

Steven King



Report of the Constitution Review Group

III CONSTITUTION REVIEW GROUP  
GRÚPA AITHBHREITHNITHE AN BHUNREACHTA

MAY 1996.

## The Preamble

*In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,*

*We, the people of Éire,*

*Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,*

*Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,*

*And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,*

*Do hereby adopt, enact, and give to ourselves this Constitution.*

## Preamble

### Introduction

A Preamble is not an essential element of a constitution. Some constitutions do not have any. Only the enactment phrase – *We, the people, enact this Constitution* – has formal significance. Any normative elements in a Preamble are likely to be expressly provided for in the Constitution. The Saorstát Constitution had no Preamble but the opening words of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922, to which it was a schedule, read:

*Dáil Éireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Éireann) and in the exercise of undoubted right, decrees and enacts as follows ...*

If a Preamble is not necessary, what purpose does it serve? From the terms of the Preamble to our own Constitution, and by reference to other Preambles, it may be deduced that a Preamble is intended to express a sense of national identity and destiny and to include invocational, commemorative, exhortatory and aspirational elements. The Preamble to the 1937 Constitution, as is usual in constitutions with a Preamble, reflects the historical context – religious, social, economic, political – in which it was enacted. There has been great change in most of those areas over the past sixty years, yet it might be thought preferable that a new or revised Preamble should be contemplated only in a substantially different and inspirational political context – such as might be created by new North-South relations.

### Issues

#### 1 whether it is possible to amend the present Preamble

The Review Group considered whether the Preamble was open to amendment, as provided in Article 46, even though the words of enactment occur only in the last line. The Attorney General's Committee on the Constitution (1968) noted that the Preamble itself uses the phrase 'this Constitution' and that the title 'Bunreacht na hÉireann' precedes the Preamble, both of which suggest that the Preamble is part of the Constitution and can be amended as such. Moreover, because the people adopted the Preamble together with the rest of the Constitution, it would seem unreal to suggest that the people do not have power to amend it. The fact that it has been cited in cases and invoked in judicial decisions (see below) also seems to confirm that it is part of the Constitution and thus subject to amendment as provided in Article 46.

## 2 whether the Preamble has legal effect

As indicated above, the Preamble has been cited in legal cases and has been taken into account in judicial decisions, for example, *McGee v Attorney General* [1974] IR 284, *The State (Healy) v Donoghue* [1976] IR 325, *King v Attorney General* [1981] IR 233, *Norris v Attorney General* [1984] IR 36 and *Attorney General v X* [1992] 1 IR 1. For this reason and others mentioned in the immediately preceding paragraph it seems that it does have legal effect.

The Review Group adverted to the relevance of the Preamble to the question of the role of natural law in the Constitution, and decided that this issue was most appropriately considered under Articles 40-44, which deal with Fundamental Rights.

## 3 whether the Preamble should continue to have legal effect

It is arguable that, in principle, it is neither necessary nor appropriate for the courts to invoke the Preamble. The Preamble is unlike the long title of a Bill in that its manifold purposes and its literary style give it much less precision of meaning. Moreover, headings and marginal notes in a Bill, as distinct from the long title, are not cognisable by the courts. It is questionable whether an essentially rhetorical, as distinct from legal, text could properly be treated as a source of fresh enlightenment or significant guidance as to the meaning or intent of specific constitutional provisions. On this view, it would be more realistic not to accord it any legal significance.

A contrary view is that what the Preamble expresses should be available, when appropriate, as an aid to interpretation of the Articles, though not as a source of substantive law.

## 4 whether the Preamble should be amended

The Review Group considered four possible approaches:

- i) leave the Preamble as it is

This did not commend itself to most members of the Review Group who felt that the language, reflecting the ethos of the 1930s, is overly Roman Catholic and nationalist in tone, is gender-biased, and would be objectionable to many in Ireland today.

- ii) insert an explicit provision in the Constitution declaring the Preamble to be the historical introduction in 1937 to the Constitution, with the corollary that it would also be declared no longer cognisable by the courts

This tacitly recognises the majority view noted under i) and would simply enshrine the Preamble as a historical entity.

