there was a serious issue of delay as well as the question of public interest and fairness to the defendants. To allow the prosecution to proceed a third time after nine years where the first verdict was quashed and the second resulted in a disagreement, was an abuse of process. The State accepted that it was a common practice, though not a rule of law, for the prosecution to offer no evidence where two juries had disagreed.

Lord Steyn delivered the judgment in which he commented on the delay. A retrial after such a long period was not right especially when a person had stood trial once, been imprisoned "and would if a retrial were ordered have to run the gauntlet and the hazards and prejudice of being tried again." Lord Steyn noted that a time may come when the delay was so great that, despite the public interest continuing, it became an abuse of process and "unacceptable for the prosecution to continue." Lord Steyn said that "It may be contrary to due process and unacceptable as a separate ground from delay that the prosecution having failed twice, should continue to try to secure a conviction." Both factors may fall to be considered.[42]

The Public Interest

These latter observations were commented on by Lord

32 *Ibid.*
33 Taylor CJ in *In Re Spier*, 1828.
34 1976 546 F2d 861. In this case two juries disagreed and a further third trial was sought. Double Jeopardy was rejected. The case was appealed to the Supreme Court and the record shows it was dismissed, but there was no judgment.
35 *Supra.*
36 *Supra*
37 392 F2d 810 (1967)
38 *Supra.*
39 *Supra.*
40 2001 EWCA Crim 120: 2001 2 Cr App R 47.
41 2000 1 WLR Privy Council decision from Trinidad and Tobago.
42 2000 1 WLR.

Kennedy in *Henworth*[43]. He didn't accept that Lord Steyn was suggesting there should be a new rule of law. The Court of Appeal rejected the argument that such a new rule of principle should exist. They re-affirmed that where crime is committed and there is a case to answer, the public have an interest in having the jury decide one way or the other. Lord Kennedy continued:

> "We recognise the possibility that in any given case, a time may come when it would be an abuse of process for the prosecution to try again. Whether that situation arises must depend on the facts of the case which include, first, the overall period of delay and reasons for the delay; secondly, the results of previous trials; thirdly, the seriousness of the offence or offences…;and fourthly,.. the extent to which the case now to be met has now changed from that which was considered at previous trials."

The Court rejected the appeal not because the convention did not exist but because on the facts, it did not assist. Further reliance was placed on the case of *Flowers v The Queen*[44]. There is also the rationale for the convention as discussed by Lord Kennedy. It is that:

> "the prosecution should only proceed against any given defendant if they consider that there are real prospects of obtaining a conviction from a jury. If two juries have disagreed when presented with substantially the same evidence, inevitably the prosecution must carefully reconsider its position."

There are many considerations to be weighed, and ultimately the question has to be asked: when the content of the case has not changed from its first two outings, what more can be said? As Murphy J said in *Demirock v The Queen,*[45] an accused facing a third trial is under enormous handicap compared to facing the first trial. Increased trials increase the possibility that an innocent accused may be found guilty. There is a point at which it is right to say as per Mason CJ in *Rogers v R*[46]

> "The public interest in securing a conviction of the appellant is clearly outweighed by other relevant considerations."

The fact that two juries have disagreed on the same evidence is reason to follow Day O'Connor J in *Tibbs v Florida*[47] where she wrote:

> "Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction though sheer governmental perseverance."

But the quintessence of the issue is that if the defendant is really **presumed** to be **innocent,** then he is not guilty, unless the jury decide on the evidence that he is guilty. The judgment that the evidence is not sufficient, leading to a disagreement, is not a proper judgment: it is not permitted by law. It is submitted that this law, which advocates "one full and fair opportunity to convict," as contended for in *Arizona v Washington*, is contrary to the philosophy and logic of law.[48] It is in need of re-examination.

