Ian Mitchell's Irish Law-related BOOK RECOMMENDATIONS

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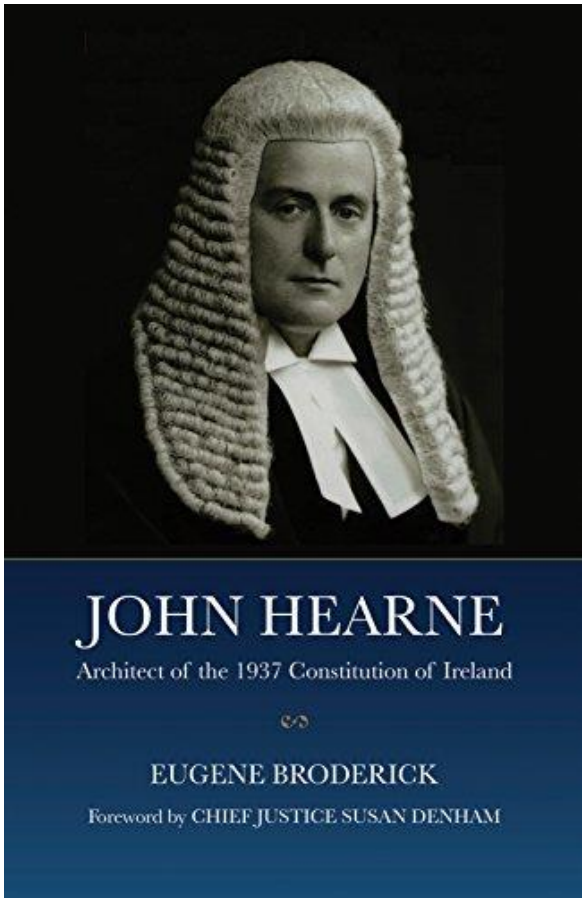

JOHN HEARNE – Architect of the 1937 Constitution of Ireland

Author: Eugene Broderick (Foreword by Chief Justice Susan Denham)

Publisher: Irish Academic Press, 2017
(*available on Amazon, click on cover image for link*)

Descriptor: The story of the making of the 1937 Constitution, and the man who drafted it. It replaced the Free State Constitution, and is still in force today.

Reviewer: Ian Mitchell, 28 November 2018

Reason to read: Explains what the men who wrote the Irish Constitution thought it was *for*. This is important as the process of constitution-making necessarily involves considering what the state is for (assuming the constitution is respected, unlike in modern Russia). The US Constitution, when taken together with the Declaration of Independence, continues to define the core American value system on a political level to this day. This book is an extended essay on what the two authors of the 1937 Irish Constitution thought was the essence of Irishness. They wanted to express "an unbroken national tradition… which defined and distinguished Ireland from other nations, *especially Britain*." (p. 232, emphasis added) The fascinating theme of this book is what that "national tradition" amounts to. For John Hearne, the civil servant who was Ireland's foremost constitutional lawyer and who drafted the document, and for Eamon de Valera, the political leader whose idea it was, the essence of Ireland was what might be called "Catholicism writ Erse". This spirit was expressed by members of the Irish Supreme Court (see review 06) who looked forward to "the development of a distinctive Irish jurisprudence… [so that] the 'voice of the Gael' would be heard in the courts… [in order to] release the Irish system of law from near servile dependence on English judicial practice and precedence… [and replace it by] a corpus of law which would have a decidedly native foundation." (p. 243)

What was this "voice of the Gael"? It was thought to speak in the language of natural law, derived from the writings of St Thomas Aquinas, the thirteenth century Italian philosopher and theologian. "In 1973, Justice Brian Walsh [a Supreme Court judge] stated that 'the natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men'… References

to natural law came almost instinctively to Irish judges in the 1960s and the 1970s." (p. 241) "Natural law was the foundation upon which the Bunreacht na hÉireann [the Irish Constitution] rested and ranked superior to the state's fundamental law." (p. 242) To put it in American terms, this is "originalism" carried to the extreme. As late as 1983, Chief Justice O'Higgins said the Constitution "stamped the ethical character of Christianity on the state", which meant that it was "constitutional" to penalise "homosexual acts between men." (p. 243) Home Rule really was Rome rule, as Sir Edward Carson warned when Ireland was still part of the United Kingdom.