- iii) while adopting i) or ii), leave amendment of the terms of the Preamble to a future inspirational political context

While such a context would provide the ideal occasion for rewriting the Preamble, most members of the Review Group would prefer that it be amended in any event in the near future. This, in fact, is the fourth option.

iv) amend the Preamble

This is the preferred option of a majority of the Review Group who feel that the Preamble as it stands is inappropriate.

If it is decided to amend the Preamble, there are two possibilities:

a) confine the Preamble to the words of enactment 'by the people of Ireland'

This is the course favoured by a majority of the Review Group who are influenced by the fact that substantive elements in a Preamble tend to be expressly provided for in the various Articles.

Thus, the desire that 'the dignity and freedom of the individual may be assured' is provided for in Articles 40-44, the aspiration that 'true social order [be] attained' is expressly recognised in Article 45, the aspiration that 'the unity of our country [be] restored' is reflected in Articles 2 and 3, the desire that 'concord [be] established with other nations' is provided for in Article 29. The recitation of such desiderata in the Preamble tends to be both selective and superfluous (and would be so even should Article 45 be deleted).

b) if, nevertheless, it is felt that a revised version of the Preamble should be prepared, the essentially political nature of a Preamble should be kept in mind and care taken to avoid divisiveness and to recognise, instead, diversity of traditions, ideals and aspirations. Consideration might be given to the following points:

- 1) the words of enactment should be in the name of the 'people of Ireland' (see amendment of Article 4 as proposed by the Review Group)
- 2) the Preamble should be declared not to be cognisable by the courts
- 3) the diversity of belief in present-day Ireland raises the question whether any wording corresponding to the present first and third paragraphs is now appropriate. It is noteworthy that the 1972 Irish Theological Association working party unanimously agreed that 'no one should be required, as a condition of citizenship, to endorse a basic belief or tradition which he does not share' and was not satisfied that a religious strand was necessary or desirable in a Preamble
- 4) there should be recognition of the diverse origins and traditions, ethnic, historical, political and spiritual, of the people, their varying social and cultural heritages, and the sacrifices and sufferings as well as the achievements of the people's forebears
- 5) it should be affirmed that the aspiration to unity of many in Ireland will be sought peacefully and through reconciliation and consent

- 6) more general aspirations could be included on the lines of the existing penultimate paragraph but
  - including peace, reconciliation, justice, freedom and economic, social and cultural progress, together with the common good and concord and co-operation with other nations, as aims to be promoted
  - indicating that these will be pursued on the basis of the inherent dignity of the individual and the equality of all.

Having regard to commitments made in both the Downing Street Declaration and the Framework Document, it might well be that progress in negotiations for an 'agreed Ireland' would provide further considerations for such a revision of the Preamble.

*Recommendation*

A majority of the Review Group favours the replacement of the present Preamble by the basic formula of enactment of the Constitution by the people of Ireland. If, however, a more extensive, revised Preamble is preferred, guidelines are suggested:

## **2 The Nation and the State**

National Right to Self-Determination

National Territory

Name of the State

Nature of the State

Powers of Government

National Flag

Language

Nationality and Citizenship

Natural Resources

Revenues of the State – Central Fund

**Article 1**

*The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.*

## National Right to Self-Determination

Article 1 sets out the national right to self-government and other related rights. This affirmation is of universal validity. The scope of the term 'The Irish Nation' has been questioned but the Review Group does not see any reason for proposing an amendment of the Article.

*Recommendation*

No change is proposed.

**Article 2**

*The national territory consists of the whole island of Ireland, its islands and the territorial seas.*

**Article 3**

*Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.*

## National Territory

The Review Group is excused by its terms of reference from considering Articles 2 and 3. Because these Articles are central to the resolution of political relationships in Ireland, and between Ireland and Great Britain, the Review Group concludes that it should not offer any comment.

**Article 4**

*The name of the State is Éire, or  
in the English language, Ireland.*

## Name of the State

Article 4 sets out the name of the State. The Review Group considers that the provision is unnecessarily complicated and that it should be simplified to indicate, in each language version, the name of the State in that language.

