

## Remarks by President Michael D. Higgins at a Reception in Áras an Uachtaráin for delegates at the Law Commissions' Meeting, 5th July 2012

Ladies and Gentlemen:

I warmly welcome the representatives of the law commissions from five jurisdictions who are meeting in Dublin this week. This meeting brings together law commissions from England and Wales, Jersey, Northern Ireland, Scotland – and our own Law Reform Commission which is hosting the annual meeting this year.

This annual meeting allows for the exchange of ideas between law commissions that share much in common but also carry the inheritance of significant unique features in terms of cultural and legal heritages.

These annual meetings are in addition of great value to all of us interested in participatory citizenship in conditions of great change. The exchange of ideas between Commissions is a great resource. Each commission represents a State or jurisdiction with very old legal inheritances, some dating back to ancient customary law. In the case of Ireland, the system of law that dates from Celtic times (known as the Brehon law) survived quite widely until the 17th century, when it was replaced by the English common law.

The missionary monks who worked in Ireland from the 5th and 6th centuries onwards began the first transcription of Brehon law. From what we know of this “Early Old” Irish language era, it is likely that the bards who provided the source material, known as Na Filí or Na Filidh, would have recited Brehon law in four line stanzas.

These transcriptions formed the basis for the *Senchas Már* (the “Great Collection of Ancient Learning”).<sup>1</sup> Given that the missionaries were well-versed in canon law, they may also have interposed some glosses on the native customary Brehon law in order to ensure a smooth integration between the two legal systems. There were, however, some conflicts: for example, Brehon law allowed for polygamy.

At a time when restoring and enhancing our reputation is a shared project of Government and my Presidency, it is worth remembering that.

The missionary journeys throughout Europe of these monks marked the beginning of the description of Ireland as the island of saints and scholars; and their work, along with their European brethren, involved the preservation of many other important texts.

The texts preserved in the nascent universities of Italy included Justinian’s *Corpus Juris Civilis*, the Code of Roman law, which dates from the 6th Century, around the time that the monks began recording Brehon law. Not only did the monks record the ancient Celtic heritage of the Brehon law, they also preserved for future use on the European stage the Justinian Code, which was in turn to prove so influential in the development in the 18th and 19th Century of legislative codes in the European States that are referred to as the Civil Law family of jurisdictions.

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<sup>1</sup> Many of the ancient law tracts were annotated in Daniel A. Binchy, *Corpus Iuris Hibernici* (in 6 volumes, Dublin Institute for Advanced Studies, 1978). See also Fergus Kelly, *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies, 1988).

As the delegates from the five jurisdictions will be fully aware, Ireland has sometimes been described as the place of the “first adventure of the common law,”<sup>2</sup> the common law states being of course those where an important source of the law is case law derived from judicial decision-making.

The migratory journeys of the missionaries, carrying and preserving copies of almost-lost ancient texts, remind us that we also have a shared European heritage of long-standing. Indeed, for the delegates from Jersey and Scotland this is not just an interesting historical footnote; they will I’m sure be able to provide us with the contemporary effects of living with a shared common law and civil law inheritance. In Ireland, we have been reminded in recent years (thanks to the increased availability of primary sources) of the influence on the content of the Constitution of Ireland of analogues to be found not just in, for example, the United States, but also from those in the German Constitution of the Weimar Republic.<sup>3</sup>

I, as a former lecturer in the Sociology of law and a parliamentarian for three decades, have a particular interest in the origins of law and its delivery, its instrumental usage. Indeed, it has struck me, in the past, how many anthropologists began with a legal training and used law, and the analyses of disputes as their entry point to understanding society: Max Gluckman, Evans Pritchard, Emrys Peters are names that come to mind.

Whatever our legal inheritance, each Commission operates in a state or jurisdiction where the law comprises a combination of common law derived from judicial decision-making and legislation enacted by a legislative parliament or assembly. What you, as Commissions, also share is a statutory mandate to conduct research with a view to the reform of the law, which includes the elimination of anomalies in the law, the simplification of the law and its modernisation. I also see that this statutory mandate for law reform also includes codification, which seems at least to hint that the code-based approach of our civil law European neighbours is not outside the Pale.

In this connection I feel I should commend our own law reform commission for its excellent work on statute law restatement and the Legislation Directory which, as a former legislator and now as President, I find invaluable. Restating and codifying laws also makes the law more accessible to citizens. This ought to be an enduring value in the promotion of the rule of law.

Of course, law and its reform is much more than a question of where we are in terms of the historical evolution of legal systems. As Mrs Justice Catherine McGuinness, President of the Law Reform Commission of Ireland from 2005 to 2011, put it succinctly in her Foreword to the Commission’s Third Programme of Law Reform 2008-2014:

“It goes without saying that the law has a significant impact on all our lives and, as our society changes, it is necessary for our laws to respond to these changes.”

I pay tribute to Mrs. Justice Catherine McGuinness for her contribution, and while it may be difficult to emulate her achievements and skills, I hope the Government will not be daunted and appoint a successor to her soon.

