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**CONSTITUTIONAL COURT OF THE CZECH REPUBLIC**

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on Constitutional Justice**

**Brno, Czech Republic, 31 May – 1 June 2012**

**MINI-CONFERENCE ON  
“THE RULE OF LAW”**

**REPORT**

by  
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The Honourable Mrs. Justice Susan Denham**

## **Introduction**

Dobré odpoledne, dámy a pánové.

Mesdammes et Messieurs.

Good afternoon Ladies and Gentlemen.

Before beginning, I thank the organisers of our Joint Council meeting and to our hosts at the Constitutional Court for the wonderful hospitality we have received here in Brno.

I am delighted for the opportunity to speak about constitutional case law of the Supreme Court of Ireland which touches upon aspects of the Rule of Law. As the Executive Legal Officer to Ireland's new Chief Justice, The Honourable Mrs. Justice Susan Denham, I bring greetings and good wishes on her behalf.

## **The Rule of Law and some common law perspectives**

The concept of the Rule of Law has thankfully received greater scrutiny in recent years. The *Report on the Rule of Law* adopted by the Venice Commission in March of last year is a significant and timely document. It is an excellent resource which helps to give a better understanding of one of the three pillars of the Council of Europe, the others being democracy and human rights.<sup>1</sup>

Ireland is a common law country but is governed by a written constitution. In common law countries and further afield, we owe a debt of gratitude to the late Tom Bingham, the former United Kingdom Senior Law Lord for examining the Rule of Law concept.<sup>2</sup> He suggested that, at its core, the Rule of Law meant:

“[t]hat all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”<sup>3</sup>

Lord Bingham has provided us with eight suggested principles of the Rule of Law in the context of a common law country like England and Wales. Many of you are familiar with these principles but they are worth recalling:

1. The law must be accessible, intelligible, clear and predictable.
2. Law and not discretion should resolve questions of legal rights and liability.
3. The law should apply equally to all, save to the extent that objective differences justify differentiation.
4. Ministers and public officers must use their powers in good faith, fairly, for the purpose for which the powers were given, without going beyond the limits of such powers, and not be unreasonable.
5. The law must afford adequate protection of fundamental human rights.
6. Means must be provided for resolving, without prohibitive cost or unreasonable delay, bona fide civil disputes which the parties themselves are unable to resolve.
7. Adjudicative procedures provided by the State should be fair.

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<sup>1</sup> See [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)003rev-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)003rev-e.pdf).

<sup>2</sup> Tom Bingham *The Rule of Law* (London, Allen Lane, 2010). This book originated in Lord Bingham's Sixth Sir David Williams Lecture on the "Rule of Law" hosted by the Centre for Public Law at the Faculty of Law, University of Cambridge.

<sup>3</sup> See [www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf](http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf)

<sup>3</sup> *Ibid* at 10.

8. The Rule of Law requires compliance by the State with its obligations in international and in national law.

In Ireland, the concept of the Rule of Law was examined by constitutional lawyer Professor David Gwynn Morgan in the early 1990s. He explained that the Rule of Law is an idea or sometimes an ideal about the nature of government. At the heart of the Rule of Law are three components:

1. Everyone, even the Government and its servants, is subject to the law.
2. The law must be public and precise.
3. It must be enforced by some independent body, principally the court system.<sup>4</sup>

This definition of the Rule of Law was adopted by Mrs. Justice Denham, now Chief Justice of Ireland, in *Maguire v Ardagh*, a Supreme Court case concerning the interpretation of the powers of Parliament under the Constitution to conduct public inquiries. She described the Rule of Law as:

“[a] cornerstone of the Irish legal system”.<sup>5</sup>

### **Ireland’s legal system and constitution**

#### **Common Law**

As I have mentioned already Ireland is a common law country. Indeed, it is often said that the first adventure of the common law outside of Great Britain was in Ireland in 1171.<sup>6</sup>

The common law has played an important role in upholding the “Rule of Law” in Ireland. The Irish legal system has evolved since achieving independence in 1922 and Ireland is governed by a written constitution known in the Gaelic language as “Bunreacht na hÉireann” which translates as the “Basic Law of Ireland”. This year we celebrate the 75<sup>th</sup> anniversary of the Constitution’s enactment. This document establishes a democratic State where the power of the people is divided between three great organs of State: the legislature, the executive and the judiciary.<sup>7</sup>

