Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

The Irish Free State Constitution

Delivered pre-recorded by Mr Justice Donal O'Donnell, Chief Justice, at the 1922 Constitution Centenary Conference on 5 December 2022

I am very sorry I cannot be with you in person at this event to commemorate and discuss the 1922 Free State Constitution. Unfortunately, this event comes at a very busy time for me. We have just returned from a bilateral exchange with the *Bundesverfassungsgericht* in Karlsruhe, and I am currently attending a conference celebrating 70 years of the European Court of Justice in Luxembourg. It does strike me however that there is a clear connection between these events and the drafting and enactment of the Irish Free State Constitution 100 years ago. In some ways, I would not be here in Luxembourg if this diverse group of men had not gathered in this room and devoted themselves to the task of producing a constitution.

First, I would like to sincerely congratulate both Laura Cahillane and Donal Coffey on the organisation of this event. It is a really impressive line-up of speakers and fascinating topics.

It is right perhaps to start with the question of why it is important to commemorate a constitution that existed for only 15 years, and was acknowledged to have flaws, and to have carried within it the seeds of its own destruction.

The 1920s were undoubtedly an era of enthusiastic constitutionalism, but subsequent decades were very turbulent waters for those constitutional vessels constructed in the immediate aftermath of the First World War. The 1922 Free State Constitution was no exception in this regard:-

(i) It was weighed down from the outset by the inclusion of provisions from the Treaty such as the Oath of Allegiance, all of which were almost universally unpopular in Ireland;

(ii) It was drafted by theorists, but put in the hands of legislators, administrators and, to a large extent, a legal community which did not always appreciate its possibilities, or indeed, its values;

(iii) The drafters, although themselves people of considerable substance, did not go on to take a role in the public of the State such as to capture the imagination of subsequent generations in the way, for example, that the drafters of the US Federal Constitution did; and

(iv) In any event, as we know, the Constitution carried a hairline fracture below the waterline in the provisions of Article 50 permitting its amendment by ordinary legislation, which would in due course sink the Constitution.

And so, after 15 years, it was, having been eviscerated by a process of amendment permitted by Art. 50, revoked and replaced by Bunreacht na hÉireann which – in significantly amended form – remains our basic law. So why consider the 1922 Constitution?

In my view, the continuing value and study of the 1922 Constitution lies in part precisely in what occurred in 1937 when a new constitution was drafted by an administration comprising those who had opposed the Treaty settlement, and indeed, the Constitution that followed it. And while significant changes were made and innovations introduced in the 1937 Constitution, what was striking was that the essential structure established in 1922 remained, and that was I think because, leaving aside the features of the Treaty which were required to be contained in the Constitution, and some experimental innovations which did not take root, the essential structure of the 1922 Constitution was, at its heart, a very modern document. Interestingly, I think that was partly because of the extensive study the committee made of the existing constitutions of the world, and in particular those emerging in the aftermath of the World War I. This infusion of modern secular and democratic optimism had a significant influence – especially when you consider the visible piety of members of the committee such as Hugh Kennedy and Alfred O'Rahilly. It established something that only became the norm in the period following World War II - that is that it established a state based on the separation of powers in which the institutions of state were created, defined by law, limited by a constitution providing for fundamental rights, and providing

furthermore that those limitations and rights could and would be enforced by actions by the courts, and, perhaps as importantly, that the decisions of those courts would be and have been complied with by the other branches of government.

I would like to touch very briefly on this last feature of the Constitution, i.e., the provision for judicial review contained in Article 66 of the Irish Free State Constitution, and continued in Article 34.3.2° of the 1937 Constitution.

I remember being fascinated by the 1922 Constitution when I first encountered it. I think part of that was the fact that it was clearly the product of idealism, both international and national, and that it was the last opportunity to avoid the division that led to the Civil War, and which has scarred Irish affairs in the succeeding 100 years, but also perhaps one of the last points in which the business being conducted was approached on an all-Ireland basis. Partition had not yet taken root, and accordingly, at least three of the participants in the drafting of the Constitution had strong connections with what is now Northern Ireland. It was a glimpse of a different Ireland without partition without the Civil War.