This touches on a core aspect of the law reform process. Because law has such a significant role in our society, any proposal for law reform inevitably requires us all to engage in a necessary contest of ideas.

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<sup>2</sup> Johnston, “The First Adventure of the Common Law” (1920) 36 *Law Quarterly Review* 9.

<sup>3</sup> See, for example, Gerard Hogan, *The Origins of the Irish Constitution 1928-1941* (Royal Irish Academy, 2012).

Reports from law commissions will invariably include the arguments for and against reform proposals, no doubt reflecting the important principle of natural justice that both sides be heard. I understand that this is usually rendered in Latin as *audi alteram partem*. I am also aware that, one of my distinguished predecessors in the Presidency of Ireland, Cearbhall Ó Dálaigh, but earlier when Chief Justice, stated that to deny a person the right to present their side of a case would, “in an ancestral adage” as he put it, be a classic case of *clocha ceangailte agus madraí scaoilte*,<sup>4</sup> a phrase in ancient Irish that has a folk tale behind it quoted as significant support.

Dáithí Ó hÓgáin, writing for Storytellers of Ireland (the 21st Century successors of the seancaithe and scéalaí, the old bearers and storytellers, and who are supported by the Arts Council), provides the following rendition of the origins of this phrase.<sup>5</sup>

There was a beggerman passing through a town one day and a dog ran out, a savage dog, and he bent down to pick up a stone to keep the dog away from him, naturally. But the stone was stuck to the ground and so the dog bit the back out of the poor man (Dáithí is more specific as to the location of the bite). And all he could do was to make a little verse: “Is olc an baile, Baile an Fhaoitigh, go bhfuil clocha ceangailte ann agus madraí scaoilte!” (“Ballyneety is a bad place because the stones are tied there and the dogs are loose!”).

Looked at in this way, it is surely of great assistance to legislators to have a reform proposal debated with the benefit of a well-researched report published from an authoritative and independent law reform body and with the benefit of well-researched arguments for and against.

There can be no doubt that we are living in an age where technological and scientific advancement has brought with it new dilemmas, new choices, new ethical decisions. The law, always a challenging and multifaceted profession, has in this modern age become a progressively more complex one. It is a profession that has had to evolve at a rapid pace in order to deal with the increasingly difficult questions that the world faces with each new medical, technological and scientific breakthrough.

Ensuring that the law is fit for purpose in the digital age is no easy challenge. We must of course constantly bear in mind that we now live in increasingly multicultural and secular societies, where a common cultural inheritance of a set of values or social assumptions can no longer be assumed.

In this ever changing and challenging modern age it has become more and more important that the law is not seen as a static artefact but as something that must continually adapt, evolve and change over time.

The law commissions represented here continually rise to that challenge and your work has led to the enactment of important legislative reforms over a very wide range of areas, including commercial law, criminal law, family law and land law. It may be that some of these areas attract more public – and political – attention than others, notably I suspect reform of criminal law.

The subject of crime and punishment is one fraught with difficult choices; and those choices are likely to be picked over in some detail, no doubt rightly so. We are thus faced with the following kind of difficult and unavoidable questions: what matters are of such significance that they should be labelled as criminal, or no longer so labelled at all; and if they are to be labelled as criminal, to what extent can we make it as clear as possible to all members of society where the boundaries lie between permissible and prohibited behaviour; and, then, if a person stands convicted of an offence, do we have a clear sense of which sanction or sanctions are appropriate for the crime and

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<sup>4</sup> *In re Haughey* [1971] IR 217, at 264.

<sup>5</sup> [http://www.storytellersofireland.org/index.php/main\\_menu/documents/dith\\_hgin\\_on\\_storytelling/967](http://www.storytellersofireland.org/index.php/main_menu/documents/dith_hgin_on_storytelling/967).

for the offender? We may not have easy answers for all these questions, but the views of a law commission may greatly assist in the ongoing search for at least some answers.

In conclusion, I would like to mention a comment from Mr Justice Michael Kirby, former judge of the High Court of Australia and former Chairman of the Australian Law Reform Commission (and whose ancestry can be traced to County Clare). Delivering the keynote address at the Law Reform Commission's 2007 Annual Conference (and third consultation seminar on its Third Programme of Law Reform 2008-2014), he pointed out the ongoing necessity for law reform:

“History teaches the need for it. Society, technology and changing values demand it.”

This echoes the idea already mentioned that law reform takes account of the reality that we live in a fast-changing society, so that law which gave us certainty where it was needed should not be seen as a static artefact but as something that can, and does, change over time. Your ongoing work in law reform ensures that, while we respect our shared legal heritages, we are not bound by them in such a way as would impede change and reform where it is required in the light of well-thought-out review and reflection.

These remarks by President Michael D. Higgins are also available at:

<http://www.president.ie/en/media-library/speeches/remarks-at-a-reception-for-delegates-at-law-commissions-meeting>