However more recently Ireland has gone secular, helped by the reputation for sexual perversion that Catholic churchmen have acquired since the revelations of the 1990s and beyond. Divorce is now legal, as is the use of contraception. Dances can be held in village halls without the local priest's say-so. In 2015, the Constitution was amended to permit same-sex marriage. This year, blasphemy was legalised. Now Ireland is much like anywhere else. So what is left of "distinctive Irish jurisprudence"? (p. 245)

In fact, the Irish Constitution has proved to be more genuinely Irish than the two starched and unbending Catholics who wrote it. By that I mean that it has proved to be flexible without being floppy. Those who shape it and implement it have progressively changed a sourly anti-British document into one that is more positive and pro-Irish. The tool has been the referendum. So far as I know, Switzerland is the only country that makes more extensive use of referendums to shape its constitution than Ireland does. Intelligently applied, as it generally has been, this has turned Ireland into a comparatively well-ordered, modern state. Of course, the cost has been "distinctively Irish jurisprudence".

One of the ways the Irish have achieved this is by making use of the American constitutional concept of "unenumerated rights". Judicial review was written into the Irish Constitution in 1937, but de Valera's bleak authoritarianism meant that it was hardly ever invoked in his political lifetime. But, starting in the 1960s, the Irish Supreme Court began to step out of his long shadow. Judges became, to a certain extent, lawmakers when they pronounced on the constitutionality of legalisation and, more importantly, when they gave legal effect to rights which were *not* listed in the Constitution. Those were the unenumerated rights, and they have become a critically important part of the Irish legal landscape. The concept derives from the Ninth Amendment to the US Constitution, part of the so-called Bill of Rights, which was adopted in 1791. ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.") Whereas before, unenumerated rights in Ireland were those deduced ultimately from the writings of St Thomas Aquinas, now they are more likely to be common-sense freedoms which the citizens of democratic countries take more or less for granted.

The first notable case of this sort will illustrate the point. In 1963, Mrs Gladys Ryan asked the Supreme Court to force parliament to prohibit the fluoridation of water on the basis that it was an infringement of her right to bodily integrity. She lost her case, but Mr Justice Kenny said in the course of his Opinion "that the Constitution guaranteed her right of bodily integrity" and that "*the personal rights of the citizen were not confined to those rights specified* in [the Constitution]." (p. 236, emphasis added) That was the starting gun. Thirty years of judicial activism followed. Though it has declined since the 1990s, partly because most reasonable rights have already been conferred, that general approach to establishing the citizen's legitimate freedom from government has been maintained. The result is that the Irish have a highly-developed approach to civil rights, one which the angry avengers of Holyrood would do well to ponder, as would the kind of brainless tyrant that nodded through the "Windrush" expulsion programme in Whitehall in order to placate a Home Secretary who wanted a "hostile environment for immigration". It seems to me highly unlikely that the Irish Supreme Court, being outside the political

realm, would tolerate government being "hostile" to any such group of people for political reasons. Now, Irish jurisprudence substantially reflects Irish human reality, which is rarely unfriendly to strangers.

That is the positive legacy of the Constitution Hearne devised, though it could not develop until his patron, Ireland's atavistic patriarch, Eamon de Valera, had died and more balanced individuals could assume leadership of the process of developing a "distinctive Irish jurisprudence". The result of the combination of judicial review, unenumerated rights and regular constitutional referendums has been that the Irish people are now about as close to sovereign in their own country as it is possible to get while still a member of the European Union. Despite Brussels, it is still remarkably responsive to the general will of the people.

