CONSTITUTIONALISM IN IRELAND, 1932–1938

NATIONAL, COMMONWEALTH, AND INTERNATIONAL PERSPECTIVES

Donal K. Coffey

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To Aishwarya

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Contents

Introduction

The first chapter of this book aims to answer the question why the Irish Free State Constitution of 1922 failed.[1] The answers depend on an understanding of the constitutional currents buffeting Ireland in the 1920s and 1930s. The focus of this work is the 1937 Constitution, a document predominantly identified with the Fianna Fáil party, the party in power when the Constitution was enacted. The most significant viewpoint for understanding why the 1922 Constitution failed is, therefore, that of Fianna Fáil. The first chapter charts the constitutional development of the party while in opposition and upon election as the government of the Free State in 1932. It provides an explanation for the flaws in the constitutional architecture of the Free State and the reasons why the 1922 Constitution was not accepted by Fianna Fáil.

The second chapter considers a question related to the first chapter: why did Fianna Fáil decide to attempt to enact a new Constitution? The party were concerned to ensure the internal sovereignty of the Irish Free State and pursued a constitutional strategy which incrementally removed all symbols of external influence. This embroiled the government of the Free State in a constitutional dispute with the government of the United Kingdom. In the course of this dispute, Éamon de Valera, president of the executive council of the Irish Free State, concluded that a new Constitution was necessary. The constitutional dispute with the United Kingdom was

[1] The answer to this question, and to that posed in the second chapter, draws on analysis previously published by the author as the article "The Need for a New Constitution: Irish Constitutional Change 1932–1935," *Irish Jurist*, 47, no. 2 (2012): 275–302.

not effectively settled until the Anglo-Irish Agreement of 1938, which recognised the constitutional advances of Ireland in the 1930s and guaranteed the territorial integrity of the new state by returning the treaty ports of Cobh, Berehaven and Lough Swilly.

The third chapter considers the abdication of Edward VIII in 1936.[2] This marked a definitive turning point in the constitutional history of Ireland in the 1930s. The crisis was provoked by the actions of Edward VIII, but it allowed the Free State to eliminate the monarchical element of the Constitution. The crisis played out in the fields of national and Commonwealth relations. Both elements are considered here. The conclusion to the crisis essentially destroyed the British legal conception of the Commonwealth, simplified the drafting of the new Constitution, and resulted in a muted British and Commonwealth reaction to the document in 1937.

The fourth chapter relates the history of the drafting of the Constitution, considering the individuals involved. It also recounts the intellectual influences on the drafters that can be discerned from the documentary record. In the course of this chapter, various historical disputes are considered. The roles of individuals such as John Hearne and John Charles McQuaid are evaluated. The chapter also considers de Valera's interest in judicial review of legislation, a mainstay of the Constitution, which has nonetheless been the subject of some historical analysis.

The fifth chapter records the public reception of the Constitution. It considers the arguments relating to the Constitution set out during the plebiscite campaign. It also considers the reaction of various interest groups. In order to appreciate the public perception of the Constitution, this chapter also delves into the plebiscite results themselves in order to consider the effect of partisan allegiance. The chapter ends with a consideration of the manner in which the Constitution was seen in the foreign press, with specific reference to Commonwealth countries and the continent.

The sixth chapter is concerned with the reception of the Constitution in the aftermath of the plebiscite. It relates the tensions that still existed within the Irish political elite in their perception of the legality of the

[2] This chapter is based on work previously published by the author as "British, Commonwealth, and Irish Responses to the Abdication of King Edward VIII," *Irish Jurist* 44, no. 1 (2009): 95–122.

document, and concludes with a description of the 1938 Anglo-Irish Treaty, which closed the circle begun in 1932 with the ascension of Fianna Fáil.

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CHAPTER 1

The Rise of Fianna Fáil and the Failure of the Constitution of the Irish Free State

The first chapter of this book charts the constitutional development of the Fianna Fáil party in the Irish Free State up to 1933.[1] It considers why the Irish Free State Constitution failed both politically and legally. The constitutional arguments advanced by Fianna Fáil until they achieved a parliamentary majority in 1933 were characterised by one unifying thread: they were unsuccessful. Nonetheless, it is not possible to fully appreciate the successful activities of the 1930s without considering the failures which preceded them.

The Failure of the Constitution of the Irish Free State

The Constitution of the Irish Free State was passed on 25 October 1922 by the Third Dáil.[2] It was underpinned by the Articles of Agreement for a Treaty between Great Britain and Ireland, commonly known as 'the treaty', and attracted the support of both the pro-treaty Cumann na nGaedheal party and the Labour Party. Kevin O'Higgins, Minister for

[1] This chapter and Chap. 2 draw on analysis previously published by the author as the article, "The need for a new Constitution: Irish Constitutional Change 1932–1935," *Irish Jurist* 47, no. 2 (2012): 275.

[2] On the 1922 Constitution, see Laura Cahillane, "An Insight into the Irish Free State Constitution," *American Journal of Legal History* 54 (2014): 1.

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Home Affairs, believed that the Constitution 'should be prized by the people' because of the degree of autonomy it gave them over their own affairs.[3]

It did not, however, attract the support of the anti-treaty forces. In the 1930s, the antipathy of the anti-treaty deputies in Dáil Éireann was to prove fatal to the 1922 Constitution. The demise of the 1920s political settlement was, however, aided by a number of structural features of the Constitution itself, these structural features provided ideological as well as legal succour to the anti-treaty deputies in the 1930s.

The major structural impediment to the viability of the Free State project is, by now, well understood. The 1922 Constitution provided, by virtue of Article 50, a majority legislative amendment power of the Constitution which was limited only by the terms of the Anglo-Irish treaty of 1921.[4] This power was interpreted by the courts to allow amendments by express and implied statutory provisions.[5] Such a wide power undermined the ability of the courts to judicially review legislation on the grounds of constitutional invalidity.[6]

It is not, however, the case that simply because judicial review proved ineffective that the Free State Constitution was doomed. Countries such as the United Kingdom and New Zealand have survived with a similarly broad constitutional power. In those countries, the only limit on the powers of the legislature are political ones.[7] The continued vitality of those political settlements indicates that consensual political limits can also provide a durable, albeit malleable, constitutional structure. There was, therefore, a second failure in the Free State political system—the failure to provide the means of political expression to those hostile to the treaty settlement within the constitutional structure of the Free State. The first,

[3] 1 *Dáil Debates* col. 1908, 25 October 1922.

[4] See John Maurice Kelly, *Fundamental Rights in the Irish Law and Constitution* (Dublin: Figgis, 1961), 4–6; Ronan Keane, "Across the Cherokee Frontier of Irish Constitutional Jurisprudence: The *Sinn Féin Funds* Case: *Buckley v Attorney General* (1950)," in *Leading Cases of the Twentieth Century*, ed. Eoin O'Dell (Dublin: Round Hall Sweet & Maxwell, 2000), 185–188.

[5] See Kelly, *Fundamental Rights*, 4–6.

[6] The question of whether the ideology of senior members of the judiciary provided a second obstacle is addressed in Donal K. Coffey, "The Judiciary of the Irish Free State," *Dublin University Law Journal* 33 (2011): 61.

[7] Swift MacNeill noted the importance of conventions on the text of the 1922 Constitution; see *Studies in the Constitution of the Irish Free State* (Dublin: Talbot Press, 1925), ix–xxi. It was recognised by Kelly as operating in relation to the 1937 Constitution's state of emergency provisions; see Kelly, *Fundamental Rights*, 20–21.

perhaps insurmountable, difficulty was the refusal of the anti-treaty deputies to accept the treaty to the extent of fighting a civil war. It is not clear that such expression could be trammelled within the boundaries of the Constitution itself, given that acceptance of the treaty was the sine qua non of the 1922 Constitution. The second, related, failure was that the experience of the 1920s was that the Constitution would be amended by Cumann na nGaedheal in order to protect the treaty settlement. The attempt by Fianna Fáil to bend the machinery of the Constitution to its aim in 1927 was ultimately scuppered by this political reality. Moreover, although the Cumann na nGaedheal government was singularly impressive in its contributions to the imperial conferences from 1926 onwards, it failed to negotiate significant constitutional advances within the rubric of the treaty with the British government, particularly in relation to the right of appeal to the Judicial Committee of the Privy Council.[8] The potential for a political constitutional settlement foundered on the antipathy of the Fianna Fáil party to the treaty, the intransigence of Cumann na nGaedheal on the treaty, and the truculence of the British administration relating to proposed changes. We will consider each of these elements in turn.