One major problem with that is getting the spades to dig out something which has been there for so long. As Jeremy Bentham, the English philosopher put it: "Error is never so difficult to be destroyed as when it has its roots in language."[49] This sentiment is also expressed by J.M. Keynes when he said that "the idea which I express is an extremely simple one and should be obvious. The difficulty lies, not in new ideas, but in escaping from the old ones, which ramify…into every corner of our minds."[50]

Perhaps it is better expressed not as a linguistic problem, but as one of boundaries. Aristotle said that things are either X or they are not X. The law requires unanimity from its 12 jurors and also that they be satisfied beyond a reasonable doubt. We have seen that this is a corporate decision which is the sum of its parts. A further Aristotelian proposition is that "it is a part of probability that many improbable things will happen"[51]. So whilst it is probable that in the majority of cases, a jury will agree on X or not X, there is no recognition of the human faculty to disagree or have a collective doubt. Indeed, that is the position in every plebiscite.

What would happen if the vote had to be unanimous? Or if the superior courts always had to be unanimous? We can say therefore that it is probable that in some cases juries will not be in agreement, or it is improbable that they will agree in every case. The law makes no concession to this status because it has drawn the boundary so tightly. What it then concludes is that there must be a retrial as the only possible solution, and perhaps an infinite number of them. It does not examine the boundary, for if it did, the law would find another way, which would eliminate the need for repeat trials.

The Scottish System

An examination of the Scottish system would be one template. It has drawn the boundary much wider so that it recognises the propensity to disagree. Its system ensures that there is never more than one trial which always ends in a just judgment. The jury is composed of 15 and a simple majority prevails. Further, in Scotland, the juries took back from the judges the right not only to find the facts, but to find the verdict as well. As a result, there are three possible outcomes to a Scots trial: Guilty, Not Guilty, and Not Proven. In real

43 2001 Cr APP R 47: 2001 EWCA Crim 120.

44 2000 1 WLR. In that case the Privy Council heard an appeal from Jamaica which has a written constitution. On a charge of murder two juries twice disagreed. No application was made at the third trial for a stay on the ground it was oppressive or an abuse of process after such long delay, due to failure of defence to seek a transcript. On third trial he was convicted and sentenced to death. He did not alleged in his appeal that under Article 20(1) of the Jamaica Constitution he was entitled to a fair hearing within a reasonable time.

45 1997 137 CLR 20.

46 181 CLR 251

47 457 US 51

48 This is the entitlements of the parties. Both the public and the defendant desire a just judgment. When the case is insufficiently strong to achieve it that ought to result in an acquittal.

49 Cited Learning To Philosophize, E.R.Emmet. Pelican 1964.

50 J. M. Keynes, General Theory of Employment, Interest and Money.

51 Cited Learning to Philosophize, E. R. Emmet Pelican 1964.

terms, the Not Proven verdict is the true interpretation of a jury disagreement as it cannot satisfy all the jurors that the evidence is sufficient to convict beyond reasonable doubt. Equally, it says clearly that the defendant is not innocent. It is a matter of proof, and that is missing.[52]

It is submitted that the problem which the laws of England created some four hundred years ago need to be re-examined and the boundary redrawn. This would result in a considerable saving of time, expense, and particularly, anxiety. It would be certain that when a trial commenced, there would be a verdict. This is to everyone's benefit. It is a just judgment. It balances the competing rights of society, and satisfies its right to the "ends of justice". It would relieve everyone from any "insuperable obstacle to the administration of justice…It would relieve the need to put the defendant on trial again…[and it would secure a] defendant's valued right to have his trial completed by a particular tribunal…"[53] It satisfies the equal rights of society and the defendant to finality. The anxiety, insecurity, and risk of conviction is well expressed by Hall J in *In Re Spiers*[54].

> "He was placed upon his trial; his life was in the hands of the jury. His breast was occupied by a commixture of hope and fear; it throbbed alternately with both, and whether the struggle terminated in a verdict of guilt or innocence, it was certainly a guarantee against any future prosecution upon the same charge, and that guarantee need not claim to be bottomed upon any extraordinary maxim marked with tenderness for the life of man."

