Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

John Kelly And The Past, The Present and The Future of Constitutional Law

Delivered by Mr Justice Gerard Hogan at The John M Kelly Memorial Lecture, UCD Sutherland School of Law on 3 March 2026.

As I look back on my life, I recall my days as a student of the Law School in UCD in the late 1970s with great affection. We received a fantastic legal education which trained us not only in the substantive law, but also in the legal techniques of precedent, statutory interpretation and reasoning by analogy. Most of all, we were thought to think and reason as lawyers. I could pay tribute to many, both living and the dead, but I have come here tonight to pay tribute to one person, the late John Kelly.

I recall his Jurisprudence class of 1978-1979 with particular affection. Not only did he introduce us to the great legal thinkers, but he interwove these theories into a sort of applied constitutional law class. His admiration for Devlin's critique of Hart – a critique which, with the benefit of hindsight, might now have to be looked again through a new lens – did not preclude him praising the profundity of the analysis found in Hart's *The Concept of Law*. He particularly liked what I might term Hart's secular natural law or minimum content of law theory, a theory which appealed to his own sense of legal positivism and which, I suspect, re-inforced his own disagreement with the way the natural law was being used by the then generation of Irish judges. Most of all he was fascinated with Hans Kelsen's theory of the *Grundnorm* and he explored how it might be applied to a problem then beginning to confront the Irish courts, namely, the legal consequences of a finding of unconstitutionality of a statute.

That fascination extended to an in-depth examination of the remarkable decision of the Supreme Court in *The State (Byrne) v. Frawley,* the judgments in which had been helpfully delivered the previous year in December 1977. The problems presented were both intriguing and novel. Here a prisoner had elected to proceed with his trial for robbery just as the Supreme Court had found in *de Búrca v.*

Attorney General that the then system of all-male, ratepaying juries was unconstitutional. When, following his subsequent conviction, Mr. Byrne later sought his release from custody by way of complaint under Article 40.4.2º on the ground that he had been tried by an unconstitutionally composed jury, the Court was required to confront a range of problems, including the duty of the judge to uphold the Constitution, waiver, estoppel and, not least, the effect of a finding of unconstitutionality.

For Kelly, Henchy's judgment was a master-class on these topics reflecting classic Kelsenian theory that an unconstitutional law was an operative fact with legal existence which could not be ignored. As Kelsen himself had argued in his *General Theory,* the law in question:

> "cannot be something null ab initio, that is to say, legally nothing. It has to be considered as a norm annulled with retroactive force by the decision declaring it to be null *ab initio*. Just as everything King Midas touched turned to gold, everything to which the law refers becomes law, i.e., something legally existing."

One can trace a consistent line of subsequent judicial thinking from *Byrne* through to *Murphy* (the married women's tax case); *Mr. A.* (who remembers that summer in Dublin in June 2006 when the Government came close to collapse by reason of that case?) and the more recent suspended declaration of unconstitutionality mechanism deployed in the aftermath of the University Seanad case, *Heneghan v. Minister for Housing*. To this Kelly could also add examples drawn from Roman law and Ulpian's discussions of the status of judgments of the *de facto* judge and the illegally appointed praetor, Kelsen, Hart and Holmes. He also saw Henchy's earlier dissent on grounds of delay in the adoption case with the invalid adoption order, *M. v. An Bord Uchtála* and his majority judgment in *Corrigan v. Irish Land Commission* (where the illegal composition of the tribunal had been waived) as a sort of prequel to the later judgment in *Byrne*. Kelly managed to weave these themes together in a magical fashion and, in my own case, he left me with a life-long interest not only in Kelsen, Hart, Holmes and Henchy, but most especially in constitutional law.