Political Settlement and the Free State Constitution

Sinn Féin was an abstentionist party which refused to take its seats in the Free State Parliament. In March 1926, Éamon de Valera, president of the anti-treaty Sinn Féin party, proposed that if the oath of allegiance to the king were abolished then abstentionism would become a matter of policy, not principle. This motion was defeated and on 23 March 1926 de Valera founded a new party, Fianna Fáil, in the La Scala theatre.

Fianna Fáil's first manifesto set out a National Programme of 22 points;[9] the first six were constitutional. The party would:

1. Assert the right of the nation to its complete freedom.
2. Oppose all claims of any foreign power to dictate to them or to interfere in any way in the government of Ireland.

[8] See David Harkness, *The Restless Dominion: The Irish Free State and the British Commonwealth of Nations, 1921–31* (London: Macmillan 1969), chapter 6 and *passim*. See Thomas Mohr, *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Dublin: Four Courts Press, 2016) for a comprehensive account of the history of the appeal to the Judicial Committee of the Privy Council.

[9] University College Dublin Archives (UCDA): P150/2047.

3. Repudiate any assent to the partition of Ireland, and strive resolutely to bring partition to an end.
4. Remove from the assemblies of the people's representatives all acts of subservience to the United Kingdom, all oaths of allegiance and all political tests.
5. Bring together in one national assembly all the parliamentary representatives of the people.
6. Replace the Free State Constitution, with its articles dictated by England, by a Constitution freely framed by the representatives of the people.

This National Programme formed the basis of constitutional action for the Fianna Fáil government in the 1930s.[10] De Valera used his first three addresses to the party's annual ard-fheiseanna, or party political conference, to adumbrate the deficiencies of the Free State Constitution.[11] De Valera repeatedly emphasised the importance of having majority rule to determine national policy. He believed that the oath of allegiance prevented the establishment of majority rule in the country because it excluded abstentionist representatives. He also repeatedly stated his wish for the removal of all forms of external interference with the government of the country. The most important Fianna Fáil document in terms of constitutional analysis in the period establishing the party, however, was the pamphlet, *King and Constitution*, written by the journalist Frank Gallagher.[12]

In 1926, Fianna Fáil circulated the first of what were to be four pamphlets on policy matters. The second of these pamphlets was the one written by Gallagher.[13] The aim of the pamphlet was to prove the case for the principle laid out in Fianna Fáil's 'Programme for Action', that is, to '[r]eplace the Free State Constitution with its articles dictated by England by

[10] On the links between the republican tradition and the constitutional ideologies of the two major parties, see Donal K. Coffey, "1916, 1921 and the 'Destruction of the Legal Unity of the British Empire'," *Dublin University Law Journal* 39, no. 2 (2016): 333.

[11] UCDA: P150/2048-9 and *A National Policy Outlined by Eamon de Valera* (Dublin: Fianna Fáil, undated), which contains the 1926 address.

[12] Frank Gallagher, *King and Constitution* (Dublin: Fianna Fáil, undated). Gallagher was de Valera's personal secretary in 1927 and 1928, editor of the Fianna Fáil journal *The Nation* from 1928 to 1930, and editor-in-chief of the *Irish Press* upon its foundation; see Graham Walker, "'The Irish Dr. Goebbels:' Frank Gallagher and Irish Republican Propaganda," *Journal of Contemporary History* 27 (1992), 149.

[13] And, as it turned out, last.

a Constitution freely framed by the representatives of the Irish People'. Constitutional governance 'must, if it is to have popular support, conform to the tradition shared by the people or, at the very least, must in no way conflict with it'.[14] This principle was defined within the nationalist tradition as follows:

> The freed peoples, having been made wise by long suffering, see into the future and know that the first act of a liberated democracy must be to lay securely the foundations of a free national life. The laying of these foundations is completed when a Constitution is drafted and made law having the real consent of the people, expressing the national faith, and giving unbridled scope to the national genius.[15]

Needless to say, the Constitution of the Irish Free State was seen as failing this test. Gallagher referred to the 'Preamble' as establishing the Constitution subordinate to the Anglo-Irish treaty, which was signed under the threat of 'immediate and terrible war'.[16] Gallagher's main argument against the 1922 Constitution was that Griffith took a Constitution to London which he believed was consistent with the Anglo-Irish treaty but that this document was revised to comply with British objections:

> [W]e find of the 83 original clauses, every clause that was not merely technical was altered, thirty being practically re-written. For instance, in the Draft Constitution there is no Oath, no recognition of the British King, no Governor-General. There is no supremacy given over the Irish courts to the British Privy Council, no recognition of Partition, no acceptance of imperial citizenship. There is no 'co-equality' with English colonies, no limitation of Ireland's international statue, no summoning and dissolving of Parliament in the English King's name, no involvement of Ireland in Britain's wars [….]

[14] Gallagher, *King and Constitution*, 3.

[15] Gallagher, 5. In the debates on the Free State Constitution Kevin O'Higgins, vice-president of the executive council and minister for justice, stated:

> On the face of it this Constitution is not a republican Constitution; perhaps I would not be wrong in saying that it is as little a republican Constitution as a British Constitution. It contains the trappings, the insignia, the fiction and the symbols of monarchical institutions, but the real power is in the hands of the people.

See 1 *Dáil Debates* col. 47127–478, 20 September, 1922.

[16] Gallagher, 6. In fact, the 'Preamble' to which he referred was Section 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922.

> But the most vital change of all occurs in the Preamble. In the Free State leaders' own draft the Preamble declared the 'sovereign right' of the Irish nation 'as a free people': asserted in the name of the people unrestricted control over the national destiny, and declared the purpose of the Constitution to be 'that Ireland may take her place among the nations of the world as a free democratic State.' When the Constitution was brought back from London gone were these brave words and substituted for them was a new Preamble which by subordinating the Constitution to the 'treaty' not only destroyed every germ of national freedom in it but deprived it of all claim to be a 'fundamental law.'[17]

According to Gallagher, the Constitution of the Irish Free State was not the fundamental organic law of a sovereign people, but an externally imposed law. Fianna Fáil resolved when it came to power to remove these externally imposed limitations on national sovereignty. It is important, however, to note that the difference between the Fianna Fáil party and Sinn Féin was that the former was at least willing to consider the possibility of compromise. Admittedly, the terms of this compromise were unpalatable to the government, but the 1926 split demonstrates that Fianna Fáil were amenable to using the institutions of democratic governance in order to achieve their nationalist aims. The events of 1927 demonstrated that this was not possible.

Fianna Fáil and the 1927 General Election

In 1927 the primary constitutional target of the party was the oath of allegiance. The oath was provided for in Article 17 of the Free State Constitution, and was worded as follows:

> I … do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to H. M. King George V., his heirs and successors by law in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

Fianna Fáil deployed a variety of arguments against the oath of allegiance before the 1927 general election. Some of the arguments were based on matters of principle, others on practical politics. The former arguments can be summarised as follows:

[17] Gallagher, 13. On British reaction to the Irish draft, see Laura Cahillane, *Drafting the Irish Free State Constitution* (Manchester: Manchester University Press, 2016), 47–64.

1. *The perjury argument*—it was argued that if Fianna Fáil TDs ('Teachta Dála'—the Irish term for Members of Parliament) took the oath with the intent to break it they would be, according to their own lights, guilty of perjury.[18]
2. *The oath to the Republic argument*—most of the leading figures of the Fianna Fáil party had taken an oath to uphold the Republic; the oath of allegiance would require forswearing the republican oath.[19]
3. *The political test argument*—the oath was often described as a test which prevented the representation of one third of the people and thus weakened any governmental authority.[20]
4. *The taking of the oath was not mandated by the treaty*—this argument was based on (i) the wording of the treaty, and (ii) the fact that the original Constitution submitted to London by the Free State government omitted any oath.[21]

To these may be added the practical consideration that it was the oath which separated Fianna Fáil from the other parties. Cumann na nGaedhael believed it was a treaty obligation.[22] Labour was against it but had taken it,[23] and Sinn Féin was an abstentionist party.

[18] *The Nation*, 11 June 1927: 'The Fianna Fáil party attaches importance to an oath; it will not perjure itself.'

[19] See the statement of de Valera in *The Nation*, 25 June 1927; 'To Republicans that oath of allegiance is a foreswearing of their national ideals.'

[20] *The Nation*, 4 June 1927: 'FIANNA FÁIL can give you a STABLE GOVERNMENT because it will not shut any party out of the National Assembly.' See also statement of de Valera in *the Nation* 25 June 1937: 'To maintain a political test like the oath, which disfranchises one-third of the people is undemocratic and unjust.'

