

Bunreacht na hÉireann –

Liberty’s Bulwark in an Age of Uncertainty

*An Address by the Auditor, Declan Harmon to the Inaugural Meeting of the
187th Session of the Law Students’ Debating Society of Ireland.*

The Honorable Society of King’s Inns

Tuesday, 21st February 2017.

Mr. Justice Hogan, Ms. Justice Baker, Deputy O’Callaghan, Benchers of the Honorable Society of King’s Inns, Distinguished Guests and Members of the Law Students’ Debating Society of Ireland, Ladies and Gentlemen:

First, I wish to begin by thanking all the staff of the King’s Inns – both academic and support – for their assistance not only in preparing for this Inaugural Meeting tonight but also for their unwavering encouragement for all the students of the Inns throughout the year.

To my fellow students, I would like to say thank you for the honour you have conferred on me by electing me to be Auditor of this 187th session of the Law Students’ Debating Society of Ireland. To be chosen by your peers to represent them is a particular honour in any context. For me, the honour is enhanced even further when I consider the contribution made to the law and to the life of this country generally by some of my distinguished and notable predecessors, the work of one of whom in particular, John Hearne, I will have the pleasure of referring to in the course of my address. I would also like to thank my colleagues on the LSDSI Committee for their support.

The title of my address this evening is “Bunreacht na hÉireann – Liberty’s Bulwark in an Age of Uncertainty”. In choosing the Constitution as the broad theme of my address, I was conscious that 2017 is the 80th anniversary of the enactment of the Constitution by the people. My address will first examine the role that the Constitution has played since 1937 as an anchor for the democratic Irish state. Secondly, it will look at what lessons the era that Bunreacht na hÉireann was drawn up in can teach us for our uncertain world today. Finally, it will argue that the Constitution was and remains liberty’s bulwark, providing for us in Ireland what James Madison sought from his nation’s constitution:

[A] republican remedy for the diseases most incident to republican government¹.

Turning then to my first point: the role of the Constitution as an anchor for the democratic Irish state. To understand this point, it is, I submit, helpful to go back and examine what was sought to be achieved by those who drafted the Constitution. Taking such a journey allows me to draw attention to the role played by John Hearne, who was Auditor of the LSDSI in the 1919 to 1920 session. After a short period of practise at the bar up until 1923, he became assistant parliamentary draftsman in the office of the new Free State Attorney General and later legal adviser to the Department of External Affairs.²

Éamon de Valera had the opportunity to observe Hearne’s work as he simultaneously held the roles of President of the Executive Council and Minister for External Affairs. De Valera was clearly impressed by what he saw because it was Hearne, rather than anyone within the

¹ Madison, *The Federalist Papers (Federalist 10)*.

² McGuire and Quinn eds., *Dictionary of Irish Biography* (Volume 4, Royal Irish Academy, 2009), at 582.

Department of the President, whom he instructed to prepare draft heads for a new constitution.³ De Valera himself later described Hearne as “architect in chief and draftsman of the Constitution”.⁴ Hearne was, I will aim to demonstrate in a moment, a man who transcended the limitations of his own time.⁵ It is a privilege to be able to pay tribute to him as one of his successors as Auditor tonight.

John Hearne had a deep understanding of jurisprudential thought on constitutional issues and was influenced, in particular, by the United States Declaration of Independence, the Declaration of the Rights of Man and the Bill of Rights.⁶ Such influence can certainly be seen in Hearne’s memorandum to de Valera of 18th May 1935 in which he explained the methodology adopted in the preparation of the draft heads that he delivered to his political master that day. According to his memo, Hearne’s aims were, *inter alia*, to produce a constitution that would “contain certain basic Articles guaranteeing fundamental human rights” and “to place the Articles in a specially protected position...to render them unalterable save by the people themselves”.⁷

Today, Hearne’s aims probably seem axiomatic. After all, who in 2017 would design a constitution that did not contain a guarantee of fundamental human rights. However, in 1937, the fact that Hearne stated his objectives in such clear terms was remarkable for, I submit, two reasons.