The Review Group also considered whether the Article should be amended to include 'Republic of' in the name of the State. It is satisfied that the legislative provision (section 2 of the Republic of Ireland Act 1948), which declared the description of the State to be 'the Republic of Ireland', is sufficient.

*Recommendation*

The Article should be amended to read:

Éire is ainm don Stát.  
The name of the State is Ireland.

**Article 5**

*Ireland is a sovereign,  
independent, democratic state.*

## Nature of the State

Article 5 sets out the nature of the State as sovereign, independent and democratic. The Review Group considered whether the term 'republic' should be substituted for 'state' and does not favour any change.

**Recommendation**

No change is proposed.

**Article 6**

*6.1 All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.*

*6.2 These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.*

## Powers of Government

Article 6 states the people's right to decide by whom and how they are ruled and reserves the power of government to the organs of State established by the Constitution.

### *Conclusion*

Some members of the Review Group see no need to change the text of this Article, considering that the words 'under God' are widely acceptable. Others prefer that religious references generally should be reviewed by the Oireachtas in the context of amendment of the Preamble and other relevant parts of the Constitution.

*Article 7*

*The national flag is the tricolour  
of green, white and orange.*

## National Flag

Article 7 prescribes the national flag. The Review Group is of the view that the provision might need reconsideration in the context of an overall settlement of political relations in Ireland but not otherwise.

*Recommendation*

No change is proposed.

#### Article 8

*8.1 The Irish language as the national language is the first official language.*

*8.2 The English language is recognised as a second official language.*

*8.3 Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.*

## Language

### Discussion

Article 8 establishes the two official languages of the State. It accords primacy to the Irish language which is described both as *the* national language and the *first* official language. The English language is *recognised* as a *second* official language. This wording is unrealistic, given that English is the language currently spoken as their vernacular by 98% of the population of the State.

The designation of Irish as the 'national' and the 'first official' language is of little practical significance. The intention to give special recognition to the Irish language is understood and respected but it is arguable that this might be better achieved, while allowing both languages equal status as official languages, by including a positive provision in the Constitution to the effect that the State shall care for, and endeavour to promote, the Irish language as a unique expression of Irish tradition and culture.

The Review Group considers that there is an implicit right to conduct official business in either official language and that the implementation of this right is a matter for legislation and/or administrative measures rather than constitutional provision.

The word 'Béarla' is now commonly used in Irish to denote the English language and should supersede the expression 'Sacs-Bhéarla'.

### Recommendation

The first and second sections of Article 8 should be replaced by English and Irish versions on the following lines:

- 1 The Irish language and the English language are the two official languages.
  - 2 Because the Irish language is a unique expression of Irish tradition and culture, the State shall take special care to nurture the language and to increase its use.
- 
- 1 Is iad an Ghaeilge agus an Béarla an dá theanga oifigiúla.
  - 2 Ós í an Ghaeilge an chuid is dúchasaí de thraidisiún agus de chultúr na hÉireann, beidh sé de chúram ar an Stát an teanga a chaomhnadh agus a h-úsáid a leathnú.

**Article 9**

*9.1.1° On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.*

*9.1.2° The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.*

*9.1.3° No person may be excluded from Irish nationality and citizenship by reason of the sex of such person.*

*9.2 Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.*

## Nationality and Citizenship

### Introduction

Article 9 deals with nationality and citizenship. It confers citizenship on all who, immediately prior to entry into force of the new Constitution, were citizens of Saorstát Éireann (Article 9.1.1°), anticipates legislation to make further provision for acquisition and loss of citizenship (Article 9.1.2°) and prohibits exclusion from citizenship on grounds of sex (Article 9.1.3°). Article 9.2 imposes on citizens the duty of fidelity to the nation and loyalty to the State. The subsequently enacted legislation, that is, the Irish Nationality and Citizenship Acts 1956–1994, makes further provision in regard to citizenship.

### Issues

- 1 whether Article 9.1.1° should be deleted on the grounds that it is spent

The Review Group noted that this issue was addressed by the Attorney General's Committee on the Constitution (1968) which indicated in its report that the subsection will continue to have effect as long as anyone who was a citizen of Saorstát Éireann in 1937 is still living and, after that, while claims to citizenship by descent from such persons may arise. The Review Group agrees with this view and concludes that the subsection is not spent.