When discussing constitutional law, it is important to recall that – unlikely as it may seem - Kelly shared one important perspective with his arch-nemesis, Charles

J. Haughey. (I appreciate that even in a few sentences we have already travelled quite a long way from Kelsen and Holmes). Both shared the view – later popularised by Professor Joe Lee in his ground-breaking book, *Ireland 1912-1985* – that Ireland had yet to realise the potential of her independence and that mediocrity and conventional wisdom reigned in many walks of life, legal thinking and jurisprudence included. Part of that was that fresh thinking and new perspectives was required in so many areas. Kelly felt this very strongly and it is, I suggest, the key to an understanding of his outlook in this area. Constitutional law offered the richest rewards for those who were willing to break with the common law tradition, a tradition which Kelly too closely associated with the pain and tragedy of pre-1922 Irish history for him to have any real affection for that corpus of law. This was a common theme of his: writing in 1988 he spoke of a "national history which, if I could, I would turn back and reshape in a sense happier for the ancient Irish race, dispossessed in the 16th and 17th centuries of land, power, influence and self-respect."

Thus, in the context of the development of constitutional law, Kelly may be said to have espoused the same sentiments which the composer Richard Wagner had urged on his followers: "Kinder! Mach' etwas neues" (Children, do something different), even if the "etwas neues" on the part of the Supreme Court did not always meet his approval. He would, at times, profess to be dismayed by some novel judgment of Walsh or Henchy holding this or that law to be unconstitutional, but in truth I think that he was secretly pleased that at least – and at last - something new, adventurous and different was being done.

It was true that to accommodate himself to this task one had to deal with a document produced by another political arch-nemesis of his, Eamon de Valera, who Kelly held responsible for the Civil War and much else besides. But Kelly was ultimately willing to make that accommodation and he came in time to admire – for the most part, privately - the quality of the constitutional drafting and the seamless architecture of the Constitution's structure, even if this was sometimes done through gritted teeth.

Kelly's fundamental critique of the judiciary was twofold. First, starting with *Ryan v. Attorney General,* he argued that they had relied too much on their own moral sensibilities with the subjective discovery of unenumerated personal rights, a

practice which the present Chief Justice memorably described in his Sleep of Reason essay in 2018 as "find a right, win the case" type of jurisprudence. We see this in the sustained critique of *Ryan* found in the brilliant opening essay of the second edition of *Fundamental Rights*. The second was the converse of the first, namely, that the Irish judiciary were not making the best use of the actual text of the Constitution. We see this in his 1983 *Irish Jurist* essay on "Equality before the law in three European jurisdictions." Here the theme was that the Irish courts had not made the proper use of Article 40.1 and that the Irish equality jurisprudence was formalistic and lacking in creativity, especially when compared with the manner in which similar guarantees contained in the German Basic Law and Italian Constitutions had been interpreted by the German and Italian Constitutional Courts, even though they had been given a head start of about 12 years over those courts.

I will return to these themes shortly, but first let me delve into the past as it is the first of the topics mentioned in the title to the lecture.

John Kelly and the past

Kelly had a nostalgic affection for the early days of the Irish Free State. To read any of his writings – whether political or legal – on this topic, one has the sense of being transported to a world of old sepia photographs of Collins, WT Cosgrave and O'Higgins, while in the background Count John MacCormack is singing Gortnamóna on a crackly wireless transmitter from a still nascent Radio 2RN coming from the GPO. Kelly often pined for the idealism of original pre-1921 Sinn Féin movement and the high standards to which the then infant state aspired or, as he put it, "the youthful national pride and hope for the future" which, for him, at least, the establishment of the Irish Free State had generated. He despaired that the Civil War seemed to prove that Ireland was struck by a form of *mí-ádh*, doomed to continue in a death-loop of tragic history.