³ Keogh, “The Irish Constitutional Revolution: An Analysis of the Making of the Constitution” in Litton ed., *The Constitution of Ireland 1937 – 1987* (Institute of Public Administration, 1988), at 8.

⁴ *Ibid.*

⁵ *Ibid.*, at 65.

⁶ Denham CJ, “Waterfordian John J. Hearne: A drafter of the Irish Constitution” *Paper delivered to the Waterford 1,100 Talks series*, 10th November 2014.

⁷ Keogh, note 3, at 8.

First, as was stated by Denham J (as she then was) in *A. v. The Governor of Arbour Hill Prison* [2006] 4 IR 88 “many of the principles set out in the Constitution of 1937 were ahead of their time. It was a prescient Constitution”.⁸ The learned judge rightly identifies in this regard that Ireland led the common law world in 1937 by expressly stating in the Constitution that the jurisdiction of the superior courts extended to questioning the validity of any law *vis-à-vis* the provisions of the Constitution.⁹ This is what gave practical effect to the fundamental rights protections contained within the text.

Second, the desire to give special protection to those rights and to make their altering a matter for the people alone, demonstrates the democratic nature of the Constitution and how it was to be an expression of the sovereign will of a sovereign people. This principle ultimately was formulated in Article 6 of the Constitution stating, as it does, that all powers of government derive “from the people”. As a result, to borrow the words of Walsh J in *Crotty v. An Taoiseach* [1987] 1 IR 713, “it is the People themselves who are the guardians of the Constitution”.¹⁰

As Denham CJ has previously pointed out, 1937 was the first time the Irish people had been given an opportunity to give their assent to a constitutional document.¹¹ However, part of what makes the Constitution the anchor of our democracy, I would submit, is that it is not a staid and static text from 80 years ago. As Murray J said in *Sinnott v. Minister for Education* [2001]

⁸ [2006] 4 IR 88, at 145.

⁹ [2006] 4 IR 88, at 146.

¹⁰ [1987] 1 IR 713, at 783.

¹¹ Denham CJ, “Some thoughts on the Constitution of Ireland at 75” *Paper delivered to the UCD School of Law Conference on “The Irish Constitution: Past, Present and Future”*, 28th June 2012.

2 IR 545, the Constitution is “a living document which falls to be interpreted in accordance with contemporary circumstances”.¹²

That dictum of Murray J begs the question ‘What are our contemporary circumstances?’. In attempting to answer that question, I will mention another anniversary. This year marks 40 years since the Harvard economist and American diplomat John Kenneth Galbraith wrote his book *The Age of Uncertainty*. In explaining the title of the book, Galbraith said that he would contrast the great certainties of economic and political thought in the 19th century with the great uncertainty facing the world in 1977.¹³ As Professor Barry Eichengreen of the University of California, Berkeley has recently pointed out, considering the concerns of today, if Galbraith were writing the same book in 2017, he probably would call the 1970s “The Age of Assurance”.¹⁴

Our contemporary uncertain circumstances can, I submit, be well illustrated by reference to one dispatch from the bush telegraph of our age, Twitter. On the night that Donald Trump was elected President of the United States, Florian Philippot – who is one of the chief advisers to the French Front National leader Marine Le Pen – tweeted “Their world is collapsing. Ours is being built”.¹⁵ Of course, it would be arrogant to ignore either the enthusiasm that many in France feel at the prospect of a Le Pen presidency or the support that President Trump garnered from a significant minority of American voters. However, I doubt I am alone in experiencing

¹² [2001] 2 IR 545, at 680.

¹³ Galbraith, *The Age of Uncertainty* (Houghton Mifflin Company, 1977), at 7.