#### *Recommendation*

No change is proposed.

- 2 whether Article 9.1.1° should be deleted on the grounds that the matter could be adequately dealt with by ordinary legislation

The Review Group considers that the subsection is a fundamental and uncomplicated provision guaranteeing Irish citizenship to all persons who were citizens of Saorstát Éireann immediately prior to entry into force of the new Constitution, and as such is appropriate for inclusion in the Constitution. It concludes accordingly that it should not be deleted.

#### *Recommendation*

No change is proposed.

**3 whether a provision on citizenship by birth should be inserted in the Article**

The Review Group notes that sections 6 and 7 of the Irish Nationality and Citizenship Act 1956 provide, *inter alia*, for citizenship by birth. These provisions are not lacking in complexity. They confer entitlement to citizenship on all persons born anywhere in Ireland, except children of aliens entitled to diplomatic immunity in the State at the time of birth. However, in the case of a person born in Northern Ireland after December 1922 (and not a citizen by descent), realisation of that entitlement is subject to the making of a declaration by or on behalf of that person that he or she is an Irish citizen. This latter proviso is presumably for the purpose of avoiding the conferring of Irish citizenship by birth in Northern Ireland on unwilling recipients and it seems unlikely that it will be amended in the near future. (It should be noted that most persons born in Northern Ireland after December 1922 are entitled to citizenship by descent, without requirement of any declaration).

*Conclusion*

The Review Group, recognising that a provision on citizenship by birth necessarily includes exceptions and conditions and is correspondingly complex, is of the view that the subject is more appropriately dealt with in ordinary legislation. It concludes that a provision on the subject should not be inserted in the Article.

**4 whether reference to both nationality and citizenship in Article 9.1.2°-3° should be retained**

The use of both 'nationality' and 'citizenship' is probably attributable to a continuation of a British Commonwealth usage. It does not seem that the two terms have different legal meanings. Article 9.1.2° anticipated legislation in regard to both citizenship and nationality, now comprised in the Irish Nationality and Citizenship Acts which do not purport to give the two terms different meanings. The Attorney General's Committee on the Constitution (1968) concluded that the term 'nationality' was probably obsolete in Irish law but that in popular usage it implied inclusion of all those of the Irish race. Nevertheless, the term 'nationality' is included in the citizenship legislation (the Irish Nationality and Citizenship Acts); the term 'national' is used in section 6 of the Transfer of Sentenced Persons Act 1995; and Article 8 of the EU Treaty, as inserted by the Maastricht Treaty, refers to 'nationals' of member states. In these circumstances retention of the term 'nationality' in the Article would appear to be justified.

*Recommendation*

No change is proposed.

**5 whether a provision to limit the basis on which citizenship by naturalisation may be granted should be inserted in Article 9**

Section 14 of the Irish Nationality and Citizenship Act 1956 provides for conferring of Irish citizenship by means of the grant of a certificate of naturalisation. Section 15 sets out conditions to be complied with if

the certificate is to be granted. Section 16 permits these conditions to be waived in certain specified circumstances.

*Recommendation*

No change is proposed.

The Review Group is aware that unease has been expressed in regard to the waiver of conditions in some cases in recent years. It is of the view that, in so far as there might be a problem in this respect, it would not be appropriate to seek to deal with it by constitutional provision. It would be open to the Oireachtas to provide in legislation, more specifically than in section 16 of the Act, for the circumstances in which the conditions under section 15 might be waived, and/or for subjecting waiver decisions to closer scrutiny by the Dáil.

**6 whether a provision to limit the basis on which legislation might provide for loss of citizenship should be inserted in the Article**

The Review Group noted that the provisions for deprivation of validly acquired citizenship in the Irish Nationality and Citizenship Acts are confined to citizenship by naturalisation. Even in that limited field, the grounds for deprivation of citizenship are relatively narrow. It does not appear necessary to impose any restriction on the legislative activity of the Oireachtas in this respect.

*Recommendation*

No change is proposed.