#### **Constitution**

The Constitution explicitly vests the power of judicial review of legislation in the Superior Courts.<sup>8</sup> The Superior Courts is comprised of the High Court and the final court of appeal which is the Supreme Court. These courts, may strike down laws enacted by Parliament which are deemed to be repugnant to the Constitution. The Superior Courts may also invalidate acts done by bodies which breach constitutional justice or fair procedures. Thus, Ireland favoured the American tradition of judicial review of legislation over the common law tradition of parliamentary sovereignty.

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<sup>4</sup> Morgan *Constitutional Law of Ireland* (Dublin, Round Hall Press, 1990) at 42.

<sup>5</sup> *Maguire v Ardagh* [2002] IESC 21. The Supreme Court held that Parliament does not have an inherent power to conduct inquiries which involve requiring witnesses to attend to give evidence and to produce documents and which may make findings which adversely affect the good name (which is a constitutionally protected right) of any person other than a member of Parliament. As they do not have an inherent power, such a power must be conferred on them by the Constitution or by legislation before they can conduct such an inquiry.

<sup>6</sup> “The First Adventure of the Common Law” by His Honour Judge W.J. Johnston, 36 *Law Quarterly Review* 9 (1920). The author notes at page 30 that “[The common law] came as an essential part of the accoutrement of King Henry II and his knights and clerics when they set out with jingling spur and clanking armour on their march from Waterford to Dublin in November, 1171.”

<sup>7</sup> Article 6.1 of the Constitution of Ireland.

<sup>8</sup> Article 34.3.2 of the Constitution of Ireland.

## **Human Rights**

The Constitution of Ireland protects explicit fundamental rights of the person. The protection of fundamental human rights is now recognised as a key part of the Rule of Law as acknowledged by the Venice Commission.<sup>9</sup> Article 40.3.1 of the Irish Constitution provides that:

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

Article 40.3.2 provides that:

“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

The Supreme Court has found that this Article protects “unenumerated rights”, by which I mean rights that are not explicitly written in the Constitution. The landmark case in this regard is *Ryan v Attorney General* [1965] IR 294.

### **Ryan v Attorney General**

The case concerned legislation which permitted the addition of the chemical fluorine to the public water supply system to prevent dental decay especially in children. The appellant Mrs. Gladys Ryan was married with five children and lived in Dublin. She and her family were connected to the public water supply. The nearest alternative non-fluoridated water supply was three miles away. Thus, it was not practicable for her to obtain a non-fluoridated alternative for the family’s domestic needs. Mrs. Ryan alleged that the statute providing for the fluoridation of the public water supply was unconstitutional as it infringed her rights and those of her children, on three grounds:

- First, the violation of the personal rights of her and her children in the form of a right to bodily integrity under Article 40.3 of the Constitution;
- Second, a violation of the authority of the family under Article 41 of the Constitution;<sup>10</sup>
- Third, a violation of the family’s right to the physical education of their children under Article 42 of the Constitution.<sup>11</sup>

Mrs. Ryan lost her case in both the High and Supreme Courts. However, the Supreme Court, upholding the High Court held that she did have a right to bodily integrity and stated:

“The court agrees with...[the High Court] that the ‘personal rights’ mentioned in [Article 40.3.1] are not exhausted by the enumeration of ‘life, person, good name, and property rights’ in [Article 40.3.2] as is shown by the use of the words ‘in particular’; nor by the more detached treatment of specific rights in the subsequent sections of the Article. To attempt to make a list of all the rights which may properly fall within the category of ‘personal rights’ would be difficult and, fortunately, is unnecessary in this present case.”

This decision of the Supreme Court established the doctrine of unenumerated rights in Irish constitutional law. Some examples of other rights identified by the Superior Courts as being unenumerated rights protected by Article 40.3.1 of the Constitution, include the right not to be tortured or ill-treated, the right to have access to the courts, the right to legal representation on

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<sup>9</sup> *Supra* n. 1.

<sup>10</sup> See Appendix for full text of Article 41.