[21] See *The Nation*, 11 June 1927: 'Let us be fair to the treaty and recognise that though it mentioned an oath it did not mention who were obliged to take it. By the text of the treaty, no one is bound to take the oath.' See also the statement by de Valera in *The Nation*, 27 June 1927:

> The 'Treaty' does not make the Oath compulsory. That is clear not only from the wording of the oath, but is the recorded opinion of the pro-Treaty leaders. The Constitution drawn up under the supervision of the 'Provisional Parliament,' and passed by its legal experts as being in full conformity with the clauses of the 'Treaty,' contained no oath.

[22] See, for example, statements by Kevin O'Higgins on Article 17 in the Dáil; 1 *Dáil Debates* cols. 1039–1040, October 3, 1922.

[23] See, for example, statements by Thomas Johnson in the same debate; 1 *Dáil Debates* cols. 1047–1048, and subsequently *Irish Independent*, 29 July 1927.

In the aftermath of the 1927 election, de Valera and the Fianna Fáil representatives attempted to gain access to the Dáil for the purposes of voting upon the motion of the selection of the new ceann comhairle. On 27 June, *The Nation* published a joint legal opinion written by barristers—Arthur Meredith, Albert Wood and George Gavan Duffy. The opinion addressed the issue of the status of deputies who had not been prepared to take the oath during the period prior to the election of the ceann comhairle, the chairperson of the Irish Lower House:

> In reply to the queries directed to us in consultation, we are of opinion that there is no authority in anyone under the treaty or the Constitution, or the standing orders of Dáil Éireann to exclude any members of that House (whether he has taken the oath or not) from any part of the House before the House has been duly constituted and the ceann comhairle thereof duly elected.[24]

The reasoning underlying this conclusion was as follows. The Constitution provided that the oath was to 'be taken and subscribed by every member of the Oireachtas before taking his seat therein'.[25] Standing order number 1 provided that the clerk of the Dáil was to appoint a day, before the convening of the Oireachtas, for taking the oath in compliance with the Constitution.[26] The clerk was to open the proceedings on the first day of the meeting of the Dáil and, after dealing with electoral matters, was to act as chairman for the purposes of the election of the ceann comhairle.[27] A motion proposing a ceann comhairle could be made 'by any deputy who has taken his seat in accordance with law'.[28] The flaw identified by the opinions lay in the clerk of the Dáil's inability to exclude members who refused to take the oath. The ceann comhairle certainly had the power to exclude someone on the basis of the order of the house but it was arguable that the clerk of the Dáil did not.[29] Under this line of reasoning, the

[24] *The Nation*, 27 June 1927; *Irish Independent*, 23 June 1937. It was referred to by deputy Gilbert Hewson as a 'mere legal quibble', Hewson to de Valera, 22 June 1927 (UCDA: P150/2401). De Valera's official biography notes that none were members of Fianna Fáil: 'Two of them might well be considered ex-Unionists.' See Earl of Longford and Thomas O'Neill, *Eamon de Valera* (Dublin: Gill & Macmillan, 1970), 252.

[25] Article 17.

[26] *Dáil Éireann: Standing Orders Vol. I: Public Business* (Dublin, 1927).

[27] Orders 2–5.

[28] Order 5(1).

[29] See orders 47–50.

members of the Dáil who had not taken the oath could not be excluded until the election of the ceann comhairle.

The government, or executive council, obtained an opinion which stated that deputies who attempted to take their seat without taking the oath, even for the purposes of voting in a new ceann comhairle, could be ejected in order to preserve the peace and did so eject them.[30] Fianna Fáil responded with a two-fold constitutional strategy. The first was to initiate litigation. Sean Lemass described this avenue on 23 July as 'like taking an action against the devil in the court of hell'.[31] Fianna Fáil obtained a counsel's opinion by Albert Wood, a king's counsel with a left-leaning background. Wood's advice was more radical than that contained in the June opinion. A copy of the opinion may be found in the de Valera papers.[32] Wood's point, in brief, was that, insomuch as the standing orders required the taking of the oath, they were ultra vires:

> [T]he Dáil has no power to do any act outside the specific powers contained in the treaty and the Constitution. As the taking of the oath is not a condition precedent to Membership and as penalties have not been created for the non-taking of the oath, therefore no disability whatever attaches to legislation nor to Membership if non-subscribing Members take part in the proceedings of the House.[33]

[30] UCDA: P190/52. In Golding's biography of Gavan Duffy, there is some confusion about the chronology in relation to the 1927 elections. Goulding indicates that despite the Gavan Duffy *et al.* opinion, de Valera signed the register in the aftermath of the June election. However, this occurred after the September 1927 election, rather than the June 1927 election; see G.M. Golding, *George Gavan Duffy 1882–1951* (Dublin: Irish Academic Press, 1982), 32–33. See also Michael Laffan, *Judging W.T. Cosgrave: The Foundation of the Irish State* (Dublin: Royal Irish Academy, 2014), 245–246.

[31] *The Nation*, 23 July 1927.

[32] Memo entitled 'Ó Ceallaigh & Another v The Attorney General & Others: Counsel's Opinion of Mr. Albert Wood K.C.' (UCDA: P150/2033).

[33] Wood contended it was not a condition precedent as no place or time was stipulated in the Free State for the taking of the oath of allegiance. He contrasted this with the Parliamentary Oaths Act 1868, 29 & 30 Vict c. 19. Section 3 provided:

> The oath hereby appointed shall in every Parliament be solemnly and publicly made and subscribed by every member of the House of Peers at the table in the middle of the said House before he takes his place in the said House, and whilst a full House of Peers is there with their Speaker in his place, and by every member of the House of Commons at the table in the middle of the said House, and whilst a full House of Commons is there duly sitting, with their Speaker in his chair, at such hours and according to such regulations as each House may by its standing orders direct.

The case was brought at the suit of Seán T. O'Kelly, vice-president of Fianna Fáil, against the attorney-general. The high court cause-book for 1927 has been mislaid by the national archives; however, a detailed account of the case is carried in *The Nation*. The plaintiffs asked for a declaratory order against the attorney-general, ceann comhairle, and the clerk and superintendent of the Dáil on the following grounds:

> That on the true construction of the Constitution of the Irish Free State the plaintiffs, as duly elected deputies, were and are entitled to enter the place of meeting of the members of the chamber of deputies, assembling to constitute the house, and elect a chairman thereof, without taking or subscribing the oath set out in Article 17 of the Constitution.
>
> That the forcible exclusion of the plaintiffs and forty-three other deputies from the place of meeting and from the meeting of Deputies on 23rd June 1927, by the defendants, Colm Ó Murchada and Padraig Ó Braonain, was without authority and illegal.
>
> That the said exclusion was a usurpation of an authority and functions which could be exercised (if at all) by the chamber of deputies properly constituted through their elected chairman; and
>
> That the election purporting to have been made on the occasion of such meeting of the defendant, Michael Ó hAodha as ceann comhairle of the house, while the plaintiffs and other deputies were forcibly excluded from the meeting, was null and void.[34]

The second component of Fianna Fáil's constitutional strategy was to attempt to force the issue using the provisions relating to direct democracy under the Constitution. Article 48 of the Constitution provided for the establishment of the Initiative under which people could propose laws or constitutional amendments.[35] The provision had not been brought into

[34] *The Nation*, 16 July 1927.

[35] Article 48 stated:

> The Oireachtas may provide for the Initiation by the people of proposals for laws or constitutional amendments. Should the Oireachtas fail to make such provision within two years, it shall on the petition of not less than seventy five thousand voters on the register, of whom not more than fifteen thousand shall be voters in any one constituency, either make such provisions or submit the question to the people for decision in accordance with the ordinary regulations governing the Referendum. Any legislation passed by the Oireachtas providing for such Initiation by the people shall provide (1) that such proposals may be initiated on a petition of fifty thousand voters on the register, (2) that if the Oireachtas rejects a proposal so initiated it shall be submitted to

force but the Article provided that 75,000 voters could force the issue.[36] Fianna Fáil mobilised to gather these signatures and soon had 96,000 signatures.

In response to the assassination of Kevin O'Higgins on 10 July 1927, the Cumann na nGaedhael government passed two Acts. The first was the Public Safety Act 1927.[37] Section 3 of the Act provided that any contravention of the Constitution contained in the Act should operate as an amendment for so long as the Act was in operation.[38] Section 22 established special military courts which, under section 25, could impose any penalty which the central criminal court could and which, under section 25(1), could impose the death sentence for cases of treason or murder.[39] One notable feature of the Act was section 16, under which a suspect could be detained by order of a district court judge for seven days and for a further two months on an order of a minister of the executive council. Despite trenchant opposition from the Labour Party, Cumann na nGaedhael succeeded in passing the Act.