The Irish Position

Up to the present time, the law here has been that there was no limit on the number of re-trials.[55] On 10th June 2008, the Supreme Court considered this issue in *DS v. Judges of the Cork Circuit and the DPP*. In the High Court, O'Neill J had held on the principle, not of double but triple jeopardy, that two trials was enough. This satisfied the public right to prosecute while guarding against the inherent dangers of repeat trials. The Supreme Court reversed in part, but dismissed the appeal by the DPP. They held unanimously that it was not double jeopardy as understood in the ancient definition of Lord Coke. The lead opinion was delivered by Denham J., with whom Hardiman, Fennelly, and Finnegan JJ agreed. The minority was delivered by Kearns J. [with whom Fennelly and Finnegan JJ also agreed]. Denham J held that the relief was discretionary and could only be granted depending on all the circumstances of the case. In the evaluation of *DS*, Denham J held that no single circumstance was sufficient of itself to grant prohibition, but when viewed cumulatively, the circumstances amounted to a disproportionate response, oppression and unfairness. It was not clear whether that limitation was specific to that case or being laid down as a general rule. It seems unlikely that if there is one exceptional circumstance that it could not be a sufficient ground. A further limitation was that the discretion to prohibit a trial should only be exercised with caution. The judgment is based on *Perez,* without reference to it. It is a policy decision. The learned judge eschewed all discussion of the law available on this subject from the USA, Australia, and UK. The judgment recognised the convention but makes only slight reference to it, describing it as a circumstance in which a further trial may not be commenced. It may provide a sound basis from which to review the facts, and it is recognised that such a convention "has inherent wisdom."

Kearns J also dismissed the appeal but did so on abuse of process grounds. It is common to both judgments that the DPP may bring a third or subsequent re-trial as there is no legislative determination. The difference is that Denham J takes the narrow view of the issue saying (on no less than nine occasions), that the discretion must be exercised having regard to all the circumstances of the case. Kearns J applied the convention and abuse of process principle, and said that in general, there should only be two trials, where particular criteria are satisfied. In essence, these are: 1) Seriousness of the offence 2) whether the applicant may have caused the requirement for a further re-trial --if the trial collapsed because of error on the part of the applicant, then he cannot gain from it 3) any period of delay which was caused by the prosecution and 4) the extent to which the case now to be met has altered from that which two previous juries considered.

In coming to these conclusions, the Court was mindful of the need to preserve the right of society to prosecute and punish all crimes, and the right of an accused to a fair trial, and not to be oppressed. Therefore, the Court could not lay down an arbitrary rule of "two strikes and you are out." That is a matter for legislation. Denham J does not limit retrials to any particular number, but does couch her opinion in such a way as to make it difficult for an applicant to succeed unless there is a substantial weight of fact supporting oppression and unfairness.

Kearns J also holds that the classic concept of double jeopardy has no relevance. In his review of the authorities, he is struck by the need to recognise and find "*the breaking point*." While repeat trials may be justified in some exceptional circumstances, in general he is of the opinion that the point may come when it becomes an abuse of process to continue. One consideration is whether there is any real prospect of a verdict on a further attempt. There may be circumstances when this is warranted to satisfy the ends of public justice. However, as a general starting point, the convention ought to be followed.

Fennelly and Finnegan JJ also joined with Kearns J. Socrates said one judgment cannot be truer than another, it can be better, in the sense of having better consequences.[56]

Running the gauntlet is no easy matter. The more often it happens, the less a defendant has to say, the more difficult it becomes.

> *"So all my best is dressing old as new*
> *Spending again what is already spent…"*[57] ■

52 As one judge notoriously put it when directing a jury to acquit: "We know he did it, but we just can't prove it."
53 *Wade v Hunter, supra.*
54 *Supra.*
55 *A.G v Kelly*, 1938 1 IR 109.
56 Referred to in Betrand Russell, History of Philosophy, P 150.
57 Shakespeare Sonnets No 76.