<sup>11</sup> See Appendix for full text of Article 42.

criminal charges, the right to constitutional justice and fair procedures, the right to marital privacy, the right to travel and the right to marry.<sup>12</sup>

Therefore, the Constitution establishes a firm human rights foundation in the basic law. Indeed, the Preamble to the Constitution, in stern language seeks to:

“...promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.”

The People of Ireland enacted the Constitution by way of plebiscite on 1<sup>st</sup> July 1937 and it came into operation on 29<sup>th</sup> December 1937. This was at a time prior to the Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights and Fundamental Freedoms of 1950. Yet it placed human rights and the dignity of the person as a central feature of the Constitution which was remarkably far sighted when one considers Europe of the 1930s.

### **Damache v The Director of Public Prosecutions**

I would now like to speak about a recent decision of the Supreme Court which has the Rule of Law at its core. It concerns the protection of the dwelling home from unlawful intrusion by the State. The Supreme Court was obliged to examine whether power exercised by the State was a disproportionate interference with the personal rights of the citizen.

### **Inviolability of the dwelling**

To give some background, the case concerned Article 40.5 of the Constitution which provides that:

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<sup>12</sup> See *Report of Constitution Review Group*, May, 1996 at p.246. Other rights identified include:-

- The right not to be tortured or ill-treated (*The State (C) v. Frawley* [1976] I.R. 365).
- The right not to have health endangered by (*The State (C) v. Frawley* [1976] I.R. 365).
- The right to earn a livelihood (*Murphy v. Stewart* [1973] I.R. 97).
- The right to marital privacy (*McGee v. Attorney General* [1974] I.R. 284).
- The right to individual privacy (*Kennedy v. Ireland* [1987] I.R. 587).
- The right to have access to the Courts (*McCauley v. Minister for Posts and Telegraphs* [1966] I.R. 345)
- The right to legal representation on criminal charges (*The State (Healy) v. Donoghue* [1976] I.R. 325).
- The right to justice and fair procedures (*In re Haughey* [1971] I.R. 217, *Garvey v. Ireland* [1980] I.R.75).
- The right to travel within the State (*Ryan v. Attorney General* [1965] IR 294).
- The right to travel outside the State (*The State (M) v. Attorney General* [1979] I.R. 73).
- The right to marry (*Ryan v. Attorney General, McGee v. Attorney General*).
- The right to procreate (*Murray v. Ireland* [1985] I.R. 532)
- The right to independent domicile (*CM v. TM* [1991] I.L.R.M. 268).
- The right to maintenance (*CM v. TM*).

The rights of an unmarried mother in regard to her child (*The State (Nicolaou) v An Bord Uchtála/The Adoption Board* [1966] IR 567, *G v An BordUchtála/The Adoption Board* [1980] IR 32.

The rights of a child (*In re Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656, *G v An Bord Uchtála/The Adoption Board, PW v AW* [Ellis J unreported High Court, 21 April 1980], *FN (a minor) v Minister for Education and Others* [1995] 2 ILRM 297).

The right to communicate (*The State (Murray) v Governor of Limerick Prison* [D'Arcy J unreported High Court, 23 August 1978], *Attorney General v Paperlink Ltd* [1984] ILRM 343).

“The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.”

The succinctness of this Article belies its significance as one of the most important, clear and unqualified protections given by the Constitution to the citizen. When the Constitution was being drafted in the mid-1930s, the framers looked to the constitutional texts of other European countries for inspiration including those of Czechoslovakia, Poland and Portugal. Article 40.5 of the Constitution is quite similar to Article 115 of the German (Weimar) Constitution of 1919. The German Basic Law “GrundGesetz” of 1949 has a similar provision in Article 13 which I will return to later.

There has been a long history of protection of the home under common law. In 1604, Sir Edward Coke (pronounced Cook) in *Semayne’s Case* 77 ER 194, stated:

“That the house of every one is to him as his (a) castle and fortress, as well for his defence against injury and violence, as for his repose.”

Furthermore, the principle was referred to by Sir William Blackstone, in his *Commentaries on the Laws of England* (1768), where he stated:

“For every man’s house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence.”

