

Address to the Constitutional Convention*

Dublin Castle, 1 December 2012

The 1937 Constitution

1. It is a pleasure and an honour for me to be asked to address you on this historic occasion. In doing this I am conscious of the fact that this short address may fortuitously serve as a link between the last occasion in which the Constitution was comprehensively reviewed and today, as I was a member of the Constitution Review Group (1995-1996) which reported in May 1996. I propose to say a few short words with regard to both the past and, within the constraints of my present office, about the future.

2. Shortly after the British evacuated their troops from this very building in January 1922, Michael Collins set about establishing a committee to draw up a new Constitution (of fundamental law) for the nascent Irish Free State which would come into being in December 1922. The Committee came up with many interesting new ideas. It borrowed from the US Constitution the idea of judicial review of legislation, i.e., the idea that laws which infringed human rights could be invalidated as unconstitutional by the courts. This was a radical idea, almost unknown in the Europe of its day. The Committee borrowed from Switzerland the idea of direct democracy and the idea that any fundamental changes in the rules governing our society could only be changed by referendum. Finally, the Committee borrowed from the inter-war constitutions of continental Europe for the contents of the human rights protections. In this regard, the Committee borrowed heavily from the much admired German Constitution ("Weimar Constitution") of 1919. The Weimar Constitution has served as model for every subsequent new constitution on continental Europe, not least those of Germany, Italy and Spain.

3. For various reasons, the Constitution of the Irish Free State was not a success. A drafting error meant that the Oireachtas could easily amend it and no referendum was held during

its lifetime. Just as critically, the Constitution was bound up with the terms of the 1921 Anglo-Irish Treaty and as that Treaty was gradually dismantled, so too did the seams of the 1922 Constitution come apart.

4. By the middle of the 1930s a fresh start was necessary. Fianna Fáil came to power in 1932 and in 1934 Mr. de Valera had set up a top-level review committee to review the 1922 Constitution article by article. This Committee recommended keeping the existing fundamental rights protections (subject to a few changes) but recommended more fundamental change elsewhere. In April 1935 de Valera asked the most influential member of the 1934 Committee, John Hearne, Legal Adviser at the Department of Foreign Affairs, a hugely gifted lawyer with remarkable talents, to prepare a draft of a new Constitution. Hearne's immaculate first draft was prepared within weeks thereafter and it served as the template for the present Constitution.

5. Drafting began in earnest in August 1936 and continued relentlessly until the Constitution was passed by a single-chamber Oireachtas in June 1937. The Constitution had the distinction of being the first ever adopted by a popular vote on 2 July and it entered into force on 29th December 1937. Since June 1941 (i.e., three years after the inauguration of the first President) it can be amended only by referendum.

6. While Hearne was the principal drafter, thousands of documents were generated in the course of drafting. Outside of the drafting committee, the persons with the greatest influence on the drafting were the parliamentary draftsman, Arthur Matheson, the Secretaries of the Departments of Finance and Justice, outside lawyers and judges from the High Court and Supreme Court, a Jesuit, Fr. Edward Cahill S.J. While there is a sort of mythology about the role of the future Archbishop of Dublin Fr. John Charles McQuaid, my own analysis of the archival material suggests that his role and influence – which, in any events, dates only from February 1937 (i.e., rather late in the drafting process) – has been somewhat overstated.

7. The Jesuit submission of October 1936 was much more influential, because their wording was borrowed more or less completely from a variety of different inter-war Constitutions which caught their fancy, sprinkled with the occasional sentence or two from Papal Encyclicals from this period. The fact that this draft was so influential is one of a number of

reasons why so much of the wording, style and structure of the Constitution has a close affinity with the continental constitutions of the period. Remember that the drafters in 1922 had done much the same and much of their language of 1922 made its way into the 1937 Constitution and, of course, Hearne was independently borrowing from these continental sources.