The second Act was the Electoral Amendment (No. 2) Act 1927, which provided, under section 2, that candidates for election at the Dáil would have to sign an affidavit to the effect that they would subscribe to the oath. Section 4 provided that the oath had to be taken within two months of being elected or one month after the house sat. Failure to comply meant the seat would be vacated and the person could not go forward as a candidate for five years. Article 17 of the Free State Constitution provided for the taking of the oath of allegiance. It did not provide a time within which the oath had to be taken. It also did not provide for what would happen if the oath were not taken. Article 17 was described by Sean MacEntee as a

> the people for decision in accordance with the ordinary regulations governing the Referendum; and (3) that if the Oireachtas enacts a proposal so initiated, such enactment shall be subject to the provisions respecting ordinary legislation or amendments of the Constitution as the case may be.

[36] Not more than 15,000 could be from one constituency.

[37] See Seosamh Ó Longaigh, *Emergency Law in Independent Ireland 1922–1948* (Dublin: Four Courts Press, 2006), 77–86, on the genesis and operation of the Act. See also Fergal Francis Davis, *The History and Development of the Special Criminal Court, 1922–2005* (Dublin: Four Courts Press, 2007), 39–42.

[38] The provisions of this Act were considered in the case of *AG v MacBride* [1928] IR 451.

[39] Ó Longaigh recounts that the original Bill proposed a special court composed of three high court judges but this was dropped after justices Fitzgibbon and Murnaghan indicated they would resign rather than sit on the court, ibid., at 77, 79.

'law of imperfect obligation'.[40] The Electoral Amendment (No. 2) Act 1927 remedied these defects; it provided for a timeframe within which the oath was to be taken and for the consequences of a failure to take it.

On 20 August, Fianna Fáil deputies indicated in a unanimous resolution that they were prepared to take the oath and Fianna Fáil entered the Dáil by subscribing to it, though they saw it as an 'empty political formula'. After de Valera had signed the register, he commented to the clerk of the Dáil that the clerk 'would live to see the book containing our signatures burnt on the streets of Dublin'.[41]

In the Oireachtas, Cumann na nGaedhael responded to Fianna Fáil's Initiative campaign by amending the Constitution to delete the provisions relating to Bills being referred to the people (Article 47) and to the Initiative itself (Article 48).[42] The cumulative effect of the constitutional changes made by Cumann na nGaedhael in 1927 and 1928 were, on one view, to force the oath upon republicans, severely restrict the liberty of citizens and remove the democratic rights of the people. On another view, they were to save the institutions of state from attack and prevent the Anglo-Irish treaty from being usurped by constitutional Initiative. John Regan has argued that, given Fianna Fáil's resilement from the positions it held regarding the legitimacy of the Free State and the oath of allegiance, this moment '[i]n a world of rational consistency … should have been the treatyite's moment of triumph. It was not to be.'[43] At the time, however, the possibility of Fianna Fáil achieving power seemed remote. In a letter to the Earl of Granard, W.T. Cosgrave expressed his (presumably feigned) disappointment that Fianna Fáil could not be exposed through a period in office; he wished 'de Valera were as strong as he is unfortunately weak'.[44]

The broad legislative amendment power was used to frustrate the nationalist aspirations of Fianna Fáil. However, it was clear that this power had been used in such a manner as to make the task of Fianna Fáil easier were they to be elected to government. As Andrew Malone noted in 1929:

> It cannot be said that [the amending] power has been used with either wisdom or discretion by the executive council, and in the course of the amend-

[40] *The Nation*, 9 July, 1927. He stated: 'Article 17 could be disregarded with impunity.'

[41] Memo by Frank Aiken and James Ryan, 23 September 1927 (UCDA: P150/2403).

[42] Constitution (Amendment No. 10) Act 1928.

[43] John M. Regan, *The Irish Counter-Revolution 1921–1936* (Dublin: Gill & Macmillan, 1999), 274.

[44] Cosgrave to the Earl of Granard 3 October 1937 (UCDA: P285/230).

> ing discussions passions have often been aroused which will not die down easily. But more dangerous, and disturbing, for the future is the lack of respect with which the constitution has been treated, as a mere party issue in a passionate house.[45]

Malone was alive to the possibilities inherent in the manner in which the power had been used: 'Many parliamentary precedents have been created by Mr. Cosgrave in the heat of party battle which will serve Mr. de Valera well in any future revolutionary adventure which he may decide to undertake.'[46]

The actions of Cumann na nGaedheal while in government fatally undermined the viability of the 1922 Constitution. The fact that the party rendered the Constitution malleable and used this malleability for their own purposes ensured that Fianna Fáil's actions in the 1930s enjoyed some internal constitutional credibility.[47] Nonetheless, there remained the matter of the Articles of Agreement for a Treaty which the Free State and United Kingdom had undertaken to comply with. The treaty was a potential legal impediment to the actions of the Free State; moreover, as it underpinned the entire Free State Constitution, it could have proven an important bulwark in preserving the 1922 settlement.

However, the actions of the British government also made clear that even if Fianna Fáil were in power, it would be unlikely to accede to the party's republican constitutional project. This was most obvious in the case of the appeal to the Judicial Committee of the Privy Council.[48] The progressive expansion of the appeal in relation to Irish cases under the lord chancellorship of George Cave gave rise to a backlash against the privy council in the Irish Free State, even amongst the pro-treaty government.[49] However, repeated attempts by the Cumann na nGaedheal government to negotiate a restriction on appeals to the privy council were unsuccessful.[50]

[45] Andrew Malone, "Party government in the Irish Free State," *Political Science Quarterly* 44 (1929), 363–378.

[46] Andrew Malone, "Party government in the Irish Free State," *Political Science Quarterly* 44 (1929), 363–378.

[47] See also Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland* (Dublin: University College Dublin Press, 2011), 54.

[48] Hereinafter referred to as the privy council. See Thomas Mohr, *Guardian of the Treaty*, 90–119.

[49] See Thomas Mohr, "Lord Cave, the British Empire and Irish Independence—A Test of Judicial Integrity," *Oxford University Commonwealth Law Journal* 12, no. 2 (2012), 229.

[50] See Mohr, *Lord Cave*, 245–248.

The failure of the pro-treaty government to secure agreement on this issue underscored the point that the only possible action on the basis of the treaty would have to be unilateral.

From the British side, of course, repealing the appeal would have amounted to a dangerous blow to the unity of the Commonwealth legal system, which had the king as head of all three branches of government. The attempts by the Free State to eliminate oversight from Westminster, and to do so at a pace that outstripped the ambitions of the other dominions, were naturally viewed with the deepest suspicion.[51] However, it is possible that a greater tolerance to some constitutional ingenuity in relation to Free State affairs in the 1920s might have preserved the possibility of bilateral agreements between the British and Irish governments in the 1930s.[52] Indeed, the Cumann na nGaedheal government actually sought an agreement with the British government in 1931 to abolish the oath requirement in order to halt de Valera's electoral advance: this was also unsuccessful.[53]

A meeting between John Hearne, legal advisor to the department of external affairs, and Sir Harry Batterbee, assistant under-secretary of the Dominions Office, in London in July 1932 illustrates the deep antipathy which the issue of the privy council had created in the Irish civil service. Hearne argued:

> If those whose duty it was to carry out the directions of successive governments had been able to say to president de Valera when he took office that the privy council had been regarded by the British government as a treaty issue just as the oath was now so regarded by the British government, but that the privy council issue had been settled by agreement without any difficulty whatever because of the wishes of the Irish people in the matter, what a difference might have been made. But what had been the position? The president had to be told … that negotiations lasting over years had been a failure, and that an absurd interpretation of the treaty was solemnly advanced over and over by successive British law officers to defeat the privy council policy of the government and people of the Irish Free State.[54]

[51] See David Harkness, *The Restless Dominion: The Irish Free State and the British Commonwealth of Nations, 1921–31* (London: Macmillan, 1969).

[52] Mohr, *Lord Cave*, records some possibilities at 247.

[53] See Mohr, *Guardian of the Treaty*, 131.

[54] NAI: DFA (unregistered papers) reprinted in *Documents on Irish Foreign Policy, Volume IV, 1932–1936* (Dublin, 2004) at 78–79 (8 July 1932).