These sentiments have been encapsulated in the words of the age-old familiar saying:

“A man’s home is his castle.”

## **Facts**

In February of this year, the Supreme Court held that legislation violated Article 40.5 of the Constitution in the case of *Damache v The Director of Public Prosecutions* [2012] IESC 12. The appellant, an Algerian man with Irish citizenship, was the subject of a criminal investigation by the police into an alleged conspiracy to murder a Swedish cartoonist who had made a particular depiction of the Islamic prophet Mohammad thereby provoking serious unrest in several Muslim countries. It was suspected that the appellant was involved in the conspiracy with other individuals resident in Ireland. It was also suspected that the appellant made a threatening phone call to an individual in the United States.

The police received intelligence reports from the Federal Bureau of Investigation (FBI) and phone recordings made in the United States. The criminal investigation was commenced by a senior member of the police force of the rank of Detective Superintendent. During the course of the investigation, the Detective Superintendent granted a search warrant to a lower ranking member of the police force of the rank of Detective Sergeant, a practice which was permitted by section 29(1) of the *Offences against the State Act, 1939* as inserted by section 5 of the

*Criminal Law Act, 1976*.<sup>13</sup> The search warrant was granted in relation to the appellant's dwelling home.

At the time of the search, the appellant, his wife and child were present in the dwelling and he was arrested for the offence of conspiracy to murder. Items of property were removed from the appellant's home as evidence including a mobile phone. The appellant was later charged with an offence of sending a telephone message to another person which was of a menacing character.

### Appeal

The appellant's solicitor sought a judicial review of the issuing of the search warrant on a number of grounds.

- That the police officer who issued the search warrant was not an independent and impartial decision maker because he was also directing the investigation.
- That there was no evidence that the police officer had reasonable grounds for his suspicions about the appellant.
- That the relevant section of the legislation was invalid under the Constitution because it failed to provide for the balance between the requirements of the common good and the protection of individual rights.

Therefore, he sought a declaration that the statutory provision (section 29(1)) was unconstitutional. The State argued that the legislation was not repugnant to the Constitution but was a legitimate part of the State's armoury to protect itself from offences against the State and against the justice system therefore any diminution of rights is proportionate and lawful.

The application failed in the High Court and Mr. Damache appealed to the Supreme Court.

The Chief Justice, Mrs. Justice Denham noted that the issuing of a search warrant is an administrative act but that it must be exercised judicially. In most cases, the impartial issuing of a warrant is issued by a District Court Judge or by a Peace Commissioner. In limited and serious investigations, members of the police force have been given statutory powers to issue search warrants arising from urgent situations or if immediate action is needed as a last resort. Such a warrant must be executed within a short timeframe usually 24 hours but under section 29(1) of the relevant legislation here, it remained valid for a week.

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<sup>13</sup> Section 29(1) of the *Offences Against the State Act, 1939* as originally enacted provided that:

"Where an officer of the Garda Síochána (Irish Police) not below the rank of chief superintendent is satisfied that there is reasonable grounds for believing that documentary evidence of or relating to the commission or intended commission of an offence under any section or sub-section of this Act or any document relating directly or indirectly, to the commission or intended commission of treason is, to be found in any particular building or other place, the said officer may issue to a member of the Garda Síochána not below the rank of inspector a search warrant in accordance with this section."

Section 5 of the *Criminal Law Act, 1976* substituted the following section for section 29(1) of the Act of 1939:

"Where a member of the Garda Síochána not below the rank of superintendent is satisfied that there is reasonable ground for believing that evidence relating to the commission or intended commission of an offence under this Act or the Criminal Law Act, 1976, or evidence relating to the commission or intended commission by treason, is to be found in any building or part of a building or in any vehicle, vessel, aircraft or hovercraft or in any other place whatsoever, he may issue to a member of the Garda Síochána not below the rank of sergeant a search warrant under this section in relation to such place."

The Chief Justice reviewed cases law of the Superior Courts which confirmed the well-established principle that the person issuing a search warrant should be an independent person. The Court also stated that a person issuing a warrant must be satisfied on receiving sworn information that there are reasonable grounds for a search warrant.

