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Why did the Bunreacht of Saorstát Éireann collapse in 1928?

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Hugh Kennedy at an earlier speaking engagement, electioneering for the Dublin South by-election in 1923. He won the seat but gave it up eight months later prior to being appointed Chief Justice. (NLI KEN8).

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On May 23rd, 1928 the Irish Justice Minister stood up in the Dail for the second reading of the Courts of Justice Bill. One of the minor matters contained in the bill was dealing with who could stand in for the unique responsibilities of the Chief Justice Hugh Kennedy¹ in his absence. “I might mention that the Chief Justice has not, I think since 1924, taken any holidays” he explained. Now however there was need to plan for Kennedy’s absence as he shortly departed for the United States where he spent over two months. By all accounts the tour was a great success², especially when he was fêted in Boston, a city that Cosgrave earlier in the year had been told to avoid for fears of his personal safety!³

But the highlight of the tour must have been the meeting of the American Bar Association in Seattle in July 1928 where he gave a major speech about the origins of the Irish Constitution – a document he is regarded as being the chief author of⁴.

The Seattle speech.

In general the speech steered clear of controversial waters and indeed, Kennedy’s legal position necessitated this. In some ways the historical introduction to the speech was defensive, an attempt to justify the Irish Free State and indeed the Treaty to a largely republican audience. For example, his description of the notorious Oath makes clear it was nothing at all like the subservient Oaths other British Dominions swore, since it primarily pledged allegiance to the Constitution and only then to be ‘faithfull’ to the British King⁵. He could say little about one aspect of legal affairs that he cannot have relished; that as former Attorney-General for the Irish Free State it was he who had to appear before the King’s Privy Council as the highest court of appeal in Ireland. Kennedy in fact had been forced to do this as early as 1923 in the case of *Bowman v Healy* and had luckily won his case in London⁶. Interestingly he makes only an oblique reference to this event and avoids mentioning his own appearance.

It was only in the closing remarks of his speech when he introduced the first hint that all was not well with his *Bunreacht*, with the following reference to Articles 47 and 48, the Referendum and Initiative. After pointing out that ‘the draftsmen’ (including himself) would not have introduced them into the text of the document without studying their implementation in other countries and satisfying themselves that they were workable, he then said this:

‘When I left home for my visit to you, proposals for the removal of the enabling clauses from the Constitution were before the Oireachtas and were being so ardently debated as to remove them from the category of matters which I could properly discuss’⁷.

¹ Hugh Kennedy, born in Dublin and baptised there 15th July 1879. For a full biography see Keane’s article in the RIA Dictionary of Irish Biography, although this wrongly states that Hugh’s mother was a Kennedy from Tipperary instead of Clare.

² Smiddy letter to Dublin, NAI DT S5727 (DIFP website), 2nd October 1928.

³ Smiddy letter to Dublin, NAI DT S4529 (DIFP website), 9th January 1928.

⁴ The details of Kennedy’s precise role in the drafting is covered by Thomas Towey, ‘Hugh Kennedy and the constitutional development of the Irish Free State’.

⁵ Kennedy, Hugh, ABA Lecture, p441.

⁶ Towey, Thomas., p369.

⁷ Kennedy, Hugh. ABA Lecture, p445.

This essay will examine the collapse of the Constitution in 1928 and 1929 focussing on two elements of the document: the twin Articles 47 and 48 – Referendum and Initiative – and Article 50 governing the right to amend the Constitution by ordinary legislation.

Articles 47 and 48: Referendum and Initiative.

The idea behind the Referendum and Initiative was not new but, as Figgis outlined in his ‘Constitution Explained’, was originally devised by the Swiss before being adopted by many European countries as well as Australia and parts of the United States⁸. The Initiative allowed ordinary people to propose legislation that perhaps the Government was reluctant to propose itself. The counter argument is of course that it gives a prop to vocal minorities (or even agitators, depending on one’s point of view). Such was the case in the Weimar Republic when the Communists used the Initiative to propose legislation to forcibly repossess Royal lands without compensation in 1926⁹. This was the exact opposite of what Figgis claimed, namely that the Initiative produced conservative, not revolutionary law-making.

Nor would most people describe de Valera’s attempt to abolish the Oath as a conservative move, and we can only speculate on what Figgis (who committed suicide in 1925) would have made of this next development. Since technically the Initiative required a referendum of its own to enforce its implementation, de Valera decided to propose a referendum for implementation but referring in it to the specific plan to initiate the removal of the Oath. His petition was announced in the Dail on May 3rd, 1928. It immediately hit the rocks since his arch-rival Cosgrave had already indicated his intention to get rid of the Referendum and Initiative articles by ordinary legislation before they could be used; in one extraordinary statement the latter claimed that the Oireachtas cannot be coerced to pass legislation when clearly, the Constitution did just that¹⁰. This then was the backdrop against which Kennedy made his Seattle speech, with TD Patrick Little of Fianna Fail referring in the Dail to the ‘wrecking of the Constitution’¹¹.