¹⁴ Barry Eichengreen, “This is a true age of uncertainty for the world economy” *The Guardian*, 14th December 2016.

¹⁵ Matthew Weaver, “Right wing populists first to congratulate Trump on historic upset” *The Guardian*, 10th November 2016.

a feeling of fear when I consider Philippot's image of the rule-based order that has existed since the Second World War crumbling in favour of what I can only describe as demagoguery.

That image, therefore, brings me to the second theme I wish to explore: what lessons the era that Bunreacht na hÉireann was drawn up in can teach us for our uncertain world today.

When the Constitution came into operation in December 1937, much of Europe was entering into an earlier period of demagogic control, with devastating consequences that are unnecessary for me to spell out. In Ireland itself, despite the peaceful transition of power from Cumann na nGaedheal to Fianna Fáil in 1932, there were concerns expressed during the debate on the proposed constitution that the new document was an instrument for de Valera to impose tyranny. During the Dáil debate on the draft Constitution, John A. Costello, who would later hold the office of Taoiseach established by the Constitution, said:

I tell the House there is not a greater tyranny than the tyranny which masquerades under the cloak of democracy. That is the sort of tyranny that is embodied in that document before the House, a tyranny which masquerades under the cloak of democracy.¹⁶

Costello's fear was not realised. In fact, such fears could not have been wider of the mark. De Valera did not carve out an authoritarian power base for himself and deliberately avoided doing so or being seen to do so. For example, in a conversation with the British Ambassador in 1967, then President de Valera said that, after "hesitating for a long time over the American presidential system" he ruled it out as an option for the new Constitution because Irish people

¹⁶ Dáil debates, Volume 67, Number 2, Column 304, 12th May 1937.

were “too long trained in English democracy to sit down under a dictatorship, which is what the American system really is”.¹⁷

Professor John A. Murphy has pointed out that the 1937 Constitution bore witness to de Valera's commitment to liberal democratic principles.¹⁸ It was also, argues Professor Murphy, de Valera's way of exorcising the ghost of his rejection of the majority verdict of the electorate in the 1921 to 1926 period.¹⁹

De Valera and his drafters delivered to us a Constitution which has allowed the State to withstand world war, repeated economic depression and a 30 year campaign of subversive activity on our island to become one of the longest continuously surviving democracies in the world. The American constitutional scholar Francis X. Beytagh has characterised Ireland's position thus:

It is, perhaps, an anomaly that a small, relatively poor country off the coast of continental Europe, for centuries subjugated politically by a more powerful neighbour, has become, in a number of respects, a microcosm for assessing the future of constitutionalism around the world.²⁰

We should be careful, however, not to attribute too much power to one document. For example, as has been pointed out by Hogan J and Professor Whyte, the German Weimar constitution of 1919 inspired the (non-justiciable) Directive Principles of Social Policy contained in Article

¹⁷ Ferriter, *Judging Dev* (Royal Irish Academy, 2007), at 203.

¹⁸ John A. Murphy, “The 1937 Constitution – Some Historical Reflections” in Murphy and Twomey eds., *Ireland's Evolving Constitution* (Hart Publishing, 1998), at 13.

¹⁹ *Ibid.*

²⁰ Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* (Round Hall Sweet and Maxwell, 1996), at x.

45 of Bunreacht na hÉireann²¹, the prohibition on retrospective criminal legislation in Article 15.5.1²², the inviolability of the dwelling provided for in Article 40.5²³ and the powers and functions of the president²⁴. To quote Hogan J, the reach of the Weimar constitution “stretched right into the fundamental rights provisions” of the 1937 Constitution²⁵. But no matter what protections the Weimar constitution provided to citizens of the Weimar Republic, the constitution was of little assistance to them when faced with Hitler’s *Machtergreifung* (seizure of power).