This failure of bilateral negotiations meant that one final buttress of the Free State constitutional settlement was removed.

Given the dangers which had been flagged by Malone in relation to the extremely open nature of the legislative amendment power, it must be asked why the amendment power was extended to 16 years in 1929. The answer is that the executive council had need of it for short-term purposes. The second reading of the Bill to extend the legislative amendment power by a further eight years contained a number of telling remarks. De Valera indicated he would not object as he wished to avail himself of its power for his own purposes.[55] Deputy T.J. O'Connell, leader of the Labour Party, noted that if amendments were as prolific as they had hitherto been, 'there will not be much of the original Constitution left at the end of the eight years'.[56] Hugo Flinn interjected: 'Going, going, gone!' O' Connell replied: 'And what then?' The answer, we now know, was a new Constitution.

There remained, however, two potential points where Fianna Fáil attempts to undermine the Free State Constitution could be thwarted. The first was a political institution which derived its mandate in a different way than did the Dáil. The Senate of the Irish Free State was elected from 1928 on a combined Dáil and exiting Senate franchise. One third of the membership was elected every two years. This created a lag between popular representation in the Dáil and the membership of the Senate. As we shall see, this political impediment was instrumental in 1932 when Fianna Fáil attempted to remove the oath of allegiance.

Another institution which demonstrated a willingness to preserve the infrastructure of the treaty was the Supreme Court of the Free State. The actions of the Cumann na nGaedheal administration, again, were to create a dangerous precedent here. The institutional interplay between the courts and the popular branches were characterised by an unwillingness to abide by court decisions that were unfavourable; use was made of retroactive legislation and constitutional amendments to undermine such decisions.[57] This created another layer of political confusion surrounding the constitutional structure of the Irish Free State; if such legislation could be passed

[55] 28 *Dáil Debates* col. 1317, 13 March 1929.

[56] 28 *Dáil Debates* col. 1317, 13 March 1929.

[57] See also Donal K. Coffey, "Comparative and institutional perspectives on the exercise of the judicial power in the Irish Free State," in *Judicial Power in Ireland*, ed. Eoin Carolan (Irish Academic Press, forthcoming).

by proponents of the 1922 Constitution, what could one expect from opponents of its very existence?

The antipathy of Fianna Fáil, the failure of Cumann na nGaedheal to either legally entrench the Constitution under a constrained amendment procedure or politically entrench the Constitution by creating a shared political morality surrounding the Constitution, and the antipathy of the British administration to any change meant that, by 1931, the continued viability of the Free State Constitution rested on ensuring that Fianna Fáil did not come into government. This hope was dashed in 1932.

The 1932 Election Campaign

At the October 1931 ard-fheis, de Valera delivered an address on constitutional issues that foreshadowed the developments of the 1930s. First, he advocated the elimination of the oath of allegiance. Once the oath had been abolished, a general election was to be held within two years to give those people who had found the oath repugnant the opportunity to stand for office. De Valera continued: 'This new assembly could sit as a constituent assembly, deliberately charged with the revision of the Constitution, so as to bring it, as far as possible, in accord with national ideals.'[58] The oath of allegiance was the primary issue which dominated Fianna Fáil's constitutional argument, but it would be necessary to remove all elements of the Constitution inconsistent with 'national ideals' to make it truly republican.

Second, de Valera stated that the office of the governor-general would be retained, 'to avoid legal difficulties', but that the 'ultimate aim would be to assimilate the office to that of president of the republic'. Finally, de Valera addressed the issue of the Senate and stated his belief that the 'whole question … of a second chamber, and, if such were thought desirable, its composition and size, can be referred to the constituent assembly I have mentioned'. There are two important elements to this. First, de Valera was aware of political institutions, the Senate and the governor-general, which could delay or frustrate the constitutional aims of a Fianna Fáil government. With this address, de Valera was putting them on notice that their continued existence could not be taken for granted under a Fianna Fáil administration. Second, it is important to note that in 1931 de

[58] *Irish Independent*, 28 October 1931.

Valera's proposal was concerned with the revision, rather than repeal, of the 1922 Constitution. However, by his prosecution of these constitutional designs in the 1930s, he set the process of adopting a new constitution in motion. His experience of constitutional change would demonstrate the necessity for a new, rather than a revised, Constitution.

Against de Valera's proposals for a constituent assembly Cumann na nGaedhael noted: 'It is evident that if Fianna Fail is returned to power that we are to be treated to at least three years of elections, re-elections and constitution-mongering before we really know what we are in for.'[59] This argument was disingenuous; de Valera had clearly indicated concrete areas of constitutional revision and his proposed method for dealing with these problems. Nonetheless, the remarks were, in a certain sense, prescient: there was a re-election, but the period of 'constitution-mongering' extended to 1938.

On 15 February 1932, Fianna Fáil placed an advertisement in the *Irish Independent*, written by de Valera himself, asking voters to give them their vote the next day.[60] The advertisement reassured the electorate that Fianna Fáil stood for 'the rule of law':

> It stands for the right of the Irish people, through their freely elected representatives, to make laws binding on the people, without being subjected to undemocratic pressure of any kind, and to ensure that all such laws shall be obeyed.

An externally imposed Constitution such as the Constitution of the Irish Free State did not provide suitable conditions for the operation of the rule of law. Such 'undemocratic pressure' was responsible for 'internal dissension' through inter alia providing for an oath of allegiance to the Crown. It was necessary to remove this undemocratic interference in order to put an end to the 'internal dissension' which was such an obstacle to national progress. The party, it was claimed, 'aims to remove all causes of internal dissension, so that a united effort may be made to solve our pressing problems, invoking to this end the spirit of Irish patriotism'.[61]

[59] 'Fighting Points for Cumann-na-nGaedhal Speakers and Workers: General Election 1932' at 150 (UCDA: P190/281).

[60] 41 *Dáil Debates* col. 1084, 29 April 1932. *Irish Independent*, 15 February 1932.

[61] Ibid.

1932: Constitutional Stasis

The primary issue on which the Fianna Fáil party had campaigned was the abolition of the oath of allegiance. The new government was quickly made aware of the difficulties which attended the abolition of the oath. The first difficulty was internal—the Senate refused to pass the constitutional amendment abolishing the oath. The second was external—the British government insisted that the oath was binding and refused to negotiate on the issue. In 1932, the Fianna Fáil government was also embroiled in a conflict involving the governor-general. Although the existence of the post was in conflict with Fianna Fáil's republican constitutional reform, the government did not succeed in abolishing it.

Constitutional Reforms in 1932

On 16 February 1932, Fianna Fáil eclipsed Cumann na nGaedhael as the largest party in the state. The general election returns did not, however, produce a majority of Fianna Fáil deputies in the Dáil, and a minority government was formed with the support of the Labour party.

Nonetheless, the achievement of the constitutional course sketched out by Fianna Fáil was a matter of the highest priority. This may be gauged from the fact that three days after the first sitting of the Seventh Dáil the cabinet decided to introduce a Bill abolishing the oath of allegiance.[62] On the third sitting of the seventh Dáil the Constitution (Removal of Oath) Bill passed the first stage.[63] We have already covered the issues relating to the oath before the 1927 General Election. The fact that in 1932 Fianna Fáil had already taken the oath did not weaken their resolve to remove it. Before the government acted to remove the oath, however, they were forced to consider the vexed issue of the legal basis of the Irish Free State: were there impediments, deriving from either Constitutional or international law, which prevented them from abolishing the oath?

[62] 12 March 1932 (NAI: Taois s.2264). Technically speaking, the 'allegiance' sworn was to the Constitution, and merely to 'be faithful' to the king, but the use of the term 'oath of allegiance' is typically taken to incorporate the entire formula.

[63] 41 *Dáil Debates* col. 171–175 (20 April 1932). The two previous sittings, on 9 and 15 March, had disposed of issues which were necessary for the operation of Parliament. The third sitting was actually the first day on which substantive legislative work was done.

The analysis of these legal problems differed according to the view taken on the issue of the constitutional basis of the Irish Free State.[64] There were two major streams of thought as to the establishment of the Free State—British and Irish. Two questions underlay these theories. First, was there a treaty between Great Britain and Ireland? Second, how was the Constitution of the Free State enacted?