Main talking points (re Europe):

1. In 1957, John Hearne, who had been appointed the first Irish Ambassador to the US in 1950, gave a talk at Harvard University about the writing of the Constitution. He explained why it had been so important to establish Ireland's sovereignty: "We want[ed] to correct the cardinal political error into which the framers of the 1922 Constitution were led when, at the instigation of the British government, they agreed to *the fantastic proposition that our laws were to be valid or void and were to stand or fall by the test of their conformity or otherwise with a formula associated with other states.*" (p. 150, emphasis added)
2. Most people would consider that last sentence a good description of the situation within the European Union. Dr Broderick makes a detailed examination of the referendums which Ireland has held in relation to Europe (including the Nice and Lisbon Treaties, which were both rejected, and then re-run) and their effect on the Constitution. "The Constitution has been amended to accommodate the limitations on national sovereignty consequent on membership of the European Union." (p. 247)
3. In effect, Ireland wanted to get out of the British Empire in order to turn righteous and join the Catholic "empire", and then, after half a century of poverty and boredom, it turned secular and embraced the European Union's equally prescriptive and internationalist empire. That may be the will of the Irish people, but the question of national sovereignty appears to have been reduced to a free choice between which empire rules the country. Britain made the same choice in 1972. But it later came to realise that membership of the EEC was one thing: membership of the EU quite another. The first was commercial and administrative; the second political and authoritarian. The first suited Britain; the second did not. Will Ireland remember that distinctive Irish jurisprudence required distinct constitutional independence?

Thought(s) provoked (re Scotland): There are innumerable lessons for Scotland in this story, given that the first thing that the SNP separationists wanted to do after winning their referendum in 2014 was to write a new constitution for the country. They said (as I have discussed in *The Justice Factory*) that they wanted the constitution to embody "values". The Irish experience since 1937 shows how dangerous that approach is. Values change. Hearne and de Valera had a specific type of community in mind when they undertook what Hearne himself called a "plan for reconstructing society from top to bottom." (p. 248) The aim was to "secure a social order in which justice and charity shall inform all the institutions of national life." (p. 249) Today, Scottish separationists attack inequality and "the Toaries"; then, Hearne and company attacked *laissez-faire* economics as they "embodied a false notion of

humanity". They wanted the state to "intervene in economic affairs when the general good demanded it", and to replace "harsh competitive strife [with] a co-operative effort to meet man's needs, morally as well as materially." (p. 249) They also wanted to confine women to the home and cast in stone the Catholic teaching on the virtues of (patriarchally organised) private property. The current President of the Republic, Michael O'Higgins, said of de Valera's Ireland that it featured "a restrictive religiosity and a repressive pursuit of respectability, affecting in particular women." (p. 266)

When that went out of date, the Constitution had to change. It did. But unless Scotland allowed for judicial review, the justiciability of unenumerated rights and regular referendums on changes to its constitution, the country would be strangled by zero-tolerance virtue enforcement. Since the separationists want to *reduce* the freedom of judges to take decisions in court, the Irish approach to judicial lubrication of the constitutional machinery is ruled out. No constitution can work in the long run on without tolerance and change. The alternative is constant rewriting. But that defeats the object of entrenched standards that are above parliament and are therefore, in the SNP's narrow use of the term, "undemocratic". Without a constitutional court of some sort, Scotland would be forever frozen in the attitudes of 2014, but for the deliverance of the referendum outcome. To appreciate the horror of this fate it is enough to imagine a constitution written at the time of the previous devolution referendum (1979) when the atmosphere was redolent of the Bay City Rollers and Ricky Fulton's televisual analyses of Church of Scotland ethics.