This can be seen most clearly in his *Hidden Treasure* article in the 1988 DULJ. This was based on a remarkable lecture delivered by him in Trinity in January 1988 on the occasion of the 50th anniversary of the Constitution. It was a tour de force deconstruction – complete with, as ever, scintillating analogies drawn from Justinian and other Roman law sources - of the Supreme Court's then recent judgment in *Webb v. Ireland* (1987) dealing with the ownership of the Derrynaflan

Chalice which had been found by treasure hunters. At common law, the Crown could have asserted an entitlement to ownership based on the Crown prerogative. In *Webb* the Supreme Court held – or, at least, seemed to hold – that all these former Crown prerogatives had disappeared with the enactment of the Constitution of the Irish Free State. The Court went on to hold that the State was nonetheless entitled to ownership of the hoard by reference to Article 5 (sovereignty) and Article 10 (with its reference to "all royalties" of the State) of the 1937 Constitution.

By pointing out that the Court's understanding of the sovereignty of the Irish Free State – and, hence, the survival of Crown prerogatives - ran counter to the contemporary usage and understanding on all sides during that period, Kelly's critique was an extremely powerful one. To take but one of his examples of the old prerogative power – namely, the grants of patents of precedence to enable barristers to become Senior Counsel – that practice was continued by the Supreme Court as heretofore until statutory regulation of this came with the Legal Services Regulation Act 2015. You might think that - based on the logic of *Webb* - the Supreme Court should have discontinued the practice of participating in calls to the Inner Bar for want of legal authority until that power was restored by the 2015 Act. But, no, undaunted by any of this, the practice continued as if nothing had ever happened.

As if this was not enough, Kelly also pointed out that the reasoning in *Webb* did not sit easily with the actual language of Article 49 of the Constitution which contemplated that at least that some of these old prerogative powers were retained, save that they were exercisable for the people by the Government pending the enactment of appropriate legislation to replace the prerogative power in question.

I nonetheless cannot help thinking that his personal nostalgia for the unified national movement of 1919-1921 and the Cummann na Gaedheal government of 1922-1932 somewhat coloured his perceptions of what was realistic and achievable on the part of the Irish Free State Constitution. Writing in 1980 in the Preface to the first edition of *The Irish Constitution,* Kelly speculated that with more settled conditions the first Government might have allowed the transitional period (first of eight years, then extended to 16 years) during which that

Constitution might have been amended by ordinary legislation to expire, "thus letting judicial review to become a reality". He continued:

> "With regard to the fundamental rights recitals, too, the large edifice of judge-made law which has been erected on Articles 40-44 (and on Articles 34 and 38 might, apart from the newly entrenched rights in the field of the family and education, have arisen on the less elaborate statements of the old Articles 6-10 and Article 64-72, just as the US Supreme Court has constructed a great corpus of jurisprudence on the fairly brief statements of the early amendments."

I think that there are two fundamental objections to this. First, the US Supreme Court's jurisprudence is substantially based on the equality and due process provisions of the 14th Amendment, which provision found no parallel in the Constitution of the Irish Free State. But there *is* a parallel – and a strong parallel at that - between the 14th Amendment on the one hand and Article 40.1 (equality) and Article 40.3 (due process and more) on the other, so that one really had to be wait for 1937 for that process of constitutional adjudication based on fundamental rights to take hold in a meaningful way.

Second, it is perhaps sufficient to state that the Irish Free State Constitution collapsed because there was in effect no clear hierarchy of norms as between ordinary legislation, the Constitution itself and the Anglo-Irish Treaty of 1921 (which had been originally scheduled to that document by s. 2 of the Irish Free State (Saorstát Éireann) Constitution Act 1922). While the Oireachtas had been given no power to amend the Treaty or to amend the Constitution in a way which conflicted with the Treaty, it was originally envisaged that all *other* amendments to the Constitution would be effected by referendum. By reason, however, of a last minute change to Article 50, the Irish Free State Constitution had, however, allowed itself to be amended by ordinary legislation for an initial eight-year period and this period was extended for a further eight years in 1929 by ordinary legislation. This meant that during the entire period of its lifetime between 1922 and 1937 the Constitution of the Irish Free State was totally vulnerable to a wide range of legislative changes, often of a far-reaching character.