The British Theory of the Constitutional Basis of the Irish Free State

On 6 December 1921, the Irish and British representatives signed the Articles of Agreement for a treaty between Great Britain and Ireland. This brought the Irish War of Independence to an end. On 31 March 1922, the British passed the Irish Free State (Agreement) Act 1922.[65] This Act gave the force of law to the Articles of Agreement for the treaty.[66] Despite the onset of civil war the Dáil sat as a constituent assembly and passed the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 (or 'the Irish Constituent Act').[67] This Act contained the Constitution of the Free State and the Articles of Agreement in the Schedules to the Act. The Act provided that the Constitution was to be subordinated to the Articles of Agreement; in the event of conflict, the Articles of Agreement were to be preferred. On the British side, the Westminster parliament passed the Irish Free State Constitution Act 1922.[68] This Act purported to enact the Irish Free State Constitution. It differed from the Irish Constituent Act in a number of crucial ways. It explicitly provided that the King could appoint a governor-general at any time after the Act came into force, allowed for the extension of Acts that applied to other dominions to the Free State if the Parliament of the Free State

[64] For further historical background to the dispute, see Thomas Mohr, "British Imperial Statutes and Irish Sovereignty: Statutes passed after the creation of the Irish Free State," *Journal of Legal History* 32 (2011): 61, 65–73. Mohr also explains how the difficulties continue to this day. See also Nicholas Mansergh, *The Unresolved Question: The Anglo-Irish Settlement and its Undoing 1912–72* (London: Yale University Press, 1991), 190–192.

[65] 12 Geo. 5 c. 4.

[66] S. 1(1) and Schedule to the Act.

[67] Mohr points out that the Constituent Assembly ceased to exist after the Free State Constitution came into force on 6 December 1922 while the Third Dáil passed other pieces of legislation. See Thomas Mohr, *The Irish Free State and the Legal Implications of Dominion Status* (PhD Thesis, University College Dublin, 2007) Vol. I, 159.

[68] 13 Geo 5 c. 1.

assented, and reserved the power of the British parliament to make laws affecting the Free State where the British parliament would have the same power for other dominions.[69] Both the Irish and British Acts were given the force of law by the king on 6 December 1922.

The British, however, denied that any treaty had been ratified between the British and Irish states. A treaty required a compact between two independent constitutional entities. Members of the Commonwealth, with the same head of state, were not sufficiently independent of one another. The British adhered to the *inter se* doctrine, which was based on the notion of each member having as head of state an indissoluble, unitary Crown.[70] This doctrine implied that the Articles of Agreement could not constitute a treaty as the Commonwealth members could not conclude a treaty between its various members. Instead, the Articles of Agreement was an agreement which was nonetheless binding between the two states, notwithstanding the fact that it was not a treaty.

Under the British theory, the Irish Free State had been brought into being by the British statute passed in 1922. This statute purported to give the force of law to the Irish Constitution. It also reserved the power to legislate for the Free State on the basis of constitutional usage with other dominions. This power was not included in the Irish statutory counterpart. Under this theory, the Irish State did not have any legal source beyond British statute. One implication of this theory was that the British parliament could revoke the legal basis of the Free State. This theory also had consequences for any radical re-structuring of the treaty; such a measure risked infringing the Irish Free State Constitution Act 1922 (the British Act), which prohibited any internal constitutional change which derogated from the treaty. This, in turn, meant that any radical alteration of the treaty risked sharp diplomatic and political conflict with the British.

[69] S. 1.; S. 2.; S. 4.

[70] The doctrine:

> [A]sserts that relations between the countries of the Commonwealth are not international relations but *sui generis*, being founded upon a common allegiance to the Crown; that in so far as these relations are governed by law it is Commonwealth constitutional law, and that international law is to a more or less extent inappropriate and perhaps even inapplicable.

R.Y. Jennings, "The Commonwealth and International Law," *British Yearbook of International Law* 30 (1953), 320.

The Irish Theory of the Constitutional Basis of the Irish Free State

Under the Irish theory, the Free State was a sovereign independent state.[71] The Articles of Agreement for a treaty between Great Britain and Ireland had been ratified by the Irish side in the Constituent Act passed in 1922 and by the British in their Irish Free State (Agreement) Act 1922. The Articles of Agreement were a treaty from this date, at the latest. This position was bolstered, according to the Irish view, by the registration of the document with the League of Nations on 11 July 1924.[72] The Irish theory based the Constitution of the Irish Free State upon the Constituent Act passed by the Dáil. The Irish theory saw a clear difference between the other dominions and the Free State. It had enacted its own constitution while the other dominions had their constitutions enacted by the Westminster parliament.[73] Of course, from the British point of view, they had enacted the Irish Constitution, but the root of title was disputed by the Irish side.

John Hearne, legal advisor in the Department of External Affairs, who was to become intimately involved in the drafting of the 1937 Constitution, composed an illuminating memorandum on the legal basis of the Irish Free State upon the ascension of Fianna Fáil to power in 1932.[74] Hearne's memo was premised on the fact that the Free State was an international state both on the basis of judicial decisions and the internationally accepted criteria for statehood. He cited the judgments of Kennedy CJ in *In Re Reade* and Murnaghan J in *Alexander v Circuit Judge for Cork*.[75] Hearne drew attention to Kennedy CJ's statement that after the ratification of the treaty, '[t]he Irish Free State was then a recognised national being, with its

[71] Adherents of this theory in some form included Leo Kohn, *The Constitution of the Irish Free State* (London: George Allen & Unwin Limited, 1932), 90–92; Hugh Kennedy in Leo Kohn, *The Constitution of the Irish Free State*, xii; Henry Harrison, *Ireland and the British Empire, 1937: Conflict or Collaboration?* (London: Robert Hale, 1937), 102–103, John Gordon Swift MacNeill, *Studies in the Constitution of the Irish Free State* (Dublin: Talbot Press, 1925), 1–6.

[72] See Michael Kennedy, *Ireland and the League of Nations 1919–1946: International Relations, Diplomacy and Politics* (Dublin: Irish Academic Press, 1996), 53–58.

[73] By the South Africa Act 1909, the Commonwealth of Australia Constitution Act 1900, the British North America Act 1867, and the New Zealand Constitution Act 1852. The Australian Constitution had been ratified by plebiscite but was enacted by the Westminster Parliament.

[74] NAI: Taois s.12046, 31 March 1932.

[75] *In Re Reade*, [1927] IR 31. *Alexander v Circuit Judge for Cork*, [1925] 2 IR 165.

international status in relation to Great Britain and to the other members of the British Commonwealth … as well as to the rest of the political world, established and defined by the treaty'.[76] He also drew attention to Murnaghan J's holding: 'Under Article 1 (of the treaty) Ireland became an independent State.'[77] He then asked whether the political reality of the state adhered to the pronouncements of Kennedy CJ and Murnaghan J. Hearne isolated three criteria which indicated 'international status and Statehood'. A state, he said, had to be:

1. invested with full treaty making power, which has
2. a recognised right of legation, and which, having these characteristics,
3. exercises and is capable of maintaining ordered conditions, independently of external control, over a given portion of territory is accepted as a separate member of international society.[78]

Hearne concluded that the Free State fulfilled all three criteria. Hearne pointed out that Kennedy CJ's view was based upon the fact that a treaty was concluded between Ireland and Britain, not on the substance of the treaty itself. Hearne therefore argued against the view that the status of the state was based on British legislation:

> Once this State came into being, once its international personality was created, once its relations with the rest of the political world including Great Britain and the British Dominions were established as international relations the treaty provisions which had that effect had done their work and no alteration of the treaty could undo it.
>
> There is no legal competence within or without this State to destroy this State but if we derive its legal origin from the British Parliament that is from a source which has the inherent legal power to revoke its own acts we are likely to put ourselves in the position of jeopardising the internal and external sovereignty of this country.

Hearne's analysis concluded with rhetoric one rarely finds in official memoranda, but which was clearly designed to appeal to de Valera's republicanism:

[76] [1927] IR 31 at 62.
[77] [1925] 2 IR 170.
[78] NAI: Taois s.12046.

> The treaty of 1921 has been successfully used by us abroad, not only to destroy the legal unity of the British Empire, but to destroy the political, the diplomatic, and the international unity of the British Empire as well. The fact of separate foreign policies, the fact of separate diplomatic representation, and the fact of separate treaty engagements have smashed the whole Imperial regime and system and already the jurists have settled down to the task of recasting the theory upon which that regime and that system rested.

The Statute of Westminster 1931

Radical revision of the fundamental character of the Free State Constitution (such as the abolition of the oath of allegiance) risked conflict with the two legal systems which claimed to have instituted that Constitution: the Irish and the British.

