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The 2013 Irish Constitutional Convention: A bold step or a damp squib?

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In late 2012 the Irish government finally took the long-anticipated step of establishing the Irish Constitutional Convention (www.constitution.ie), whose first formal session was held on the weekend of January 26-27 2013. Ireland now joins a small but growing band of countries to have gone down the route of using people's conventions as a means of considering big questions of institutional design.

Needless to say, this is not the first time that Irish constitutional reform has been on the agenda. Despite its relative rigidity, Ireland's Constitution (enacted in 1937) has not been immune from change, although much of this has been relatively recent. After a three-year period of settling in during which time some tweaks were made (for the most part of a 'housekeeping' nature – see Gallagher 2010: 78-84), the first formal moves to amend the document were not until the early 1970s, in each instance requiring a referendum. Since that time there have been 31 proposals for amendment voted on by Irish citizens, 23 of which have been accepted.

There has also been plenty of talk (and ink) devoted to the possibility of further constitutional reform, not least in the various reports of Joint Committees of the

¹ The author is supporting the work of the Irish Constitutional Convention as its research director. All views expressed in this chapter are the personal views of the author.

Oireachtas (Parliament): the 1967 Committee on the Constitution; the 1996 Constitution Review Group (arguably the most comprehensive of these); the 1998 All-Party Committee on the Constitution; and most recently the four reports of the joint Committee on the Constitution whose work preceded the 2011 general election. All these reviews shared in common two things, namely: (1) that the membership comprised members of the establishment (politicians and legal and academic experts); and (2) that none saw the light of day as an actual constitutional reform. Whether the current Constitutional Convention will override the second issue is too early to tell, but certainly it does override the first.

The issue to be considered in this chapter is just how significant a move is the establishment of the Constitutional Convention? The chapter is arranged in three parts. I start by outlining the origins and nature of the Convention. I then briefly review how the Irish initiative compares with other examples of people's conventions that have occurred over the past decade. Finally, I provide a preliminary assessment of the significance of the Irish Constitutional Convention.

The Irish Constitutional Convention

Arguably the origins of the Irish Constitutional Convention was in late 2009/early 2010 in the deliberations of the Oireachtas Joint Committee on the Constitution, whose report in July 2010² proposed the establishment of a Citizens' Assembly (modeled on the British Columbia Citizens' Assembly) to consider the question of electoral reform. In the discussions leading up to this report the Joint Committee had been given evidence from a number of expert witnesses (the current author included) informing the committee membership of the merits of such an approach and it is likely that this may have had some bearing on the proposal.

The work of the Joint Committee coincided with a major policy review by Ireland's then largest opposition party, Fine Gael whose long-standing leader, Enda Kenny sought to make his mark with significant policy proposals. In late 2009-early 2010 Kenny made a number of speeches on new policy areas that attracted considerable

²http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-Constitution/Report_2008/20100722.pdf

media attention and the ire of some of his frontbench colleagues who were not happy with the leader's efforts to produce party policy on the fly without input from party colleagues. Among the policy proposals that Kenny sought to bounce on his colleagues was electoral reform. Like many commentators at the time, Kenny proposed replacing Ireland's single transferable vote (STV) electoral system with a variant of the German mixed-member electoral system, his rationale being that this would help to reduce the excessive localism in Irish representative politics.³

Electoral reform was not the only reform proposed by Enda Kenny; he also promised gender quotas and the abolition of the Seanad. In the ensuing backlash from his parliamentary colleagues he found himself forced to back track on a number of his proposals. It is apparent that some of his advisors were aware of the deliberations of the Joint Committee, which might explain why in Fine Gael's subsequent *New Politics* policy document, published in March 2010, a specific proposal for a new electoral system was replaced by one proposing instead the establishment of a Citizens' Assembly to deliberate on options for electoral reform.⁴ The Citizens' Assembly proposal was retained for the party's election manifesto in the 2011 general election, a manifesto that included a suite of other constitutional reform proposals.