One difficulty here was that the drafters had never envisaged that the initial eight-year period could itself be extended by ordinary legislation as was done in 1929 when the Constitution was amended by the simple expedient of replacing the words "eight years" with "sixteen years.". Yet in December 1934 in *The State (Ryan) v. Lennon,* a majority of the Supreme Court held that this 1929 amendment was nonetheless a valid amendment of the Constitution. (This decision was another great favourite of Kelly's, so much so that he called it his Desert Island case, the luxury item of reading which the BBC allowed its desert island castaways). This, however, was not the only infirmity attaching to the 1922 Constitution because since May 1924 with the decision in *R. (Cooney) v. Clinton* – the parting gift of the old Irish Court of Appeal in its very last judgment before it was abolished - the Irish courts had sanctioned the doctrine of implied amendment. By this was meant that if during the course of the eight year/sixteen year period there was a conflict between an Act of the Oireachtas and the Constitution the latter must be taken to have been impliedly amended by the enactment of ordinary legislation which conflicted with it. This was, of course, totally at odds with any proper sense of a hierarchy of norms and it meant that during the currency of the IFS Constitution it was almost impossible to know what it did or did not provide. There could be no really no surprise that - in line with standard Kelsenian theory - the Constitution would ultimately suffer an internal collapse.

Kelly's nostalgic yearnings for the Irish Free State and its Constitution nonetheless never faded. Writing in 1988 he expressed the hope that its life and times might "attract more interest from lawyers and historians than, up to this, it has generally received." In this respect, at least, his wishes have been posthumously honoured and the constitutional history of the period has never been better served than by the subsequent contributions of Professor Donal Coffey of Maynooth, Professor Laura Cahillane of UL and, of course, by Professor Niamh Howlin and Professor Thomas Mohr of this Law School. They, too, and others have brought the Constitution and the law of that period alive in a way which Kelly could only have admired.

John Kelly and present-day constitutional law

The writings and learning of John Kelly have profoundly influenced the development of Irish constitutional law. In some ways, along with Brian Walsh, Seamus Henchy and others, he could be said to done more than almost anyone else to ensure that our constitutional identity (of which more in a few moments) changed such that the Constitution survived into the very different Ireland of 2026. Much of this is due to his introductory essay in the 2nd edition of Fundamental Rights in the Irish Law and Constitution.

This is one of the great pieces of legal writing in the common law world. In its own way it is as profound as anything Holmes or Brandeis or HLA Hart ever wrote. This crisp and elegantly written discourse is informative, incisive, provocative and fair. Almost sixty years later this 73 page essay is still a joy to read, from first to last. In that essay, Kelly advanced two themes. The first was that de Valera had "underestimated the Fundamental Rights Articles as a check on legislative power" and, indeed - although this was put more tentatively - that he had simply intended these provisions as simply "headlines" to the Oireachtas. The second was that the Supreme Court had taken the wrong direction with regard to unenumerated rights in *Ryan v. Attorney General*.

The first theme would require a separate lecture in its own right and it must be recalled that Kelly was writing before the drafting papers from 1937 had become available. Whatever else may be said about him, de Valera had an interest and feel for constitutions and legal matters which is perhaps unusual in a non-lawyer politician. The drafting papers show that if de Valera was indeed surprised by subsequent judicial developments, it cannot be said that he had not been warned in advance by his civil servants. Besides, unlike the US Constitution – which says nothing on the subject – if you say in Article 15.4 that the Oireachtas must not enact an unconstitutional law, that Article 34 expressly gives the power of judicial review, that Article 26 allows the President to refer Bills to the Supreme Court and you subject the exercise of legislative and executive powers to scrutiny by reference to higher constitutional norms, well, then, you can hardly complain if the courts take you at your word and begin to find laws unconstitutional.