The risk of conflict with the British law eased following the enactment of the Statute of Westminster, 1931.[79] The Statute was based upon the reports of the imperial conferences in 1926 and 1930. It was designed to guarantee equality between the members of the Commonwealth by removing restrictions which had hitherto attached themselves to dominion legislation and the ability of the British Parliament to override dominion legislation.

Section 2(1) of the Act provided that the Colonial Laws Validity Act 1865, which declared colonial laws which conflicted with British statutes void, did not apply to any dominion legislation passed after the enactment of the Statute of Westminster. Section 2(2) of the Statute provided that laws made by a dominion would not be made inoperative by reason of the fact that they conflicted with a British Act, and that dominions could repeal any Act insofar as it was part of their law. Section 3 vested extra-territorial jurisdiction in the dominions.[80] Section 4 provided that the British Parliament could not legislate for the dominions unless the dominions concerned had requested and consented to the enactment.

The Statute was interpreted differently by the Irish and British sides. This divergence in opinion may be explained by the different interpretations of the legal basis of the Free State. As previously noted, for the

[79] 22 Geo. V, c 4. See Thomas Mohr, "The Statute of Westminster, 1931: An Irish Perspective," *Law and History Review* 31, no. 4 (2013): 749.

[80] This was necessary after the case of *Macleod v Attorney-General for New South Wales* [1891] AC 455; see Thomas Mohr, "The Foundations of Irish Extra-Territorial Legislation," *Irish Jurist* 40 (2005), 89–93.

British, the Irish Parliament was a creation of British Statute. Therefore, the Statute of Westminster vested significant extra powers in the Free State Parliament. During the second reading of the Bill, Winston Churchill pointed out that the Irish Free State could repudiate the Articles of Agreement of the treaty and the British Free State Constitution Act.[81] During the committee stage, Colonel John Gretton moved an amendment to prevent the Statute from applying to the British Constitution Act or the Articles of Agreement.[82] In response, James Thomas, Secretary of State for Dominion Affairs, pointed out: 'If you want to ensure the return of Mr. De Valera, then carry this Amendment.'[83] The provisions of the treaty, it was pointed out, were safeguarded by the Constitution itself. In the House of Lords, Viscount Hailsham argued that every other Dominion had supported the Free State in objecting to the specific reservation in the Statute of Westminster in relation to the Articles of Agreement.[84] It was inconsistent with the idea of co-equality between members of the Commonwealth to reserve individual statutes from the operation of the Statute of Westminster. The Statute of Westminster, therefore, did apply to the Articles of Agreement and could be used to amend the British Act which gave the force of law to the Constitution under the British theory of the Irish Free State.

The Proposal to Delete Article 17: Irish Law Advisors' Opinions

In early 1932, the constitutionality of the proposal to delete Article 17 and so abolish the oath of allegiance was considered from the point of view of Irish law. In a memorandum on the matter, John Hearne argued that the Oireachtas had the power to delete Article 17 of the Constitution by virtue of Article 50 (which provided that amendments which were consistent with the treaty could be made by way of ordinary legislation).[85] He also suggested that the Oireachtas should amend Section 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 (which prohibited any constitutional alteration which infringed the treaty) as it was inconsistent with the international status of a state that its constitution

[81] 259 *House of Commons Debates* 1194 (20 November 1931).
[82] 260 *House of Commons Debates* 303 (24 November 1931).
[83] 260 *House of Commons Debates* 310 (24 November 1931).
[84] 83 *House of Lords Debates* 222 (26 November 1931).
[85] NAI: Taois s.2264, 21 March 1932.

should be fettered by a treaty.[86] Hearne did not foresee any constitutional difficulty in the proposal to amend Section 2; it was merely an ordinary statute. That, as we shall see, was not the view which would be taken by the Supreme Court in 1935.

According to Hearne's analysis, the sole impediments to the deletion of Article 17 derived from international law. The oath was provided for in Article 4 of the internationally binding treaty of 1921. He suggested that the wording made it clear that an oath was to be taken by the members of the Oireachtas.[87] He stated that Articles 1 and 2 of the treaty made it clear that the Free State was to be a member of the Commonwealth. All dominions had some form of oath but the previous forms had been rejected by the Irish delegation. Article 4 simply varied the form of the oath to be taken, not the question of whether or not an oath was to be taken. Furthermore, the fact that the Irish government had incorporated the oath in the 1922 Constitution indicated that they accepted this view. Hearne's argument on the issue of the oath was convincing, and it appears likely that such an argument would have succeeded had it been tested in court. Hearne opposed the deletion of the oath using the Statute of Westminster as it implicitly accepted the British view of the status of the Free State.[88] Instead, he advocated negotiation, international arbitration or, simply as a possibility, the renunciation of the treaty.

Hearne's was not the only view canvassed on the issue. Conor Maguire, the attorney-general, held a meeting with two prominent barristers, George Gavan Duffy and Senator Michael Comyn.[89] The attorney-general solicited 'their separate opinions on the exact constitutional position created by the Articles of Agreement for a treaty of the 6th December, 1921, and the recent Statute of Westminster'. Comyn had already provided a

[86] In this and other memoranda he did not consider whether the Oireachtas possessed the power to amend the Constituent Act; see also NAI: AGO/2002/14/1410, 27 May 1931.

[87] Article 4 began, '[t]he oath to be taken'.

[88] This point about the antipathy of the Irish Free State to the Statute of Westminster has not been always appreciated. Keogh and McCarthy state of the Cumann na nGaedheal government, '[u]sing the freedom of the Statute of Westminster, [the government] was preparing a constitutional amendment bill when it fell in 1932'. See Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution: Bunreacht na hÉireann* (Cork: Mercier Press, 2007), 50. The Cumann na nGaedheal government, however, never claimed that the Statute of Westminster granted them powers they did not already possess.

[89] NAI: Taois s.12046, 21 March 1932.

detailed analysis of the effect of the Statute of Westminster on inter-Commonwealth relations.[90]

There is no record of further analysis by Comyn but Gavan Duffy provided a memo on the subject on 25 March 1932. In it Gavan Duffy adhered to the orthodox Irish line on the legal basis of the Free State. In his analysis the Constitution derived from the Irish Constituent Act. Section 2 of the 1922 Act provided that the Constitution was to be construed subject to the treaty. Gavan Duffy differed from Hearne in that he believed that this Act was passed by the Dáil as a constituent assembly. He stated: 'The powers thus removed from the purview of the Oireachtas reside in the constituent assembly.' In other words, since the 1922 Act was enacted by a form of super-legislature, a constituent assembly, it could not be amended except by another constituent assembly. Gavan Duffy did not explicitly state that the Oireachtas was of inferior status to a constituent assembly but this seems to have been the logical import of this statement as it distinguished between the two bodies. This meant that the Oireachtas could not repeal Section 2. This was precisely the view which would be taken by the Supreme Court in *The State (Ryan) v Lennon*.[91]

Finally, a memorandum was prepared on the conflicting views of the legal basis of the Free State. This memorandum appears to have been the work of the attorney-general, Conor Maguire.[92] He considered the Irish and British views on the juridical basis of the Free State, quoting extensively from the judgment of Kennedy CJ in *In Re Reade*. This judgment was based on the view that there was a treaty between the Irish and British governments and the Constitution had been enacted by the Irish Constituent Act. He then considered the British position and noted that since the Statute of Westminster the Oireachtas could, under the British view, amend the treaty by removing Article 17 from the Constitution. He stated that he had canvassed the views of George Gavan Duffy, Michael

[90] In the attorney-general's account of the meeting he stated that Comyn had already provided a note on the Statute of Westminster. This note is dated 25 March 1932.

[91] [1935] IR 170.

[92] The memorandum is unsigned and undated but begins by noting that the author had been instructed by the president of the executive council to prepare the memorandum on the legal basis of the Free State for the cabinet. This indicates it was prepared by the attorney-general.

Comyn, Arthur Meredith and the parliamentary draftsman on the issue, and that they agreed on this point.[93]

The Constitution (Removal of Oath) Bill 1932

Emboldened perhaps by the opinions of Maguire and Hearne, the new government introduced the Constitution (Removal of the Oath) Bill. The Bill was divided into three parts. First, it removed Article 17 of the 1922 Constitution which made the oath of allegiance obligatory. Second, it removed Section 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922. This provided that the Constitution was to be construed by reference to the treaty and that any part of the Constitution which was repugnant to the treaty was invalid. Third, it removed the limitation on amendments contained in Article 50 of the 1922 Constitution whereby amendments were to be within the terms of the Anglo-Irish treaty. Article 50 mirrored the terms of Section 2 of the Constituent Act but Article 50 was located within the Constitution itself. The deletion of these two provisions was essential if the amendments were to be constitutionally effective.