Within a few months of the launch of Fine Gael's *New Politics* document, the Labour Party – soon to become Fine Gael's coalition partner as a result of the outcome of the 2011 election – also published an ambitious agenda for constitutional reform.⁵ Indeed, the Labour Party's proposals for change were even more ambitious and wide-ranging than Fine Gael's. At the heart of their proposals was the establishment of a Constitutional Convention to consider root and branch reform of the entire Irish constitution. The party proposed that the membership of the Constitutional Convention should comprise one-third politicians, one-third experts, and one-third ordinary citizens. Like in Fine Gael's case, these proposals were retained in the party's election manifesto.

³ For discussion, see Farrell (2010).

⁴ *New Politics*, March 2010; subsequently revised in 2011, see <http://www.finegae12011.com/pdf/NewPolitics.pdf>

⁵ *New Government, Better Government: changing a broken system. Labour's 140 proposals to transform government, politics and the public services* (Labour, January 2011). By the time of the election it is safe to say that political and constitutional reform was very high on the agenda of all Irish political parties, without exception (Suiter and Farrell 2011).

The outcome of the 2011 general election was the formation of a Fine Gael/Labour coalition government, whose ‘Programme for Government’⁶ sought to marry the sometimes quite disparate manifesto promises of both parties. In relation to the parties’ respective proposals on Citizens’ Assemblies and Constitutional Conventions, this coalition marriage resulted in the following wording:

‘We will establish a Constitutional Convention to consider comprehensive constitutional reform, with a brief to consider, as a whole or in sub-groups, and report within 12 months on the following:

- Review of our Dáil electoral system.
- Reducing the presidential term to 5 years and aligning it with the local and European elections
- Provision for same-sex marriage.
- Amending the clause on women in the home and encourage greater participation of women in public life.
- Removing blasphemy from the Constitution
- Possible reduction of the voting age.
- Other relevant constitutional amendments that may be recommended by the Convention.’⁷

There were no details about the membership of the Convention (most observers assumed that this would most likely be based on the Labour party’s tripartite model), nor was anything said about its modus operandi.

The expectation was that the Convention would start work soon after the election; both parties’ manifestos indicated their desire to move quickly on their reform proposals. It was in this context, therefore, that a group of us⁸ decided to mobilise to start an initiative, promoted by the Irish political science community to extoll the

⁶http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Programme_for_Government_2011.pdf

⁷ By the time of its launch, 18 months or so later, the Convention’s list of items was extended to include the issue of whether to give voting rights in Presidential elections to Irish citizens living abroad (voting at the embassies).

⁸ The other colleagues involved included: Eoin O’Malley, Jane Suiter and Elaine Byrne.

virtues of deliberative approaches, seeking to influence the government's plans relating to the Constitutional Convention. To that end we secured a generous donation from a philanthropic organization based in Dublin – Atlantic Philanthropies – to fund a year-long set of activities under the banner of *We the Citizens*,⁹ which culminated in a pilot Citizens' Assembly held over a summer weekend in 2011. A final report, presented to government, included survey evidence (drawn from the deliberative poll underlying the Citizens' Assembly) demonstrating the success of the deliberative process in terms of its impact on the citizen participants (for more, see Farrell et al. 2013).

While we cannot be certain of this, there is good reason to believe nevertheless that the *We the Citizens* report was influential in the move by the government to finally – albeit 18 months later than envisaged – launch the Constitutional Convention, as well as in the decision over how it should be comprised (notably the decision to increase the citizen membership to two-thirds of the total and to dispense with expert members) and how it should operate, namely along deliberative lines.

The Convention held its inaugural (launch) event in the historic venue of Dublin Castle on December 1 2012, with opening speeches by the Taoiseach, Tánaiste and opposition party leaders. Chaired by Tom Arnold, the outgoing chief executive of Concern, the leading international charity, the other 99 members of the Convention are 66 citizens selected at random by the survey company Behaviour and Attitudes, and 33 elected members of the Oireachtas (29 members) and Northern Ireland Assembly (four members). To allow for the possibility of members not being available for all meetings, a list of substitute members was drawn up at the same time.