To this we must add the fact that at a late stage of the drafting a new Article 45 was created – largely in response to the concerns of the Departments of Finance

and Justice who did foresee a good deal of all of this – providing for non-justiciable socio-economic rights. As O'Byrne J. said in the *Sinn Féin Funds* case in July 1947:

> "If it were intended to remove this matter [i.e., the fundamental rights provisions] entirely from the cognisance of the Courts, we are of opinion that it would have been done in express terms as it was done in Article 45 with reference to the directive principles of social policy, which are inserted for the guidance of the Oireachtas, and are expressly removed from the cognisance of the Courts."

In all of this it is interesting to note that the principal drafter of the Indian Constitution, BN Rau, came to see de Valera in December 1947, a few months after the Supreme Court's *Sinn Féin Funds* judgment found the provisions of the Sinn Féin Funds Act 1947 to be unconstitutional on separation of grounds and property rights provisions. De Valera confessed to Rau that if he were starting again he would not have provided for property rights protection. But that is not quite the same thing as saying he had never foreseen that these developments involving constitutional litigation might come to pass.

The second theme related to the reasoning in the fluoridation case itself, *Ryan v. Attorney General*. Here Kenny J. had engaged in what Kelly acknowledged was a "logically flawless" comparison of the language of Article 40.3.1 with Article 40.3.2 to conclude that there was a residue of "unenumerated" personal rights – such as the right to travel and the right to marry – which the courts could discover and protect. One of these was the right to "bodily integrity". Here Kenny pointed to a (then) recent Papal Encyclical, *Pacem in Terris* which had cited bodily integrity along with food, clothing, shelter, rest and medical care as among the fundamental rights worthy of protection. Kelly contended that if this were to be the judicial methodology of discovering such rights "the situation will have been reached" that Article 45's socio-economic rights would be introduced "into the machinery of judicial review by the back door."

Over Kelly's protests, *Ryan* introduced at least two decades of unspecified, unenumerated rights. Quite apart from the judicial subjectivity at issue here, there was an even more fundamental problem, in that the language of the Constitution was itself being ignored. Why was it necessary to resort to the "unenumerated" right of bodily integrity, when Article 40.3.2º actually protected the "person" in

express terms? What was the difference between bodily integrity on the one hand and the protection of the person on the other? By 1980 in *The Irish Constitution*, Kelly was arguing for an approach which sought to integrate these unenumerated personal rights into the actual text of the Constitution, so that, for example, bodily integrity was linked to Article 40.3.2º, the right to marry linked with the guarantees in relation to marriage in Article 41 and fair procedures linked with the administration of justice in Article 34.1 and so forth.

While Seamus Henchy had said something similar in his concurring judgment in *McGee* as far back as December 1973, Kelly's ultimate vindication came in 2020, with the Supreme Court's decision in *Friends of the Irish Environment v. Government of Ireland* (2020) when Clarke CJ endorsed the Kelly approach:

> "There is a sense in which the term "unenumerated" is not incorrect, precisely because the wording of the Constitution does not refer directly to rights such as those which I have mentioned. However, there is a danger that the use of the term "unenumerated" conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution.
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> That does not seem to me to have been the process by which the so-called unenumerated rights have come to be identified, but nonetheless it carries a risk of misimpression. It is for that reason that I would consider the term "derived rights" as being more appropriate, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole. "

More fundamentally, Kelly's general critique has led to a general re-appraisal of virtually the entirety of constitutional law, with judges now seeking to ground any

derivative-type constitutional rights in the actual text of the Constitution. The recent debate in *Doe v. Garda Commissioner* (2025) as to whether the reference to "dignity of the individual" in the Preamble means that dignity is a self-standing constitutional right or simply a constitutional "value" is just the latest manifestation of a trend which has been evident for at least a decade. A generation ago "dignity" would probably have been accommodated as a general "unenumerated" right without any fuss or judicial debate.