The provisions for judicial review contained in Article 66 were described later by Professor John Kelly as "potentially crucial" and are certainly central to the aspect of the 1922 and 1937 Constitutions which involve the courts.[1]

When I first encountered the Constitution, it was said generally that the inspiration for this came from the US. Thus, for example, Hugh O'Flaherty in his book of essays *Justice Liberty and the Courts* could confidently say of our Constitution that judicial review "*came to our present Constitution via the Constitution of the Irish Free State, from the Constitution of the United States of Americ*a".[2] It was said generally, by the standard texts, that the inspiration for Article 66 was either Kevin O'Sheil – one of the northerners I mentioned – who, it was said, had written a book about the US Constitution, i.e., '*The Making of the Republic*' published in 1920, or it was said, that it could be traced to the influence of C.J. France, an American member of the committee who had met James Douglas while being

[1] Kelly, Grafting Judicial Review on to a System Founded on Parliamentary Supremacy: The Irish Experience quoted Cahillane, *Drafting the Irish Free State Constitution*, Manchester 2016.
[2] O'Flaherty, *Justice Liberty and the Courts*, Round Hall 1999.

active in the work of the Irish White Cross. Thus, Akenson and Fallon in their interesting series of articles in Eire Ireland 1970 could say:-[3]

> "*He* [France] *was a useful addition because he possessed a familiarity with the structural advantages and disadvantages of the American Constitution".*

Taking each of these in turn, I remember acquiring a copy of '*The Making of the Republic*' and opening it with some excitement, but discovered that it did not contain any account of the American Constitution, or American constitutional law. Instead, it was an account of the American Revolution of 1776, rather than the Federal Constitution of 13 years later. Furthermore, we know Kevin O'Sheil did not attend many of the meetings, and did not consider himself in a position to sign any of the drafts of the Constitution. While he was a significant and interesting figure and left a fascinating account of his life, particularly in the early part of the 20th century, nothing in his background or subsequent career suggests to me he was particularly interested in US constitutional law, or indeed, the theory of judicial review.

C.J. France from Seattle was another intriguing member of the committee. He was initially a much valued member of the committee, being, as I say, associated with James Douglas, himself an important and influential member of the committee. But C.J. France seems an entirely unlikely enthusiast for *Marbury v. Madison*. It seems clear from the papers of the Constitution that his involvement in the committee was principally directed towards the question of establishing the ownership by Ireland of its natural resources. We also know that during the progress of the committee, Douglas was warned by other American contacts of Douglas against C.J. France. Brian Farrell records a letter to Douglas which he passed to Collins which stated that:-[4]

> "*We had no knowledge, of course, of what Mr France's ideas or sentiments regarding the constitutional provisions are. He may reflect our sentiments he may correctly reflect predominant American sentiment, but we do not know and therefore, our concern can be readily understood, especially as*

[3] The Irish Civil War and the Drafting of the Free State Constitution 5 Eire – Ireland (1970) 10.
[4] The Drafting of the Free State Constitution, 1970, 5 Ir Jour (N.S) 115.

his brother came out of Russia recently with ideas and opinions regarding the establishment of a government there that shocked and astounded the great majority of thinking Americans".

Subsequently, Douglas appears to have concluded that on the face value of the correspondence France looks "a pure adventurer". It seems probable that France did share his brother's dubious ideas, which must have been of a socialist, if not communist, variety. This was a period where the IWW, the International Workers of the World, were particularly active, especially in the north-western states of the United States. E.V. Debs, a socialist candidate for president, won nearly 1 million votes in 1920. One interesting indicator of the view of France can be found I think in a fascinating speech delivered by Hugh Kennedy to the semi-centennial meeting of the American Bar Association in 1928. It is entitled "*Character and Sources of the Constitution of the Irish Free State*" and refers to the influences of the written constitutions of the United States, Germany and Switzerland, but nowhere addresses the question of Article 66 of the Free State Constitution or draws any parallel with the United States.[5]

Hugh Kennedy is an interesting and complex character. I know that Thomas Mohr, for example, has done very valuable work on the Kennedy papers and it would I think be particularly valuable to have a fully rounded picture of this talented, complex and sometimes difficult man, and the first occupant of the office I hold. He undoubtedly could be both passionate and eloquent, the speech concludes:-

"*To adapt the poet's modest claim, it may be a poor thing, but it is all our own, and as such we assert its authority and claim upon our people. This boast at least we may make without fear of challenge, that under the institutions as we have made them there is no room for ascendency of class or religion, and the upgrowing youth of our State will compete, with equality of opportunity, in a free country to whose service they are now called to give of their best in conditions which realise what seemed the wild dreams with their fathers, conditions which end a feud of centuries and open up the economic and other possibilities which should flow from the reconcilement of historic enmity*".

[5] S(1928) 14 ABAJ 437.