Poor Kennedy may well have been doing some last minute changes to his speech but in the end he was overtaken by events. Just ten days before he spoke, the Government passed the Constitution (Amendment No. 10) Bill to abolish Articles 47 and 48, even using a device in Article 47 itself, which allowed for the waiving of delaying tactics if an act was necessary for the preservation of public safety¹². The final vote in the Seanad was 27 in favour of the amendment and 6 against. The last words spoken before the vote were by James Douglas, a relict from the 1922 Committee, arguing for the amendment. He declined to state whether he had supported the original text of articles 47 and 48 during the drafting process¹³.

Should either de Valera or Cosgrave be criticised for their actions in this matter? Both at least were being consistent. De Valera had always made clear his determination to

⁸ Figgis, *Constitution Explained*, p31: ‘The People as Law Makers’.

⁹ West, Franklin. *Crisis of the Weimar Republic*, p94.

¹⁰ Dail Debates, May 16th 1928. Private Deputies’ Business – Petition to amend the Constitution.

¹¹ Dail Debates, June 20th 1928.

¹² Seanad Debates, July 12th 1928.

¹³ Seanad Debates, 12th July 1928. Constitution (Amendment No. 10) Bill 1928 Fifth Stage.

abolish the Oath and of course went on to do just that when he was in power in 1933. In fact in the Dail debates he made much of how ‘constitutional’ he was now being. Cosgrave on the other hand had always been clear for some time that he planned to abolish the Referendum and Initiative, so was only bringing this tactic forward rather than introducing it solely in response to the de Valera petition. But his part must surely be considered the more cynical of the two and clearly the less constitutional, since he was trying to dispute the power of the Constitution to do no more than implement a mechanism to allow part of it (the Initiative) to function.

Article 50: Amendments to the Constitution.

The 1922 Constitution was written in a very short space of time – initially it was only given a month to produce a draft. Although this ran the risk of necessitating frequent technical changes all requiring approval by referendum, in fact the drafting committee did not allow any exceptions to such requirement. This can clearly be seen in the draft copy in the appendix to the Figgis book, in what at that stage was Article 49 (later Article 50). The exceptions clause was only introduced by Kevin O’Higgins at the Committee stage in the Dail on 5th October 1922 and in its first form allowed five years grace from the referendum approval process. This was extended to eight years on request from Thomas Johnson, with Darrell Figgis concurring: “the Article as it stood there ties us up straight away”¹⁴.

Just two months after Kennedy’s boat sailed from New York back to Cobh, the Government introduced the Constitution (Amendment No. 16) Act into the Dail. This bill amended, by ordinary legislation again, Article 50 to read ‘16 years’ instead of ‘8 years’ – in plenty of time to get onto the statute book by December 6th, 1930 when the original 8 year term was due to expire. Unlike with some of the other amendments, there was effectively no debate on this critical piece of legislation. This issue is discussed by Gerard Hogan in ‘The Irish Free State constitution undermined’, where he points out that not a word of debate was uttered in the Senate¹⁵.

By now Figgis and O’Higgins were dead and Kennedy was constrained in speaking out due to his position as Chief Justice. The polymath Alfred O’Rahilly, another former drafter, did however make his views clear albeit at a later date when the Constitution was replaced. Then he described the change to Article 50 by the Dail (sitting as a Constituent Assembly) as unfortunate in its precise wording¹⁶.

Kennedy did take his opportunity to express his views during the Supreme Court case of Ryan v. Lennon in 1934¹⁷. This case involved the detention and prosecution of four men charged with a variety of offences including conspiracy to murder. Their processing took place under the notorious Article 2a of the Constitution which enabled the suspension of habeas corpus and trial without jury for offences against the realm. The key fact in the case was that Article 2a was an amendment (Amendment No. 17) passed by ordinary legislation in 1931 after the expiry of the original 8 year clause for amendments without a referendum. The mens’ case then depended to a

¹⁴ Dail Debates, October 5th, 1928. In Committee on the Constitution of Saorstát Éireann Bill.

¹⁵ Hogan, Gerard. Origins of the Irish Constitution, p28 fn11.

¹⁶ O’Rahilly, Alfred. Thoughts on the Constitution, p8.