The Court noted that the statutory provision in question provided that a search warrant be granted to cover a wide area of search including the home. The home or dwelling is treated as a place of importance in the Constitution and case law demonstrates that it is one of the most important, clear and unqualified protections given by the Constitution to the citizen.

The Court posed the question formulated by a former member of the Supreme Court, the late Mr. Justice Henchy - whether the procedure for obtaining a search warrant in this case is a method:

“...which ignore the fundamental norms of the legal order postulated by the Constitution.”<sup>14</sup>

The Court stated that the procedure for obtaining a search warrant should adhere to fundamental principles which encapsulate an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights. However, there may be exceptions to these fundamental principles, for example where there is an urgent matter. The Court considered Camenzind v Switzerland [1999] 28 EHRR 458 as well as case law from the Supreme Court of Canada in Hunter v Southam Inc. [1984] 2 S.C.R. 145 which analysed and applied such fundamental principles.

In reaching its decision, the Court also considered the proportionality test as set out in the High Court case of Heaney v Ireland [1994] 3 IR 593. This means that the Oireachtas (Parliament) may interfere with the constitutional rights of a person only if its actions are proportionate. The test provides that the measure which restricts a fundamental right must:

- (i) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (ii) impair the right as little as possible;
- (ii) be such that their effects on rights are proportionate to the objective...”

Outlining the principles to be followed, Mrs Justice Denham said:

“For the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of search.”

She added that, while Parliament could interfere with the constitutional rights of a person, its actions must be proportionate.

In this case, the warrant was issued by the police superintendent investigating the matter, who therefore was not independent on matters relating to the investigation. The circumstances included the fact that the place searched was the appellant's dwelling, which

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<sup>14</sup> *King v Attorney General* [1981] IR 233.



the Constitution provides is inviolable save in accordance with law. No issue of urgency arose in this case.

The Chief Justice noted that it was best practice to keep a record of the basis upon which a search warrant is granted. The Court thus granted a declaration that section 29 (1) of the Offences against the State Act 1939 as amended is unconstitutional because it permitted the issuing of a search warrant by a person who was not independent.

In the Irish constitutional tradition, a finding that legislation enacted after the enactment of the Constitution in 1937 is deemed invalid from the date of the statute's enactment. A declaration of unconstitutionality by the High Court or the Supreme Court amounts to, in the words of the late Mr. Justice Henchy, a "judicial death certificate".<sup>15</sup>

### **Rule of Law as a practical concept in Damache**

The Damache case is a very good recent example of the Rule of Law as a practical concept. The Supreme Court decision underscores that everyone including the Government and its servants such as the police force is subject to the law and the Constitution. It showed how a legislative provision which was not precise was declared unconstitutional by the Supreme Court. The Supreme Court as the final court of appeal to interpret the provisions of the Constitution is the independent body charged with the task of interpreting and applying the Constitution and the law, thereby upholding the Rule of Law concept.

The decision of the Supreme Court is having an effect in other cases where people were convicted for crimes on the basis of evidence obtained on foot of warrants issued under the impugned section of legislation. In two cases since the decision, the Court of Criminal Appeal has quashed the convictions and ordered a re-trial.<sup>16</sup> The Government is currently preparing remedial legislation to permit an independent senior police officer not involved in the police investigation to issue a warrant in very limited and urgent circumstances.<sup>17</sup>

### **International perspectives on the inviolability of the dwelling**

#### **United States of America**

Many of the themes which underpin the reasoning in the Damache case such as the necessity for independent supervision of the request for a warrant and making exceptions only for cases of emergency can be found in the jurisprudence of the courts from other jurisdictions.<sup>18</sup> For example, the United States Supreme Court has often stressed that, as Justice Douglas put in the case of McDonald v. United States 335 U.S. 451-455-456 (1948):

"Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done . . . so that an objective mind might weigh the need to invade [the citizen's] privacy in order to enforce the law."<sup>19</sup>

<sup>15</sup> *Murphy v Attorney General* [1982] IR 241 at 307.

<sup>16</sup> *Director of Public Prosecutions v Timothy (Ted) Cunningham* [2012] IECCA 64 and *Director of Public Prosecutions v Jason Kavanagh, Mark Farrelly and Christopher Corcoran* [2012] IECCA 65.