People's Conventions in Comparative Perspective

Ireland is not the first country to include citizens in the heart of discussions over possible constitutional reform in a process that follows deliberative practice. We can refer to these entities generically as 'people's conventions', which share in common the following traits:

- They address big, national questions of constitutional/institutional design;

⁹ www.WetheCitizens.ie

- They are established by government to meet a certain objective in time-delimited fashion;
- They are quite deliberately and distinctly treated as a supplement (rather than competitor) to the existing system of representative democracy;
- Ordinary citizens are at their core (though on occasions working side-by-side with elected politicians);
- For the most part, the membership is based on random selection rather than election;
- For the most part, the outcome of their deliberations is generally made clear at the point of establishment (e.g. whether to have their recommendations go straight to referendum or back to government);
- At the heart of the enterprise is deliberation – ‘the process by which individuals sincerely weigh the merits of competing arguments in discussions together’ (Fishkin 2009: 33)

Table 1: Variations in people’s conventions in the modern era

	Membership	Appointment of citizen members	Agenda	Mode of discussion	Promised outcome
Australia	Mixed	Election	Limited	Debate	Referendum
British Columbia	Citizens only	Selection	Limited	Deliberation	Referendum
Iceland	Citizens only	Election	Broad	Deliberation	Non-binding referendum
Ireland	Mixed	Selection	Broad	Deliberation	Parliament
Netherlands	Citizens only	Selection	Limited	Deliberation	Parliament
Ontario	Citizens only	Selection	Limited	Deliberation	Referendum

Table 1 summarizes the main features of variation among the principal examples of people’s conventions that have been established to date. Of the six cases presented in the table, one of them (the Australian constitutional convention established by John Howard in 1998 to consider whether Australia might become a republic) did not follow the usual principles associated with deliberative processes, notably: they used election rather than random selection to pick the citizen members,¹⁰ and the mode of discussion followed parliamentary norms of debate and position taking rather than deliberation and dialogue (Constitutional Convention 1998; Warhust 1999; Williams

¹⁰ For discussion on the virtues of random selection (or ‘sortition’) in democratic politics, see Dowlen (2009), Stone (2011).

1998). Nevertheless, the fact that ordinary citizens were included in the membership was a striking departure from previous practice for Australian constitutional review (McRae and Mullins 1998).¹¹ The convention's recommendation that Australia become a republic was defeated in the subsequent referendum.

The membership of the 2011 Icelandic Constitutional Council was also elected (Bergmann 2013).¹² Established in the heat of the country's economic and financial meltdown, it was tasked with considering root and branch reform of the country's constitution. It met full time over an intensive four-month period, and produced a series of detailed constitutional reforms all of which received widespread public support (two-thirds majority votes) in the subsequent indicative referendums. At the time of writing, the parliament has yet to formally ratify these results, but the expectations are that this will follow in due course.

It is our next three cases that have attracted the most scholarly attention – the citizen's assemblies on electoral reform in the Canadian provinces of British Columbia (2004) and Ontario (2007) and the Dutch citizen's forum (*BürgerForum*) of 2006 (Fournier et al. 2011; Warren and Pearse 2008). Only ordinary citizens were involved in these cases. They were selected at random. These assemblies/forum met at weekends over a number of months: 11 months in British Columbia, eight months in Ontario and nine months in the Netherlands. The two Canadian cases resulted in referendum questions that went directly to the citizens, which in both instances were defeated (though in British Columbia, which held two successive votes on this, on the first occasion while the proposition actually received majority support it failed to pass a super-majority threshold). In the case of the Dutch citizens' forum the recommendation was for only minor changes to the existing electoral system. This was to have been discussed by the government but the process disintegrated with the collapse of the coalition government.

¹¹ Furthermore, judging by some of the citizen participants' reflections on the experience, there is evidence of a sense of empowerment and engagement that is so often associated with deliberation (<http://www.abc.net.au/concon/diaries/default.htm>).

¹² The election result was declared null and void on legal grounds by the courts. In response the parliament appointed the 25 citizen members who had been successful in that election.

Ireland is the latest entrant to this group. While the Irish case bears some similarity to the Australian one in mixing ordinary citizens with professional politicians, the decision to select the citizen members at random rather than by election and to seek to operate the convention along deliberative lines puts it more on a par with the Canadian and Dutch cases.

Bold Step or Damp Squib?

It is safe to say that the launch of the Irish Constitutional Convention attracted little by way of positive reaction. On the contrary it was met with a mix of indifference from the mass public, cynicism from the ranks of those members of the media commentariat who were bothered to pay any attention to it,¹³ and howls of derision across most social media circles.