8. What can certainly now be said is that the Weimar Constitution of 1919 served as the basic model for the Constitution. Here I might give a very minor example relevant to your immediate deliberations. Article 44 of the Weimar Constitution provided that the term of office of the German President was to last for seven years and Article 12.3.1 of our own Constitution is in the exactly the same terms.

9. While de Valera's own notes show that Hearne urged him to look at Weimar, he may not have realised the extent to which Hearne's drafting borrowed so extensively in terms of content, style and structure from Weimar. Weimar itself had borrowed from the French Constitutions of the 19th century and other inter-war constitutions (Austria, Poland, Czechoslovakia and Spain) borrowed from Weimar. Hearne frequently prepared memoranda for de Valera summarising how a great variety of other (mainly continental European) constitutions dealt with various issues.

10. At the risk of over-generalisation, one could sum up the various influences from other Constitutions and sources as follows:

Preamble: Poland (1921)

Organisation of Oireachtas, system of government and control of finances: British constitutional practice, Weimar (1919)

Separation of powers between legislative, executive and judiciary: USA (with modifications)

The President: Weimar

System of judicial review, declaring laws unconstitutional, special role for Supreme Court: USA

Power of President to refer Bills to Supreme Court: Weimar, Czecho-Slovak Constitution (1920)

System of criminal trials: US Constitution, British practice

Referendum: Switzerland, Weimar

Equality before the law and no titles of nobility: Weimar, USA (?)

General duty to protect fundamental rights (Article 40.3.1 and Article 40.3.2): Portugal

Protection of liberty and the home: Weimar, France

Freedom of association: Weimar

Protection of family (Article 41): Weimar, Papal Encyclicals (but note that the key language of Article 41 – “inalienable and imprescriptible rights, antecedent and superior to all positive law” is taken verbatim from French Constitution 1848)

Property: USA (?), Papal Encyclicals (?), Weimar

Education and welfare of children: Weimar, Papal Encyclicals.

Religion: Poland (1921); Government of Ireland Act 1920; Anglo-Irish Treaty (1921).

11. It is easy to point to the Constitution’s obvious faults and flaws: these are well known and well-documented. While I do not wish to trespass into the domain of political controversy, it can nevertheless be said that some of the more nationalist and religious references which remain do not match the prevailing social and political culture as well as they once did. But what I find intriguing is the extent to which the Constitution’s obvious strengths and considerable achievements are almost never mentioned in this public discourse. Nearly every provision of the Constitution which you will be required to consider and examine has been subjected to minute examination by the courts in a colossal collection of case-law which has built up over the years.

11. It is a testament to Hearne’s peerless drafting skills that the Constitution – with very few exceptions – fits together so beautifully and in an integrated whole. 75 years of evolving and ever-changing constitutional case-law are living proof of this. Recall how

difficult, complex and problematic the drafting of even specific and isolated constitutional amendments have proved over the last three decades or so. It is a measure of Hearne's unique talent that he could – and did – draft an entire document with little enough assistance in so short a period. Those who think we could easily start again from scratch have to ask themselves where we would be able to find another Hearne to do this work. But that is a bit like casually saying that we could easily find another Joyce or another Yeats in a new generation of writers.

12. In the period since the Constitution has been enacted there have been over 75 declarations that particular laws and rules were unconstitutional. Thus, laws preventing access to contraceptives, discriminatory taxation of married couples, arbitrary taxation systems, laws interfering with court business, discriminatory rules regarding the religion of adoptive parents, laws impeding independent Dáil candidates from standing for election; laws giving certain constituencies favourable Dáil representation; laws excluding women from juries and certain men from adopting; laws giving men ultimate say in the rearing of children; laws excluding legal aid in criminal cases and discriminating against the homeless in criminal prosecutions and laws interfering with the “inviolability” (or sanctity) of the home have been found to be unconstitutional. Important new rules promoting fairness in criminal trials, administrative decision-making and referendums have been developed by the courts based on the Constitution's requirements. Much of this seems nowadays either to be forgotten or taken for granted.