I do not subscribe to the simplistic hyperbole put forward by some who compare demagogues like Trump and Le Pen to Nazis or fascists. The threat that they pose to constitutional government is not as stark as that faced in the 1930s. But it is foolish, I submit, to consider that they and their ilk pose no threat at all. Take, for example, the questioning by President Trump of the authority of validly appointed federal judges. That is a direct attack by one branch of government on another, considerably weaker branch. It is an example of what Aristotle called incontinence, a case of excessive folly.²⁶

Our domestic politics might, current controversies aside, seem blissfully mundane compared to contemporary American, British or French politics. But our domestic politicians are also prone to the occasional bout of incontinence. An area where this has manifested itself with some regularity is the tendency of members of the Oireachtas to attempt to assume for

²¹ Hogan and Whyte, *JM Kelly: The Irish Constitution* (4th ed., Lexis Nexis Butterworths, 2003), at 266.

²² *Ibid*, at 274.

²³ *Ibid*, at 1710.

²⁴ *Ibid*, at 224.

²⁵ Hogan J, “The Influence of the Continental Constitutional Tradition” in Ruane, O’Callaghan and Barniville eds., *Law and Government: A Tribute to Rory Brady* (Round Hall, 2014), at 160.

²⁶ Thomson, *The Ethics of Aristotle* (Revised edition, Penguin Books, 1976), at 238.

themselves judicial functions. This tendency has produced a series of case law on the issue, running from *In Re Haughey* [1971] 1 IR 271 through to, in recent weeks, *Kerins v. McGuinness* [2017] IEHC 34.

The Oireachtas has a legitimate and, as was held by the Supreme Court in *Maguire v. Ardagh* [2002] 1 IR 385, inherent power of inquiry into matters properly within its remit.²⁷ However, it has proven difficult to strike a balance between the legitimate inquiry into such matters by members of the Oireachtas and the protection of the fundamental Constitutional rights of those that may come within the scope of such inquiry. Sadly, as was demonstrated by the behaviour of members of the Dáil Public Accounts Committee that was outlined in the judgment of the Divisional Court in *Kerins v. McGuinness*²⁸, some of this difficulty must be attributed to the inability of certain Oireachtas members to conduct inquiries without infringing on those rights.

This phenomenon surely played on the minds of the people when they considered the 30th Amendment to the Constitution Bill – the so-called “Oireachtas inquires referendum” – in 2011. Notwithstanding the populist anger that existed at the time arising out of the financial and economic crisis, the people had the good sense not to allow such anger be used to erode either the freedoms that we enjoy as citizens under the Constitution or the ability of an independent judicial branch to vindicate such freedoms.

The erosion of that independence and of those freedoms must be watched and guarded against very carefully because of the unique role held by the judicial branch in giving effect to the

²⁷ Hogan and Whyte, note 21, at 130.

²⁸ [2017] IEHC 34, in particular paragraphs 18 – 22.

protections contained in the constitutional text. As was stated by O'Donnell and Clarke JJ in their joint judgment in *Callely v. Moylan* [2014] 4 IR 112:

It is an important part of the principle of government by separation of powers that it falls to the least powerful and dangerous branch to define the proper area of functioning of each of the branches of government. In entrusting this task to the judicial branch, the Constitution places considerable trust in the courts to identify and maintain the proper areas of activity of each branch including their own.²⁹

The overall lesson to be learned, I submit, is this: the constitutional document itself provides no protection unless the institutional framework it provides for is strong. It must be strong enough to withstand not only external attacks but also attacks by one part of the framework on another. If it cannot do so, we will be living in a situation of, as Ó Dálaigh CJ put it in *In Re Haughey*, “*clocha ceangailte agus madraí scaoilte*”³⁰ – the town where the stones are tied and the dogs are loose.