From the outset there were three main sets of criticisms of it relating to: its composition, its agenda, and its limited advisory role. While it clearly is far too early to pass definitive judgment on the success or otherwise of the Convention, the fact that it has been operating for several months and has already deliberated over and made recommendations on four of the themes on its agenda, provides an opportunity to take early stock of it.¹⁴ Some of the criticisms that have been made can only be assessed in the fullness of time (after the Convention has completed its work and after we know how government and – if asked – citizens have reacted to its recommendations), but at this early stage in its life it is possible to make some preliminary remarks relating to the three areas of criticism.

We can start with the criticisms made about how the Convention membership has been comprised. The main point of contention here is over the mixing of ordinary citizens with elected politicians,¹⁵ the argument being that the latter are likely to

¹³For a sample, see <http://www.irishtimes.com/debate/we-ourselves-are-fit-to-make-a-new-republic-1.528385>; <http://www.independent.ie/irish-news/constitutional-convention-chief-needs-some-savvy-28942535.html>

¹⁴ Its first report is available here: <https://www.constitution.ie/AttachmentDownload.ashx?mid=e1f8e128-2496-e211-a5a0-005056a32ee4>

¹⁵ Journalistic fears of citizen members being too easily open to intimidation seemed quickly realized over an issue that emerged even before the launch of the Convention when it became apparent that the citizen members' identities were apparently to be kept anonymous. This

dominate the discussions and intimidate the citizen members.¹⁶ Based on observations of the meetings to date (and coverage by journalists), this fear that politicians would dominate the proceedings seems unfounded. A point of detail that many of the critics may not have picked up on is the modus operandi that surrounds deliberative processes such as this, namely the practice of having the members distributed in tables of seven-to-eight each with a trained facilitator whose role is to ensure that all members are given an equal right to participate in discussions in an atmosphere of mutual respect. By its very nature this ensures equal opportunity for all.

It should also be pointed out that the politician members have made every effort not to steal the limelight, particularly in the plenary discussions: as can be seen from the streamed video feed of these discussions, on regular occasions politician members can be seen encouraging other members of their table to contribute.

A further advantage of having politicians among the ranks of the members is that it could prove useful in helping to minimize the risks of a ‘disconnect’ between the Convention and the political class – a problem that was apparent in the case of the Canadian and Dutch citizens’ assemblies where the political class quite deliberately stayed clear of the work of the assemblies making it difficult for these assemblies to gain much political purchase (Fournier et al. 2011).¹⁷

The second area of criticism is over the agenda of the Constitutional Convention, which is seen at the same time as too limited and overly crowded. The first point

particular matter was quickly dissipated when at the launch meeting the Convention members agreed to release their names and county locations.

¹⁶ There was a related criticism by some elements of civil society that it was wrong to exclude experts as members. This criticism misses the point behind deliberative approaches (as shown by the other cases of people’s conventions discussed in the previous section), where experts are given a prominent role in their capacity as ‘experts’ to advise, brief and give witness to the members of the convention. The objective behind selecting a random group of ordinary citizens is to ensure that there is a decent sample of citizens (as representative as possible) who are selected as members purely on the basis of chance and not because of representing any set of vested interests or because of any particular area of expertise that they may have (for more, see Fishkin 2009).

¹⁷ For good discussion of this point, see Ken Carty’s speculations on how the Irish Constitutional Convention might operate, in a web interview several months before the launch of the Convention (http://www.youtube.com/watch?v=3E6Z_AW3CRk&feature=youtu.be. See about 50 secs into the video).

relates to the fact that the list of eight matters are too restrictive, not dealing with the fundamental issues of constitutional reform that many called for (e.g. Byrne 2012). More to the point, specific matters of constitutional reform that were also on the government agenda (e.g. children's rights; abolition of the Senate) were not included on the list of items. The criticism of the crowded nature of the agenda relates to the fact that the Convention has been given just 12 months to conclude its work, with space and resources for just eight weekends of meetings

While detailed consideration of these points will have to wait another day, it is possible to make some preliminary remarks that deal with some of the matters raised. First, in the Oireachtas Resolution of July 2012 proposing the establishment of the Convention it is explicitly stated that its work is not only confined to the eight themes it has been asked to consider; 'following completion of [its] reports [on those eight themes, it may consider] such other relevant constitutional amendments that may be recommended by it'.¹⁸ Who can say what other themes the Convention members may wish to deliberate on that might result in additional recommendations for constitutional reform?

