The UK’s Unwritten Constitution Versus Irish Written Constitution

1. Is the Written Constitution within the Irish legal system becoming closer to taking its last breath?

Although the Written Constitution within the Irish legal system has traditionally in the past served the Irish people a satisfactory standard of living and democracy. It is true that the written Constitution within the Irish system is a rigid document and therefore is deeply entrenched in the governing system of Ireland. This ensures that it is an extremely difficult and a complicated process to include new aspects within the current Constitution. The written Constitution gives more importance to written laws, than emphasising the importance of public opinion which in modern day Ireland is completely backwards thinking and undemocratic. This essay examines all the effects of having a written Constitution within the Irish legal system and makes clear that this aspect of the system is of an inadequate standard and requires reform.

The essay also makes comparisons to other jurisdictions with distinctively different approaches to the formation of their Constitutions, such as unwritten constitutions and the uncodified constitution and how they have benefited. Further on in this essay I will lay out the advantages and disadvantages of the Irish legal system altering their written constitution to an unwritten constitution. And make clear the benefits that the Irish legal system would attain. To access the effectiveness of the written constitution within Ireland, I will examine statues and the constitution of the UK to make comparisons. The crucial purpose of this essay is to evaluate the current system of the written constitution and to provide guidelines and potential reforms which may assist the Irish legal system becoming fairer and increasingly democratic.

2. Is it time Ireland changed their constitutional identity?

The current Constitution of Ireland (Bunreacht na hÉireann) was adopted in 1937 to replace the Constitution of the Irish Free State (1922). The Irish Constitution is the fundamental law of the State. The Constitution establishes the branches of government, it establishes the courts and it also sets out how those institutions should be run. It also describes the fundamental rights of every Irish citizen. The Irish constitution is a written constitution which means it is a formal document defining the nature of the constitutional settlement, the rules that govern the political system and the rights of citizens and governments in a codified form. Written constitutions are viewed as a bridle for unchecked political majoritarianism, as a restraint on government, and hence as a limiting device rather than form of democratic political expression. In legislative terms the written constitution has allowed Ireland to pass laws which have had huge political and societal impacts such as the passing of the Health (Regulation of Termination of Pregnancy) Act 2018. Which extended the rights of women within Ireland. [1: 'Research Guides: Irish Legal Research: Home' (Guides.library.harvard.edu, 2020) accessed 29th October 2020] [2:)'The Irish Constitution' (Citizensinformation.ie, 2020) accessed 30th October] [3: 'How the U.S. Constitution Has Changed and Expanded Since 1787' (HISTORY, 2020) accessed 31st October]

The UK’s current Unwritten Constitution within their legal system, provides a perfect model for reform. The UK distinctly possesses an unwritten constitution This means that Parliament, using the power of the Crown, enacts law which no other body can challenge. In legal terms, parliamentary sovereignty is a continuing fact of government that can’t be legally amended, due to the formation of the unwritten constitution. Only a legal revolution could change the Constitution. If the Irish legal system also changed their constitution to unwritten then the Irish Parliament would be mandated to create new laws or make amendments as the final source, without being hindered by the constitution. This would allow Parliament to better serve the needs of the Irish republic, by keeping up to date with societal changes, by amending and creating relative legislation to ensure the political views of the Irish people are being listened to. The unwritten constitution would give Parliament a high level of sovereignty which is accompanied by parliamentary acts that allow parliament to impeach government officials and declare a lack of confidence in the government, which again allows Parliament to better serve and protect the Irish people. [8: Constitution Unit, “What is the UK Constitution?” (2018) accessed 31st October] [9: Christina Lienen,’ Common law constitutional rights: public law at a crossroads?’ (2018) P.L 649-667] [10: Pavlos Eleftheriadis,’ Two Doctrines of the Unwritten Constitution’ (2017) 3(13) European Constitutional Law Review, 13: 525–550.]