Dr Broderick notes a University of Chicago study which concluded that the constitutions written worldwide since 1789 have had an average lifespan of "only seventeen years". (p. 260) That was because they were rigid, vague and expressed values held by only part of the population. They were, in effect, political manifestos, just as the recent proposed SNP one was going to be. That was how the Irish one was originally thought of. It was "a statement of Catholic social teachings that were in vogue in the 1930s… based on justice and charity, in accordance with the papal encyclicals *Rerum Novarum* (1891) and *Quadragesimo Anno* (1931)." (p. 250) The "values" part of the Irish Constitution (article 45) was referred to as the Directive Principles of Social Policy. These principles have been described by the modern Irish historian, J.J. Lee, as "mummified flatulence". (p. 251) But, being eternal, ineffable and transcendent, like all "values", they were non-justiciable. The happy result is that they "have been effectively ignored since their adoption eighty years ago." (p. 252)

The popular view, post-War, was that "de Valera's Ireland was a dark, drab land, which demanded oppressive conformism." (p. 263) When the legal sky lightened in the 1960s, one Irish commentator complained of the "degradation in the legal status of God." (p. 265) If Scotland embodies political correctness in its approach to politics to the same extent that Ireland did Thomist Catholicism, then it too will descend into darkness, drabness and oppression. The responsibility for averting that fate lies with all Scots. Dr Broderick quotes the jurist and politician, John Kelly: "The ultimate protection of human rights in a democracy lies with the people themselves. If they allow villains into government a piece of paper will not protect them from the consequences." (p. 266)

Surprising points: The sum and substance of all this is the Ireland has a constitution which is so flexible that it really is capable of adapting to changing political conditions about as quickly as is required given the opposite constitutional requirement of promoting social stability. In this respect it rather resembles the "unwritten" British constitution, which is both flexible and conservative at the same time, albeit at the price of incomprehensibility at time when difficult issues arise, like Brexit. As in so many

other spheres, the Irish left the Empire only to find that the logic of life takes them back to a semi-British approach to government, which should not be surprising as Irish people contributed so much to the evolution of Britain (and vice versa).

Incidental interest: Michael Collins's point, which relates to the Brexit negotiations now in progress, that the original Treaty settlement "afforded Ireland the freedom to achieve greater freedom." (p. 262) It did this, of course, by ignoring its Treaty obligations, Trump/Putin-style.

Style: Highly competent but a little colourless, in a rather "English" way, which is a shame as the Irish sense of wit and paradox can enliven and illuminate many an obscure subject. Law and legal documents become almost Talmudic without an occasional twinkle in the eye.

Publishing quality: High: well designed and well edited (but de Valera came to office in 1932, not 1936 (p. 62) and it is "royal coat of arms, not "royal court of arms". (p. 243)). Nice pictures, too.

Smile(s): None, really. The closest I could come was the insertion of the words "ipso facto" in this passage: "Women had no involvement in the planning, shaping and drafting the Constitution… The editorial committee consisted of four male civil servants… The Catholic clerics who exercised influence on the drafting process, the Jesuits and McQuaid, were, *ipso facto*, men." (p. 252)

Author: Dr Eugene Broderick was until recently the Headmaster of Our Lady of Mercy School in the elegant city of Waterford, where John Hearne was born. It is a pleasure to see books being written by schoolmasters, presumably for the simple love of it rather than for professional advancement. Since the key issue addressed in this book is the implacable loathing of the British state which John Hearne and Eamon de Valera embodied, it is worth noting that Dr Broderick has written another book about political thinking in this period: *Intellectuals and the Ideological Hijacking of Fine Gael, 1932-1938* (2010). I am looking forward to reading that. If I do, a review will follow.

Link(s): None that I can find. Dr Broderick gives many talks on history in the splendid Waterford Museums, but sadly GoPro does not (yet) seem to have penetrated the first Viking settlement in Ireland.

Overall recommendation level: HIGH – especially chapter 7: "Assessment of the Constitution"

About the reviewer: Ian Mitchell is the author of four books, including *Isles of the West* and *The Justice Factory*. He is writing a multi-volume study of Russian and Western constitutional history to be called *Russia and the Rule of Law*. He lives in Campbeltown and can be contacted at ianbookrec@gmail.com.
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