This brings me to my final point: the role of the Constitution as liberty's bulwark. Any examination of this issue must surely engage with the question as to what extent Hearne's aim of a constitution guaranteeing fundamental human rights has been fulfilled

O'Donnell J has pointed out that an examination of such issues tends to emphasise the influence of individual instances of constitutional litigation upon issues of individual rights in the development of the country.³¹ Any student of constitutional law is able to rattle off names such

²⁹ [2014] 4 IR 112, at 168.

³⁰ [1971] 1 IR 271, at 264.

³¹ O'Donnell J, “The Most Curious Forerunner' to the Fundamental Rights Provisions in the 1937 Constitution” in Ruane, O'Callaghan and Barniville eds., note 25, at 139.

as Ryan, McGee and Norris as examples of that. The existence of unenumerated rights, which was discovered, if I might phrase it in that way, in *Ryan v. Attorney General* [1965] IR 294 has, I submit, tended to overshadow the other great source of protection for citizens: judicial review.

The declaration of unenumerated rights is, of course, controversial due to the jurisprudential disagreement over whether the making of such declarations by the courts represents excessive judicial activism. For example, in *TD v. Minister for Education* [2001] 4 IR 259, Keane CJ appeared to cast scepticism over whether the unenumerated rights actually existed and certainly seemed to suggest that the declaration of such rights might properly be within the ambit of the Oireachtas and not the judiciary.³²

Certainly, it is an open question, as Hogan J and Professor Whyte put it, as to whether it was “within the contemplation of (the Constitution’s) framers that (the) doctrine (of unenumerated rights) would emerge”.³³ However, when it comes to the extensive scope of judicial review, there is little doubt that the framers of the Constitution knew exactly what they were creating. As Denham J (as she then was) pointed out in *A v. The Governor of Arbour Hill Prison* the creation of such an extensive power of judicial review was a deliberate divergence from the system of government of the United Kingdom and placed Ireland at the leading edge of jurisprudence in this area in the common law world.³⁴

The extent of the power of judicial review must be a source of frustration to politicians and officials in the executive branch of the government of the State. There may well be a view in

³² [2001] 4 IR 259, at 281.

³³ Hogan and Whyte, note 21, at 1390.

³⁴ [2006] 4 IR 88, at 146.

such quarters that the power has extended too far, particularly in the review of administrative decisions. I submit, however, that if the executive are finding judicial review frustrating, this is not evidence that the power has extended too far but that it is working exactly as its framers intended. It is a signal of the very nature of the State they intended to create.³⁵

The 1937 Constitution was seen as a partisan creation and, as I have referred to earlier, was met with suspicion by those that were of a different political persuasion to that of its principal sponsor, de Valera. It was colloquially referred to as “de Valera’s Constitution”, which was generally not intended as a compliment.

However, as I hope I have demonstrated, the Constitution has served this State faithfully in the 80 years since its enactment, often through turbulent times on our island and across our continent. It has created a stable institutional framework which, despite the inevitable controversies that arise in a vibrant democracy, is generally respected by the people it serves. It has achieved the aims of its drafters in giving justiciable effect to the fundamental rights and freedoms that it guarantees.

It is no longer “de Valera’s Constitution” or even “John Hearne’s Constitution” but “the People’s Constitution”. In the coming years the people may choose to make amendments to its provisions in a number of areas, most notably those relating to matters presently before the Constitutional Convention. However, perhaps the greatest tribute to the respect with which it is held by the people is that there are no serious proposals for it to be replaced – those who wish to see change envisage doing so by means of amendment. It has inspired constitutional documents in dozens of states that have undergone their own journey out of empire and into

³⁵ [2006] 4 IR 88, at 146.

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independence.³⁶ Moreover, it continues to inspire a distinct jurisprudence of our own which, in the words of O'Donnell J, "provides insights and surprises in equal measure".³⁷

³⁶ Denham CJ, note 11.

³⁷ O'Donnell J, "The Most Curious Forerunner' to the Fundamental Rights Provisions in the 1937 Constitution" in Ruane, O'Callaghan and Barniville eds., note 25, at 139.