An unwritten constitution within the Irish Legal system would be pivotal to allowing virtue of flexibility, to allow the enumeration of rights in times of peace and the exercise of true power in times of disarray. Since an unwritten constitution specifies nothing, it therefore contains nothing to prevent the courts from holding that some rights are inherent to a constitutional democracy and therefore inviolable. If the Irish legal system is unable to leave room for changed understandings and societal changes without being able to make relative laws to curtail these changes, then Constitutional crisis would surely be a possibility, with political revolt not far behind. [11: Jeffrey Jowell,’ Heading for constitutional crisis?’ (2004) 154 NLJ 401]

The virtue of an unwritten constitution within the Irish legal system would produce a strong Government that would have the confidence and ability to make key constitutional changes if deemed necessary. It would ensure the unelected judiciary would have neither a constitutional role nor a political role. Allowing only the elected Irish Parliament to decide on the constitutionality of law. This is seen within the UK legal system where they have not codified the fundamental rules of the constitution in a single document, giving them much greater political scope and law-making discretion. As they can make use of various statutes and conventions to collectively form their own Constitution. [12: Marina Ayzenshtat, 'Unwritten Constitution' (2016) 7 ISTORIYA.] [13: 'What Is the UK Constitution?' (The Constitution Unit, 2020) accessed31st October]

3. Analysis of why the alteration of the written Constitution to an unwritten Constitution would be beneficial to the Irish legal system

The nature of the written constitution within the Irish legal system is in clear need of reform. It is behind modern day constitutions such as the UK, Israel and New Zealand which all have unwritten Constitutions. The reformation of the written constitution is pivotal to the future growth of the Irish legal system as its flexibility allows adaptation and reform to suit changing circumstances It is also clear that Written constitutions are susceptible to informal changes that do not manifest themselves in alterations to the text, for instance as a result of judicial interpretation, legislative enactment or executive action. This means that even the written

constitution within Ireland is at risk of being informally taken advantage of. [14: Robert Blackburn, ‘Britain's unwritten constitution’ (13 March 2015) accessed 31st October] [15: 'Our Unwritten Constitution Is A Good Thing, Isn't It?' (Republic, 2020) accessed 31st October] [16: New York v United States 505 U.S. 144 (1992) Sup Ct (US)]

The clear advantage that the UK possesses in terms of having an Unwritten Constitution is that the constitution at any time can be easily amended. This process allows the UK to amend or make constitutional changes at any time to benefit the wider society. Such as the formation of the Scotland Act 1998, which devolved powers over a wide range of policy areas such as health, education, and a Scottish Executive with a First Minister. [17: Brit Politics,’ What constitutional changes have we seen in the UK?’ Accessed the 1st November]

If Ireland’s constitution was identified as unwritten it would allow the constitution to evolve, adapt and to take in to consideration changing social attitudes such as the Marriage (Same-Sex Couples) Act 2013, which was passed in UK Parliament. An unwritten constitution within Ireland would ensure that common law would guide and accord the constitution in a form of authority, which would ensure that all civil liberties within the nation would be respected. [18: The Lawyer Portal,’ The Pros and Cons of Having an 'Unwritten' Constitution: The Advantages of an ‘Unwritten’ Constitution’ (2019)]

Because the Irish legal system is bound by a written constitution there is no special mechanism for constitutional change. Recent reforms have therefore become associated with short-term political expediency and spin. The rigid document will not allow free scope for growth and development over the governance of the country. Many may argue that this rigid document guarantees that the Irish people will have access to their fundamental rights. But in real terms for the Irish legal system to have complete national sovereignty, the only way is to pursue the required reforms to become a country which contains a written constitution at the base of its legal system. Which would allow the Irish Parliament to form their own legal and constitutional compass. [19: John Baker, ‘The unwritten constitution of the United Kingdom’ (2013) Ecc. L.J., 15(1), 4.]

4. Conclusion

The current Written constitution within the Irish legal system, has acquired many criticisms. It is inflexible, crippling, and a rigid document. It should no longer have the ability to hold the Irish legal system captive. The complicated amendment process within the written constitution has immobilised the Irish Parliament’s ability to serve the Irish people, by creating laws and amending relevant aspects of the constitution to better their standard of living. The written constitution has for too long now given too much importance to written laws, then emphasising the importance of public opinion. Finally, the crucial argument is that if Ireland were to alter its constitution to that of an unwritten constitution, it would encourage greater citizen participation. Public opinion would be listened too far more closely by elected representatives within Parliament if they had the ability to change aspects of the constitution more easily. Especially at times where there is public revolt within certain aspects of the constitution.