¹⁷ Supreme Court of Ireland Important Judgements, The State (Ryan) v. Lennon (1934), www.supremecourt.ie: ‘power of Oireachtas to amend 1922 Constitution’.

large extent on the argument that Amendment no. 16 was unconstitutional. The judges sitting were FitzGibbon, Murnaghan and Kennedy with the latter dissenting when the Court ruled that Article 2a was constitutional and the mens' detention and trial could go ahead under its terms.

Did Article 2a contravene Article 50? Kennedy is certainly scathing in his remarks about 2a and those who drafted it. In summary he concludes that this article allows the Executive Council 'to supersede a great part of the Constitution whenever and for so long a time as it finds it expedient to do so'¹⁸. In determining whether the change was constitutional, he considers a number of points. But the one that most interests us here is his view on the original intent and correct interpretation of Article 50. Contrasting the universal representation of the Constituent Assembly with the membership of the Oireachtas, which he argued was restricted by the Oath issue (although in fact de Valera had swallowed his pride and entered the Dail in 1927 before either Amendments Nos. 10 and 16), he points out that the whole people as represented by the former were promised that if they wished, they could have a referendum over any change even during the initial 8 years if they so wished. This right had of course been taken away by the removal of the Referendum.

As to the extension to 16 years, Kennedy points out that this procedural device could be repeated, thus permanently removing the right of the people to have their say at all. By now he is clear that the removal of the Referendum and the extra 8 years, although moved at different times, went hand in hand in effectively destroying the Constitution¹⁹. Unfortunately he had to resort to interpretation; he claims for example that because Article 50 referred specifically to Article 47 then the latter couldn't at all be abolished at least in connection with the former, even if it was abolished for ordinary legislation. Objectively this seems debatable.

The stickiest point in the argument is the lack of specific exclusion, in the Constitution, for Article 50 itself being amended. In fact it was pointed out in the Dail debates that several of the example constitutions from other countries that the drafting committee had before them had such specific clauses in them, yet the drafters chose not to deploy such in this instance. With hindsight, the drafters might be considered to have been somewhat naive about the intentions of politicians. After some deliberation in his judgement, FitzGibbon concurs that Article 50 was open to being amended itself due to the lack of any exclusive restriction. He cites by way of example the 1909 Union of South African Constitution Act sect.152 which had a specific exclusion to prevent the clause concerning amendments from itself being amended²⁰.

The Initiative and Referendum clauses of the Constitution were very similar to those in the Weimar Republic, although the latter required a majority of eligible voters, not voters on the day, to succeed. Kohn, a citizen of the Weimar Republic, makes frequent reference²¹ to this in his study although doesn't go into a detailed examination of the problems this brought to his own country. He contents himself with some rather vague references to 'anarchical interference in government' and 'the

¹⁸ Kennedy, *State (Ryan) v. Lennon*, p200.

¹⁹ Kennedy, *State (Ryan) v. Lennon*, p212

²⁰ FitzGibbon, *State (Ryan) v. Lennon*, p227

²¹ Kohn, p240

irresponsibility of the anonymous legislator' before concluding that democracy is better off without such devices²². (Kohn submitted his thesis in 1927, a year after the fiasco of the referendum defeat for the Royal lands reappropriation bill, although the book form dates to 1932). Franklin West, in his thesis-based book of 1985, argues that the German Initiative and Referendum were never used in a truly democratic spirit but rather to interfere with normal democratic government – the exact opposite, in fact, of their intended use²³. His detailed study of the 1926 Referendum on state appropriation of Royal lands without compensation is perhaps an indicator of what might have happened in Ireland if the de Valera petition had actually resulted in his desired legislation being placed before the Dail.

'Drafting errors' and the Weimar Constitution.

Hogan in his recent talk to the Convention on the Constitution tells his audience that the 1922 Bunreacht unravelled for the same reason the Weimar one did, a drafting error²⁴ (although curiously he does not repeat this claim in his recent book, despite drawing many parallels between the Weimar and 1937 Ireland documents). Rossiter stated that 'the Weimar Constitution's draftsmen's "fatal mistake" was to create the Reichstag as the oversight body, but then to give the president the power to dismiss the Reichstag. Of course, Weimar did not fail because of a drafting error.²⁵'. It was Article 48 that gave the President emergency powers. Rossiter has three chapters on it and it was invoked 250 times in the 13 years of constitutional rule! The original Weimar draft was prepared by Law Professor Hugo Preuss, of whom one historian wrote that 'his death in 1925 spared him the experience of its failure'²⁶ – words that might even be applied a few years later to Kennedy?