<sup>17</sup> "Legislation on searches due shortly" *Irish Times* 25<sup>th</sup> May 2012.

<sup>18</sup> See *Director of Public Prosecutions v Timothy (Ted) Cunningham* [2012] IECCA 64

<sup>19</sup> The Fourth Amendment to the United States Constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

These principles were affirmed in recent times for example in the case of Groh v. Ramirez 540 U.S. 551 (2004). However, the US Supreme Court has also permitted the warrantless search of private dwellings in cases of genuine emergency, for example in the case of Brigham City v. Stuart 540 U.S. 398 (2006).

## Europe

The essence of the constitutional guarantee in Article 40.5, the “inviolability” of the dwelling, is one with very deep roots in the European constitutional tradition.<sup>20</sup> Article 3 of the short lived republican Constitution of France of 1848 had provided that the residence of every person dwelling in French territory was “inviolable”.<sup>21</sup> This same phrase is to be found in relation to the protection afforded to the dwelling in Article 15 of the Belgian Constitution,<sup>22</sup> Article 72 of the Danish Constitution and Article 14(1) of the Italian Constitution.<sup>23</sup> Article 115 of the German (Weimar) Constitution of 1919 provided that the dwelling was a “sanctuary and is inviolable”, save that exceptions might “be permitted by authority of law.”

## Germany

Article 40.5 of the Constitution of Ireland is very similar to Article 13 of the German Basic Law of 1949.

The relevant parts of Article 13 provide that:

“(1) The home is inviolable.

(2) Searches can only be ordered by a judge, or in the case of imminent danger also by other organs determined by statute; they may only be performed in the form prescribed by the law.”

It is interesting to learn that the German Constitutional Court (Bundesverfassungsgericht) in its decision of 20<sup>th</sup> February 2001 (BVerfG, 2 BvR 1444/00) arrived at a result which is very similar to that in the *Damache* case.<sup>24</sup> In the German case the public prosecutor had authorised the police to conduct a search of a citizen’s dwelling without first obtaining a judicial warrant because there was apparently an “urgent” need to conduct the investigation. When the search produced no relevant evidence, the householder moved to have the search declared unconstitutional.

<sup>20</sup> This very point was made by Mr. Justice Hardiman of the Supreme Court, Mr. Justice Hogan and Mr. Justice Moriarty of the High Court in the Court of Criminal Appeal case: *Director of Public Prosecutions v Timothy (Ted) Cunningham* [2012] IECCA 64.

<sup>21</sup> France - Article 3: La demeure de toute personne habitant le territoire français est inviolable; il n'est permis d'y pénétrer que selon les formes et dans les cas prévus par la loi. See <http://mjp.univperp.fr/france/co1848.htm>.

<sup>22</sup> Belgium - Art. 15: Le domicile est inviolable; aucune visite domiciliaire ne peut avoir lieu que dans les cas prévus par la loi et dans la forme qu'elle prescrit. See [http://www.senate.be/doc/const\\_fr.html](http://www.senate.be/doc/const_fr.html).

<sup>23</sup> Italy - § 72: The dwelling shall be inviolable. House search, seizure, and examination of letters and other papers, or any breach of the secrecy that shall be observed in postal, telegraph, and telephone matters, shall not take place except under a judicial order, unless particular exception is warranted by statute and Article 14(1): The home is inviolable. Personal domicile shall be inviolable. Home inspections, searches, or seizures shall not be admissible save in the cases and manners complying with measures to safeguard personal liberty. Controls and inspections for reason of public health and safety, or for economic and fiscal purposes, shall be regulated by appropriate laws. See <http://www.senato.it/istituzione/29375/articolato.htm>.

<sup>24</sup> See also case note by Hanf “Constitutional Court reaffirms privacy of the home in search and seizure decision” 2 German Law Journal (2001) [www.germanlawjournal.com](http://www.germanlawjournal.com).