John Kelly and the future of constitutional law

As the Danish physicist, Niels Bohr, once famously stated, predictions are difficult, especially about the future. It is, of course, quite foolish to make predictions about the future, but I will make one anyway. It is this. The Constitution has already survived longer than many were willing to predict in, say, the mid-1970s But absent some remarkable developments in Northern Ireland over the next decade or so – such as might be caused by, say a Reform government taking power in the UK or a very rapid change in the demographics of Northern Ireland - the Constitution is still likely to be in force in more or less its present form in December 2037. Fundamental change will not come easily, in part because of the deep-seated constitutional identity which that document has now acquired. Allow me to explain.

To a degree which, I think, is but imperfectly recognised, the Constitution is a key part of the glue which holds this State together. With each passing year the bonds of that glue gets, if anything, even stronger. As far as back as the second edition of *Fundamental Rights* in 1967 Kelly had recognised that the Constitution by consolidating the constitutional changes of the 1930s dismantling the Treaty settlement had in a sense re-unified the traditional wings of the (pre-1921) Sinn Féin which unity had been shattered by the Treaty and the Civil War.

In the Preface to the 1st edition of *The Irish Constitution* (1980) Kelly observed that "the basic law of 1937 can be fairly presented as a stabilising and reforming continuation of that of 1922," adding that the "royal and British theme descended between 1922 and 1948 in a chromatic scale until it ran off the constitutional keyboard; and the full republican chord which might have been struck together in 1916 if the Easter Rising had succeeded, sounded (for twenty-six counties) in an arpeggio gradually formed over a quarter of a century." The fact that the two main

parties which emerged from that split are now in Government together is not simply a confirmation of what was for his part not simply a political aspiration and a prediction, but it also tacitly confirms Kelly's own inchoate sense of our constitutional identity.

Indeed, consciously or otherwise, Kelly's production of *The Irish Constitution* in 1980 in no small measure helped with the creation of that constitutional identity because it assembled for the first time the case-law and other related material which helped in part to shape that identity. When we in the Supreme Court first spoke of our constitutional identity in *Costello v. Ireland (CETA)*(2022) it was not, I think, simply by reference to the text of Article 5 – with its reference to Ireland as an independent, democratic State – or even the other provisions of the Constitution such as Article 16 and Article 34 which re-inforce that democratic, rule of law-based constitutional identity. We also had in mind the accretion of constitutional case-law – which Kelly was the first to mine and assemble.

To that extent, the constitutional identity is not simply gleaned from what one might term static textualism, important though the text of the Constitution naturally is. Had the Constitution itself not generated its own dynamic and conflicts through a long line of case-line – and specifically perhaps had the power to find laws unconstitutional remained largely dormant – it would by now have the same significance as an unread novel consigned to failure on a bookseller's shelf. But this, of course, is not what has happened. Kelly's own writings helped to accelerate the development of the case-law and the fact that, after an admittedly slow start, there have been well over 110 findings of unconstitutionality tells its own story.

This is very much in line with the thinking of the great US comparative constitutional law scholar, Gary Jacobsohn. Jacobsohn argues that a constitution's identity is not simply found in the text, but it is one which emerges through an ongoing, dynamic process shaped by history, culture, political struggle, and constitutional interpretation. In the Irish case, it has been shaped by Supreme Court decisions, institutional and political dialogue and through the use of the referendum process to draw in the public in this on-going identity formation. Indeed, Jacobsohn uses Ireland as a prime example of his theory whereby dynamic constitutional conflict helps to shape that constitutional identity.