Second, it is already apparent that the Convention members are minded to read their brief quite liberally, moving beyond the confines of the specific questions posed in the July 2012 Oireachtas Resolution. In its January 2013 weekend meeting, for instance – its first full meeting – the Convention considered two themes, namely: whether to reduce the voting age to 17, and whether to reduce the President's term of office from seven years to five (with a supplementary question over whether a reduced term of office might then lead to aligning Presidential elections with local and European Parliament elections). Having read the briefing materials, heard from experts and advocacy groups, and deliberated over the details of the relevant arguments, the Convention members took two key decisions that undoubtedly went beyond their brief. Specifically, the Convention voted in favour of:

- Reducing the voting age to 16 (the age proposed by many of the advocacy groups promoting a reduced voting age), not 17 (the age they were asked to consider); and

¹⁸ https://www.constitution.ie/Documents/Terms_of_Reference.pdf

- Giving citizens a direct role in the process of nominating Presidential candidates (an issue that was arguably entirely beyond their remit. The Convention voted against the proposal to reduce the Presidential term).¹⁹

The third main area of criticism relates to the fact that the Convention can only make recommendations: i.e. its role is advisory rather than declaratory. Unlike the example shown by the Canadian citizens' assemblies, in the Irish case the proposal is that the recommendations of the Convention will be sent back to government to consider rather than going directly to the people as referendum proposals. This leaves the final power with government to determine whether or not its recommendations will ever see the light of day in the form of referendum questions.

Again, we have to wait and see what transpires, but a point of detail that appears not to have been taken on board is the fact that the government has given a specific undertaking to respond and in timely fashion. As it made clear in the July 2012 terms of reference: 'the Government will provide in the Oireachtas a response to each recommendation of the Convention within four months and, if accepting the recommendation, will indicate the timeframe it envisages for the holding of any related referendum.'²⁰ This means that the common practice of simply ignoring unpalatable reports, of letting worthy documents gather dust in a damp civil service cellar, is ruled out – the government has said it will respond. Furthermore, even before the Convention has completed its work at the end of 2013 it can expect to have received government responses to its earlier reports. This should provide some cause for careful reflection in government circles about the nature of those responses.

A final point about the criticisms of the limited role of the Convention is to note that such criticisms are not uncommon. Robert Goodin, for one, does not see any particular problems with this. He readily admits that these conventions can appear 'toothless'. But, he continues, the very act of involving ordinary citizens 'might afford otherwise powerless people some real power over the policy process and the outputs

¹⁹ Another instance of the Convention moving beyond its remit was in the decision at its second weekend of deliberations to recommend that the text of the Constitution should be amended to include 'gender-inclusive language'.

²⁰ https://www.constitution.ie/Documents/Terms_of_Reference.pdf

that eventually emerge from it' (2003: 167). They get to speak; those in power get to hear them speak and learn how they frame issues; and the real potential is there to influence outcomes.

Conclusion

Across the world's established democracies, the trend in recent years has been towards engaging with citizens, of increasing the scope for ordinary citizens to have a say. People's conventions can be seen as part of this 'democratic transformation' (Dalton et al. 2003). For Mark Warren processes such as this form 'a potential part of the ecology of democratic institutions' (2008: 69). They are a complement to other representative institutions. People's conventions like the Irish Constitutional Convention are not without their weaknesses, but what cannot be denied is that at their heart they represent a serious intent by our political elite to re-engage with society, and they are a step towards a form of democracy that seeks to place the citizen centre stage – a democracy, in Goodin's estimation (2003), actually centred more on inputs than outputs.

Obviously, it is too soon to know for sure about the full impact of people's conventions – and certainly it is far too early in the Irish case given that its work is still ongoing – but we can at least speculate as John Ferejohn does about how the practice of deliberation could yet provide 'a way to redeem, to some extent, the ancient promise of democracy as a form of popular government – in Lincoln's words, as government "by" the people' (2008: 213).

It is too soon to know if such lofty ideals are to be visited on Irish citizens. The early months of operation of the Irish Constitutional Convention bode well. Whether its recommendations ever see the light of day in referendums and if they do, whether those referendums pass will be a story for another day.

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