**7 whether the prohibition in Article 9.1.3° of exclusion from citizenship by reason of sex should be extended to other grounds for exclusion**

Citizenship is an essential feature and a defining element of a state. Hence it is not surprising that states usually guard jealously their right to confer or withhold citizenship according to national interests and concerns. Thus, prohibition of discrimination in granting citizenship on some grounds might not be appropriate, although discrimination on the same grounds in the general human rights field would be unacceptable. Accordingly the Review Group hesitates to recommend an extension of the prohibition which might unjustifiably restrict the freedom of the Oireachtas to be selective in its legislation on the conferring of Irish citizenship.

*Recommendation*

No change is proposed.

**8 whether any amendment of Article 9.1 is required in the light of the Maastricht Treaty provisions on EU citizenship**

Article 8 of the EU Treaty (as inserted by the Maastricht Treaty) establishes citizenship of the EU and confers that citizenship on every national of a member state. The following Articles 8a to 8d (similarly

inserted by the Maastricht Treaty) set out the rights of citizens, including freedom of movement and residence in any member state; the right to vote and be a candidate in the European Parliament and certain national elections in any member state; the right to avail oneself of the authorities of another member state for diplomatic or consular protection in a third country in which one's own state is not represented; the right to petition the European Parliament and to apply to the EU Ombudsman.

The EU Treaty provision leaves it to national laws of the member states to determine their respective citizenships and does not seek to confer Irish citizenship on any persons. Ireland, unlike some other member states, does not differentiate between categories of its citizens for purposes associated with EU citizenship. The Review Group considers that amendment of the section in the light of the EU provisions is not required.

*Recommendation*

No change is proposed.

**Article 10**

*10.1 All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all royalties and franchises within that jurisdiction belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body.*

*10.2 All land and all mines, minerals and waters which belonged to Saorstát Éireann immediately before the coming into operation of this Constitution belong to the State to the same extent as they then belonged to Saorstát Éireann.*

*10.3 Provision may be made by law for the management of the property which belongs to the State by virtue of this Article and for the control of the alienation, whether temporary or permanent, of that property.*

*10.4 Provision may also be made by law for the management of land, mines, minerals and waters acquired by the State after the coming into operation of this Constitution and for the control of the alienation, whether temporary or permanent, of the land, mines, minerals and waters so acquired.*

## Natural Resources

### Introduction

The Review Group considered Article 10 which vests in the State all natural resources, royalties etc situate within its jurisdiction (section 1), and all land, mines, waters etc previously owned by Saorstát Éireann (section 2), subject, in each case, to other ownership rights in them. It further enables legislation providing for the management and alienation of these assets (section 3) and of other assets acquired subsequently by the State (section 4).

### Issues

#### 1 placement of the Article

The Review Group considers that aspects of the Article, particularly section 2, might well have been placed originally in the Transitory Provisions. Nevertheless, it concludes that this consideration is not of such significance as to justify a proposal for change of placement.

#### 2 continental shelf resources

The Review Group notes that developments in international law allow Ireland to exercise jurisdiction in respect of the natural resources of the continental shelf (outside territorial waters). It considered in this context whether section 1, which covers only natural resources within the jurisdiction as established by the Constitution, should be amended to include the natural resources of the shelf. The Review Group noted the conclusion of the Attorney General's Committee on the Constitution (1968) that there were no significant limitations, other than those imposed by international law, on the power of the State to enact legislation having extra-territorial effect, including legislation covering the natural resources of the continental shelf. The Review Group agrees that no amendment of the Article in that respect is required. Moreover, these resources appear to come within section 4, which envisaged legislation providing for management etc of subsequently acquired resources.

### Recommendation

No change is proposed.

**Article 11**

*All revenues of the State from whatever source arising shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes and in the manner and subject to the charges and liabilities determined and imposed by law.*

## Revenues of the State – Central Fund

This Article provides for a central fund into which all State revenues, other than those specifically excepted by law, must be paid. This provision is essential to the proper control and management of the public finances and is linked with Dáil supervision of the receipts and expenditure of the State under Article 17 and the control and audit functions of the Comptroller and Auditor General under Article 33.

*Recommendation*

No change is proposed.