With remarkable insight, Jacobsohn contends that internal societal disharmony is itself a key part of the development of constitutional identity. It is this disharmony which presents a challenge to the constitutional order. The disharmony either exposes an internal unresolvable conflict within the Constitution leading to collapse – this, in effect, was, as we have seen, the story of the Constitution of the Irish Free State, especially in the aftermath of the Supreme Court's decision in December 1934 in *The State (Ryan) v. Lennon* and its confirmation that, the terms of the Treaty aside, there were really no limits on the part of the Oireachtas to change that Constitution by means of ordinary legislation. The alternative possibility posited by Jacobsohn is that the Constitution survives the challenge, thereby propelling change while simultaneously adapting, preserving and strengthening the constitutional order. That is the story of the US where the US Constitution survived the Civil War and was strengthened by the post-Civil War 13, 14 and 15th Amendments. It survived at least two further existential challenges – by abandoning *Lochner v New York* in 1937 with the US Supreme Court's decision in *West Coast Hotel v. Parrish* and by facing the growing demands for racial equality by ending de-segregation in *Brown v. Board of Education* in 1954.

It is also the story of India where the Indian Supreme Court faced down the challenges presented by the 1970s Emergency by adopting the "Essential Features" doctrine in *Kesavananda* (1973) and *Minerva Mills* (1980), decisions which effectively ruled unconstitutional attempts by Parliament to give it the unlimited power to amend the Indian Constitution. (In passing, these are not only the two most important decisions ever given by the Indian Supreme Court, but they are probably the only two foreign court decisions where in which both the Constitutions of 1922 and 1937 receive extensive discussion. To sum this up in two sentences. The Indian Constitution borrows very heavily from – word for word in some instances – the text of our Constitution and the Indian Supreme Court prefers the Kennedy dissent in *The State (Ryan) v. Lennon*.) Given that the Indian Constitution has no referendum fallback, had these decisions been otherwise, the Indian Constitution would ultimately have collapsed in the precisely same manner as the Constitution of the Irish Free State had done in the 1930s, precisely because it could then have been amended at will by the Lok Shaba. That, of course, is why they prefer the Kennedy dissent.

As Jacobsohn notes, the same is also true of Ireland, but *only* post-1937. One had first the conflict between the "old" Ireland and a more modernising, secular movement played out in both the courts, the Oireachtas and the referendum process as reflected in *McGee,* the majority and minority judgments in *Norris,* the 8th Amendment followed by the *X* case and Repeal and *Zappone and Gilligan* followed by marriage equality. A second conflict related to sovereignty concerns and the European Union, a conflict played out in cases ranging from *Crotty* to *Costello (CETA)* and a series of referenda including the Maastricht, Amsterdam, Nice and Lisbon treaties. The third – which is partially related to the first – relates to the softening of the Irish political identity by the deletion and replacement of the (original) Articles 2 and 3 following the adoption of the Belfast Agreement.

These are examples of where the constitutional changes modified somewhat – but certainly did not destroy or undermine – the Constitution's identity as a lived document which had profoundly shaped the contours of this State. Indeed, Jacobsohn argues that that very identity was strengthened by the successful use of both litigation and the referendum process in what might be termed identity-expressive constitutional moments – examples here include *McGee* and *Crotty* and the marriage equality and repeal referendums. In other words, thanks to the foresight of the drafters in 1937, the Constitution was able to survive and adapt to these challenges. All of this has re-inforced and strengthened our constitutional identity. This very identity has, moreover, political and social consequences, such that, as I said, it will not lend itself easily to change.

I imagine that Jacobsohn would agree with me in predicting that all of this will also have consequences in any possible context of a "New Ireland" or a "United Ireland." Allow me to give some examples: Everyone recognises that in that eventuality we would need to cede ground to the Unionist/Protestant tradition. But what should these be? One may pass over the fact that a variety of secularising and other constitutional and legislative changes – starting with the deletion of the "special position" clause in 1972, *McGee* and contraception, divorce and the deletion of the original Articles 2 and 3 - do not seem to have led to profound changes in North-South relations. And changes to the Preamble aside, it is not easy to see what further changes could be made without challenging key features of our present constitutional identity.