The Constitutional Court held that the search amounted to a breach of the guarantee of inviolability contained in Article 13(1) of the Basic Law. The Court stressed that any derogations from the fundamental constitutional protection must be interpreted restrictively, pointing out that an independent (judicial) examination of the need for a search was likely to limit the interference with this fundamental right by ensuring it was confined to that which was demonstrably necessary in any given case (I understand that the German term for this is “*messbar*”). This requirement promoted transparency (or in German “*kontrollierbar*”), since the objective necessity for the search has to be explained to an independent third party and appropriately documented so that it can be reviewed later.<sup>25</sup> Like the Irish Supreme Court, the German Constitutional Court acknowledged an exception for emergency cases, save that this must be genuine and not self-created on the part of the police.

### **Conclusion on the Rule of Law**

The inviolability of the dwelling is a concept known in civil and common law. It is a concrete example of the Rule of Law as a practical example. Therefore, the Supreme Court decision in the *Damache* case is not surprising. Mr. Justice Hogan of the High Court has recently pointed out that the comparisons between the Supreme Court case and the German Constitutional Court case are quite striking and highlight the common heritage of two quite different legal systems committed to the protection of the inviolability of the dwelling.<sup>26</sup> In the context of our mini-conference today, the cases highlight the commitment of civil and common law countries to the cherished European ideal of the Rule of Law. As lawyers we are custodians of the Rule of Law. The work of the Venice Commission is an excellent example of this custodianship. The Rule of Law is a big subject and this is perhaps why it has proved to be so indeterminate. In preparing for today’s conference I was struck by the remarks of Murray Gleeson, former Chief Justice of Australia. He said that:

“The importance of the rule of law lies partly in the power it denies to people and to governments, and in the discipline to which it subjects all authority. That denial, and that discipline, are conditions of the exercise of power, which in a democracy, comes from the community which all government serves.”

He continued to note that:

“The rule of law is not enforced by an army. It depends upon public confidence in lawfully constituted authority.”<sup>27</sup>

My understanding of the Rule of Law has also been greatly enhanced by Justice Gleeson’s former colleague on the High Court of Australia, Justice Michael Kirby. Justice Kirby has spoken eloquently of how:

“The Rule of Law is the alternative model to the rule of terror, the rule of money and the rule of brute power. That is our justification as a profession (the legal profession).”<sup>28</sup>

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<sup>25</sup> I am grateful to German speaking lawyers in Ireland and a German lawyer for translating these terms into English as meaning “measurable” and “controllable”.

<sup>26</sup> The Binchy Memorial Lecture, Burren Law School, “Some thoughts on the origins of the Constitution”, 5<sup>th</sup> May 2012 delivered by Mr. Justice Hogan of the High Court of Ireland.  
<sup>27</sup> Gleeson “Courts and the Rule of Law” The Rule of Law Series, Melbourne University, 7<sup>th</sup> November 2001. See <http://www.hcourt.gov.au/>

<sup>28</sup> Kirby “Terrorism and Law – Reflections in the aftermath of September 11, 2001” address to the Australian Legal Convention, Canberra, 12<sup>th</sup> October 2001 available at <http://www.michaelkirby.com.au/>. See also Interview with Justice Michael Kirby “Now history will be the judge” Sydney Morning Herald, 31<sup>st</sup> January 2009.

To conclude, I would like to recall the words of the former President of Ireland and Professor of Law, Mrs. Mary McAleese:

“Survival of the rule of law in each generation is not guaranteed. Its desiccated fragments litter the vile first half of Europe's twentieth century and its absence or worse still its bogus impersonators in so many parts of the world threaten our global stability. Wherever it exists, it was hard earned and is as precious as it is fragile. Guard it well.”<sup>29</sup>

On that positive note Ladies and Gentlemen, I thank you for listening.

Je vous remercie pour l'écoute.

Děkuji za pozornost.

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<sup>29</sup> Law Society of England and Wales Conference on Lawyers Independence: the rule of law and national security-striking the balance, London, 20<sup>th</sup> September 2006.

## **APPENDIX**

### ***Relevant sections of the Constitution of Ireland***

#### **Article 41 states:**

1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

1.2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2.2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3.1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

3.2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that -

i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,

ii. there is no reasonable prospect of reconciliation between the spouses,

iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and

iv. any further conditions prescribed by law are complied with.

3.3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

#### **Article 42 states:**

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3.1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

3.2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.