During the speech, Kennedy gave quite a detailed account of the drafting of the Constitution and described, but did not identify by name, the members of the committee, drawing attention for example, to the US connections of James Murnaghan. But he made no reference to the US lawyer who was a member of the committee. This is all the more striking because the conference was being held in Seattle, France's hometown. It seems apparent that Kennedy was warned, or perhaps had already come to the conclusion, that reference to C.J. France in the US would not be welcome among US lawyers.

The picture of France which we can glimpse is one which makes him a very unlikely enthusiast for judicial review. After all, in the United States *Lochner v. US* was only seventeen years old, *Plessey v. Ferguson* had been decided 24 years earlier, and *Dred Scott* was still vividly remembered. It is very unlikely that somebody who would have found themselves on the left of the spectrum in the US would have considered that giving power of judicial review to the courts would be a good idea.

All of this is more interesting, and perhaps striking, because as we know, draft C which was produced by Alfred O'Rahilly but also signed by someone of the significance of James Murnaghan, only contemplated the possibility of review of the validity of acts of the executive, but specifically excluded that possibility in the case of the legislature. This was because he considered that the influence of the US Supreme Court had been unhelpful, particularly in its development of substantive due process in the *Lochner* era, and the manner in which it constrained progressive legislatures.

Unfortunately, perhaps because draft C only became available late in the day, there does not appear to be much extensive debate about this, and so the thinking behind the provisions of Article 66 remain something of a mystery.

But it may be that we have been looking at this wrongly, through modern eyes, and starting from the proposition that since judicial review was an anathema to the common law system in the Westminster model and then looking for some decisive reaction to that by reference to the US.

It may be that the story is more nuanced. I have previously discussed the impact of the debates over the three Home Rule Bills and in particular, the Home Rule Bill

of 1893 and had occasion to consider the history of the context of preparing for *Maguire v. Ardagh*.[6] The reason why it was necessary to consider the history was that one of the issues to be decided was whether the power to conduct the inquiry was one that was inherent in legislatures. This involved looking at the Privy Council case of *Kielley v. Carson* in 1842 which decided that under the imperial parliament colonial legislatures had no inherent power to punish for contempt. It may, I think, be a mistake to think of judicial review *per se* as an anathema to the common law and the British Empire. In fact, judicial review was commonplace in that context. Any of the provisions for self-government of dominions or colonies required legislation establishing the division of functions and powers between the imperial parliament and the newly established colonial or dominion legislatures, and furthermore, required that that division must be capable of enforcement by courts. As the recent case in the United Kingdom Supreme Court on Scottish devolution has shown, this is in itself important constitutional law.[7] The Government of Ireland Act 1920 is a very good example. Sir Frederick Pollock quoted Kent's commentaries, stating that "*the judicial department is the proper power in the government to determine whether a statute be or be not constitutional*", and that "*this is now more natural to minds trained in English legal and political tradition*", was established in the US, and "*it has been accepted by British publicists and lawyers as applicable to the decision of causes involving constitutional questions throughout the British Empire*".[8]

Looked at in this way, what was unusual about the Irish Free State Constitution was not that the validity of the acts of the newly established legislature could be reviewed by courts, but rather that the Constitution, by reference to which those acts could be reviewed, contained a particularly expansive statement of fundamental rights.

The fact that the Irish Free State Constitution contains, at its very outset, the expansive statement of fundamental rights, most of which made their way into the 1937 Constitution almost unchanged, was perhaps one element of good luck

[6] [2002] 1 I.R. 385.
[7] Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31.
[8] Pollock, *The Judicial Committee and the Interpretation of the New Constitution, and the New Irish Constitution, Ed JH Morgan* (1912) Reissued Kennikat Press 1971.

in what was otherwise an unhappy story. The history of the Home Rule Bills suggests strongly that the British side may have wanted to protect the minority in the new State, and the Irish side wished perhaps to emphasise the independence of the State and its difference from the prior legal order. If so, and if this led to the limitation of fundamental rights and the provisions of Article 66 of the Constitution providing explicitly that the validity of laws would be explicitly subject to the jurisdiction of the courts, then that is something to be grateful for. And it perhaps makes it appropriate that I should be addressing you as it were from this distance, because the statement of fundamental rights owes perhaps as much, if not more, to our European friends, and as we discussed in Karlsruhe last week, as to the admirable example of the US Federal Constitution. All of this illustrates the fact that we still lack a knowledge as to the influence that led to the adoption of the 1922 Constitution, but also that the text remains overall of real current relevance, and perhaps most importantly that there remains work to be done and I congratulate everyone at this conference for doing it.