Part of the minority safeguards envisaged in the 1921 Treaty settlement was that there would be a ceremonial Governor-General. Another was that there would be a right of appeal from the Supreme Court to the Privy Council in London. In return for a united Ireland or, if you prefer, a new Ireland, would we now be willing to have a Governor General in place of the President? Or would we be prepared to accept the Privy Council instead of the Supreme Court as the ultimate interpreter of either the present Constitution or a new Constitution? These are matters for you the audience rather than for me. Here you have to bear in mind that (a) the very existence of these (and similar) clauses in the Treaty and Constitution of the IFS were the proximate causes of the Civil War and (b) *even* with these protections and safeguards in place, the Northern Irish Parliament still exercised its right in December 1922 under Article 12 of the Treaty to opt out of the Irish Free State.

The very difficulty of these questions - and the fact that one may instinctively assume a negative response - nonetheless simply demonstrates how powerful our core constitutional identity has actually become. That identity has been shaped not only by the 1937-text, but, just as Jacobsohn predicted, also by the lived experience it thereby created. Who, exactly, will now be willing to give up, for example, the judicial review power, or the referendum procedure or, for that matter, the office of President were any new constitution to be put forward, whether in the context of a "new Ireland" or otherwise? All of this further demonstrates that any attempt to dislodge that identity will face formidable challenges. It also shows why the Constitution is likely to achieve its centenary in more or less its present form.

In some respects, the Constitution has been a victim of its own success. It was intended to end partition, yet in a curious way by appropriating everything pertaining to this State - such as flag, language and the legal and political culture – as Irish, it has created a distinct and powerful political and constitutional identity which is estranged from Unionism, thus complicating any question of a possible re-unification.

Conclusions

Kelly's historical analysis saw the ancient Irish race lose land, power, influence and self-respect as a result of what happened here in the 16th and 17th centuries. Indeed, many would add the Penal Laws of the 18th century and the Famine of the

19th century to that list of calamities. In some ways, however, the most tragic loss was the loss of self-respect and, indeed, self-belief. Indeed, his writings Kelly praised the founding of the GAA in 1884 as the first step in restoring self-respect to a demoralised people.

The Wyndham Land Act (1905) and the Land Act 1923 – one of the first substantive pieces of legislation of the new Oireachtas – did much to restore the land. Power and influence gradually came after Independence, but for many decades self-respect and self-belief proved elusive. For much of my lifetime, under-achievement when measured against our peers seemed the norm. In the cutting – but accurate – words of *The Economist,* we were the poorest of the rich.

In these respects Kelly was a leader in both the world of politics and law by setting high standards. Few have matched his beautiful, elegant and parsimonious writing style. One might not always agree, but his analysis was always closely-reasoned and original. He wanted us as a society to be better and to climb upwards from what was often bottom place in the Western European league tables.

In a way Kelly's most lasting contribution was by re-shaping – even creating – modern Irish constitutional law he created a constitutional identity and a sense of legal achievement in which pride could be taken. In the legal field we could at last hold our heads up high and recover a sense of pride and self-respect. The development of our own constitutional law meant that it did not always have to be the common law of old or what Kelly scornfully described as the scissors and paste approach of either the judge or the legislative drafter who, figuratively speaking, waited patiently for the arrival of the next mailboat from London.

In August 1922 the then leading academic and future US Supreme Court justice, Felix Frankfurter, wrote to the Hugh Kennedy inquiring why the new IFS Constitution had adopted the system of judicial review of legislation, then de facto a first for the common law world outside of the United States. This letter never seems to have received a reply, probably because the Civil War had just started and Kennedy had other things on his mind. Even now, the question is not always the easiest to answer. But it probably reflected in its own way in the sphere of constitutional law the idealistic aspirations of those who sought to establish the infant State. They wanted the highest standards and the effective protection of human rights. These are the values which John Kelly admired and cared for deeply.

While acknowledging the manifest failures of the Irish State - both past and present –yet, in an echo of Lincoln's words, let us here in this place and on this occasion remember John Kelly by re-dedicating ourselves to these noble values and the idealistic aspirations of those who animated them both in 1922 and 1937.