13. This list of notable decisions and impacts could be much extended. But no one can possibly under-estimate the absolute centrality of the Constitution in our legal system. The verdict of our greatest constitutional scholar, the late Professor John Kelly TD in 1980, was that the Constitution had produced results which were, on the whole, “beneficial, rational, progressive and fair.” If time has made that verdict safe from review, it is nonetheless depressing to find that much public discourse in this area is dominated by the comments of the hyper-critical and the ill-informed.

14. Much of the criticism of the Constitution seems directed at the proposition that many of its provisions are unique and special to Ireland, redolent of an agrarian, nationalist and very religious society that is no more. I seriously dispute that proposition. I think that you

would rather find that much of the Constitution has very close comparators – for all the reasons that I have mentioned – with its continental counterparts. The fundamental rights – equality, liberty, family, education and children, the home, free speech, religion and freedom of thought, property – all are protected in very similar fashion and in language that represents part of the common European legal heritage since the French Revolution (“inviolable”, “inalienable and imprescriptible”, “respect”, “defend and vindicate” etc.). I might here give two examples:

15. Article 40.5 protects the “inviolability” of the dwelling (“sanctity of the home”). The *exact same language* (“inviolability”) with reference to the home may be found in the constitutions of Germany, Italy, Belgium and Denmark and similar language is also found in a variety of other continental constitutions.

16. Most continental constitutions also protect the family and the right to education, even though many Irish people have been led to believe that the provisions dealing with the family in Article 41 and Article 42 of the Constitution are unique and exceptional to Ireland. Thus, for example, Article 42.1 refers to the “inalienable right” of parents to rear and educate their children and both the “old” Article 42.5/“new” Article 42A.2 (following the recent referendum) allow for the State to step in where parents “fail in their duty” towards their children. Yet Article 6(2) of the German Basic Law (Constitution)(1949) says that “the care and upbringing of children are a natural right of parents” and Article 6(3) allows the German State to intervene where the parents “fail in their duty” to their children. Is there anything so different between those provisions, not least given the *exact same language* (“fail in their duty...”) is also used in both documents?

17. Many of these constitutions have provisions that we would consider odd and eccentric. Nearly all of them have overtly religious references, many of them far more striking than anything that was ever contained in the “special position of the Roman Catholic Church” clause in Article 44 which was removed by referendum in 1972. Many understandably object to the “mother in the home” clause in Article 41.2.2 of our Constitution, but Weimar had versions of this (Article 119 and Article 161) and even today Article 6(4) of the German Basic Law provides for the special protection of mothers and motherhood.

18. While, therefore, some of the criticisms of the Constitution's more contentious clauses are all too well-founded, the criticisms directed at the bulk of the document generally are not. It appears to be another example of all-too typically Irish characteristics of negativity, lack of self-belief and lack of civic pride in our institutions and in our own achievements.

19. In early 1865 as the US Civil War drew to an end, Abraham Lincoln wrestled with a US Constitution which, despite all its great promise, was stained by its recognition of slavery and the civil war that this had produced. Lincoln was determined that the Constitution would survive, but with the dark stain of slavery removed. The post civil war amendments eradicated slavery, guaranteed equality and due process of law and gave the US that "new birth of freedom" which Lincoln had promised at Gettysburg.

20. Our present woes – while acute – do not compare to the dilemmas which Lincoln faced. The promise of this Convention nevertheless is that should you and, ultimately, the People will it, the intentions of the drafters in 1937 as reflected in the Constitution's Preamble that the "dignity and freedom of the individual be assured" can be re-invigorated; that the Constitution too can be given a new birth of freedom which will refresh our democracy, renew our commitment to the protection of human rights and, above all, rekindle a civic pride in our State and its fundamental law and hold out fresh hope for better times in the future.

* Gerard Hogan, judge of the High Court.