What specifically was Hogan referring to in his speech? In his recent book he refers to 'the eight-year rule' ie Article 50 as the eventual undoing of the Constitution²⁷. However, in the case of Weimar most criticism is usually directed at their Article 48 which covered the suspension of rights and the introduction of military rule. Although Ireland's '48' was used often to introduce emergency powers, in fact the Constitution already gave the parliament the power to suspend habeas corpus...see in particular the debate that raged over Article 2A where its opponents argued that the extra powers to be granted were superfluous; and the Article was quickly rescinded a few months later as soon as Fianna Fail came into power. It was only one of several implicit weaknesses in Article 50 – its lack of ring-fencing from amendment itself – that Hogan in summary blames for the ultimate collapse. It should be emphasised that the dreaded Article 2A was introduced by ordinary legislation after the original eight year clause of Article 50 would have expired (which would have occurred on December 6th, 1930). Hucko, in his review of the Weimar Constitution, lists a number of faults but does include among them the fact that it was open to amendment by ordinary legislation²⁸.

²² Kohn, pp245-6.

²³ West, Franklin. Crisis of the Weimar Republic, p16.

²⁴ Hogan, Gerard. Convention on the Constitution lecture, @2' 05"

²⁵ Rossiter, Clinton Lawrence. Constitutional Dictatorship, pxv.

²⁶ Schoenberger, Christoph. Weimar: A jurisprudence of crisis (ed. Arthur Jacobson), p110.

²⁷ Hogan, Gerard. Origins of the Irish Constitution, p6.

²⁸ Hucko, Elmar M. The Democratic Tradition: Four German constitutions. Introductory essay p60.

The ABA lecture is not the only contemporary reflection to be passed down to us from the drafting Committee. The acting chairman, poet Darrell Figgis wrote a short book on the subject as later did the polymath Alfred O’Rahilly. Figgis’s book dates from 1922 and includes the draft Constitution at the back, which hence lacks the eventual eight year get-out clause, since this was actually introduced only as a government amendment during original Constitution debate by Kevin Higgins. He devoted a short chapter to ‘The People as Law-makers’, his explanation of the Initiative and Referendum²⁹.

Most of what Figgis has to say draws on what he portrays as the entirely positive experience of Switzerland who brought us the two concepts. He argues that the Referendum is generally conservative rather than revolutionary – ironic since it is the conservative nature of consulting the people that James Douglas mainly objected to when he voted to get rid of it in 1928 (‘No Bill has ever passed to which some people will not have objection’³⁰).

On December 10th 1936 the British monarch King Edward VIII abdicated. Dail deputies were immediately summoned to an emergency session the next day to rush through yet another change to the Constitution, Amendment Act no. 27, to remove all references to the King. A ‘guillotine motion’ was applied and the Bill was passed that same day. The following day, December 12th, Kennedy, whose Constitution had suffered those 27 ignominious changes, was dead from a sudden heart attack. Aged only 57, he had at least outlived fellow drafters Michael Collins and Darrell Figgis. The Dail was no longer in session but de Valera did later send a letter of sympathy to the widow³¹.

The new Constitution committee was already well under way under the expert guidance of John Hearne and their document was introduced just three months later. Although it lies outside the scope of discussion here, it is worth perhaps noting that Alfred O’Rahilly, fellow drafter from 1922 and author of ‘Draft Three’, was not impressed and criticised in particular the special mention given to the Catholic church – a special status no church had enjoyed in 1922. It forms an ironic conclusion that at the time of writing the latest version (August 2012) has also had 27 amendments (plus another three rejected by the people) but over a somewhat longer timescale! Article 46 of the new version provides that all amendments must first appear as Bills then must be approved by referendum. Article 51.1 states that although legislative changes would be allowed for a period of three years, neither Articles 51 nor 46 could be amended further in any way at any time. It is the two exceptions listed in this last article that in the view of Hogan gave the new document stability and hence its success. This was also the view at the time of O’Rahilly, who in the closing words of his ‘Thoughts on the Constitution’ remarked thus:

“The exception (2) is important in order to avoid the mistakes made in the former Constitution³².”

The ‘drafting error’ of Kennedy and his associates was no more.

²⁹ Figgis, Darrell. *The Irish Constitution explained*, pp31-35.

³⁰ Seanad Debates, 12th July 1928.

³¹ De Valera letter of condolence to Mrs. Hugh Kennedy, NLI MS 46, 790,1, dated February 10th, 1937.

³² O’Rahilly, *Thoughts on the Constitution*, p75.

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