De Valera's argument at the second stage was to divide Fianna Fáil's programme for governance into two parts, 'the part which had relation to international matters … and the part that had reference directly to domestic matters'.[94] His argument was essentially based on international law concerns, and whether the removal of Article 17 would precipitate a breach of the treaty of 1921. He argued that the oath contained in Article 17 was not required by the terms of the Anglo-Irish treaty. His argument on this point was based upon the notion of the co-equality of the members of the British Commonwealth; he asked rhetorically whether the opposition would say Canada could not pass a Bill such as was being discussed.[95] He pointed out the position of the Free State within the Commonwealth was one which was not static:

> The basis of [the opposition's argument for abolition of appeal to the privy council] was that the status of the Free State was not fixed at a special period and kept there, and the fact that we had advanced was given recognition to,

[93] King's counsel.
[94] 41 *Dáil Debates* col. 569 (27 April 1932).
[95] 41 *Dáil Debates* col. 570.

> not very long ago, when the Statute of Westminster was passed giving legal effect to the constitutional position which it was held the states of the British commonwealth had at that time attained to.[96]

He argued, mirroring Hearne, that, as a general proposition, treaties were not part of the constitutional law of countries.[97] De Valera argued that the amendment of Article 50, which provided that constitutional amendments were only valid 'within the terms of the Scheduled treaty', was consequential on the rest of the amendment; it was necessary in order to prevent frustration of the other clauses of the Bill. If Article 50 were not amended then the remaining clauses could be declared unconstitutional on the grounds that they were not valid constitutional amendments 'within the terms of the [Anglo-Irish] treaty'.

W.T. Cosgrave, the leader of Cumann na nGaedhael, conceded that Dáil Éireann had a right to pass the legislation in question but questioned what it meant in terms of national aspirations and contended that it was a violation of the treaty. De Valera responded: '[the Irish people] want complete freedom to determine for themselves what form of government they should have, and what their relations with other States should be.'[98] Deputy William Davin questioned whether, in light of Section 1, Sections 2 and 3 were necessary.[99] De Valera responded by explaining that these amendments were necessary in order to prevent the removal of Article 17 being found to be ultra vires:

[96] 41 *Dáil Debates* col. 571. Keith pointed out that this was certainly not the case under s. 7(1) of the *Statute of Westminster 1931*, which stated '[n]othing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts, 1867 to 1930*, or any order, rule or regulation made thereunder'. See Arthur Berriedale Keith, *Letters on Imperial Relations Indian Reform Constitutional and International Law 1916–1935* (London: Oxford University Press, 1935), 120 (letter to *The Scotsman*, 28 April 1932).

[97] 41 *Dáil Debates* col. 572. Despite the fact that the treaties which brought the First World War to an end contained substantive stipulations, these were a matter of international rather than national law. Thus, Austria was bound by Article 88 of the Treaty of Saint-Germain, which stated '[t]he independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations'. This prevented *Anschluss* with Germany as a matter of international law rather than by the Constitution of the Republic of Austria. An international treaty is obviously open to re-negotiation and diplomatic initiatives, which a constitution is not.

[98] For right to pass legislation, 41 *Dáil Debates* col. 582, '[w]e have, and always had, the fullest legal power to legislate in the manner which would amount to a breach of the Treaty or any particular provision of it'. For national aspirations, 41 *Dáil Debates* col. *583. For De Valera's response, 41 Dáil Debates* col. *1105, 29 April 1932.*

[99] 41 *Dáil Debates* col. 1084.

> Our domestic courts ought to have no function in the matter … There is the very good reason that if a verdict was got in the courts against their own people even though it was a mistaken judgment—and judges are no more infallible than the rest of us; they make mistakes, they can be wrong—but if a domestic court in any country gave a judgment against its own people on an international issue, it finished it because the other party would say: 'Your own courts have found against you.'[100]

What de Valera did not anticipate in 1932 was that there would turn out to be considerable juristic objections to his proposals to amend Article 50 and to repeal Section 2 which would reveal themselves only in the course of court proceedings.

The Bill passed the report stage on 19 May 1932 and was transmitted to the Senate for their consideration. The Senate considered the Bill and, in the committee stage, proposed amendments which would essentially have gutted the Bill of effective force and replaced it with a new Section 4:

> This Act shall not come into force until an agreement has been entered into between the government of the Irish Free State and the British government providing that Article 4 of the treaty of 1921 shall cease to have effect and such agreement has been ratified and approved by resolution of Dáil Éireann.[101]

The proposed amendments were transmitted to the Dáil, which refused to accept any of them.[102] In this action, it must be recalled that Hearne's proposal was to treat the treaty as an international instrument, which meant that the Senate's advice was in line with his proposal, but obviously the Irish government feared the kind of interminable negotiations which had halted the abolition of the appeal to the privy council. It was noteworthy that bilateral negotiations between the Irish Free State and British governments tended to be relatively problematic in the 1920s, whereas the Free State was far more successful in convincing multilateral bodies to

[100] 41 *Dáil Debates* col. 1108. This point was repeated in the Committee Stage, 41 *Dáil Debates* col. 1183–1184, 3 May 1932.

[101] 15 *Seanad Debates* col. 985, 8 June 1932.

[102] The Bill passed the fifth stage on 28 June 1932. 15 *Seanad Debates* cols. 1429–1430, 20 July 1932. The proposed amendments were discussed in the Dáil on 12 July 1932. On the debates, see Kohn, *The Constitution of the Irish Free State*, 374–386 and Mohr, *The Irish Free State*, Vol. II, 191–205.

accommodate its preferred course of action. This can be seen most clearly in relation to the Commonwealth of Nations.

Anglo-Irish Relations

The relationship between the Free State and the Commonwealth of Nations, particularly with Britain, was to form an important backdrop to the constitutional debates of the 1930s. The Cumann na nGaedheal government had formed a cordial, albeit sometimes testy, working relationship with the British government. The Free State government had formed common cause with the Canadians and South Africans in the imperial conferences and had been extremely influential in reforming the Commonwealth from within. Fianna Fáil's vision of the relationship between the Commonwealth and the Irish State was different. It was premised on de Valera's concept of 'external association', which he had set out in 'document no. 2' when the treaty was being debated. There is an essential continuity between de Valera's position in document no. 2 and the realisation of this position in the 1930s. It is worth setting out the terms of association favoured by de Valera in full:

> 2. That, for purposes of common concern, Ireland shall be associated with the States of the British Commonwealth [….]
>
> 3. That when acting as an associate the rights, status, and privileges of Ireland shall be in no respect less than those enjoyed by any of the component States of the British Commonwealth.
>
> 4. That the matters of 'common concern' shall include Defence, Peace and War, Political Treaties, and all matters now treated as of common concern amongst the States of the British Commonwealth, and that in these matters there shall be between Ireland and the States of the British Commonwealth 'such concerted action founded on consultation as the several governments may determine'.
>
> 5. That in virtue of this association of Ireland with the States of the British Commonwealth citizens of Ireland in any of these States shall not be subject to any disabilities which a citizen of one of the component States of the British Commonwealth would not be subject to, and reciprocally for citizens of these States in Ireland.
>
> 6. That, for purposes of the Association, Ireland shall recognise His Britannic Majesty as head of the Association.[103]

[103] See *Documents on Irish Foreign Policy Volume I, 1919–1922* (Dublin: Royal Irish Academy, 1998) doc. no. 218.

In the end, de Valera was not forced to concede on the matters of 'common concern'. The failure of the British government to comprehend the continuity of purpose between 1922 and 1938 was to complicate Anglo-Irish relations. This failure was compounded by the general British indifference to Irish affairs. As Deirdre McMahon notes: 'The British government, absorbed in more pressing affairs [between 1922 and 1932], saw, when it bothered to look, *pacata Hibernia*, a restless dominion whose pulse it hardly comprehended. The struggle to readjust its focus was long and painful.'[104]

In response to the oath crisis the British government established the Irish situation committee.[105] The committee was normally chaired by the prime minister and was described by Harkness as a 'powerful and impressive body throughout the period of its operation'. This body was responsible for the development of a hard-line stance against the Fianna Fáil government. The British government had developed a working relationship with the Cumann na nGaedhael government and viewed the ascension of Fianna Fáil to office with deep suspicion. As outlined above, the British government believed that no treaty had been concluded between the Irish and British states but that an agreement had been reached which was nonetheless binding in principle. The acceptance of this agreement by both sides had been the cornerstone of Anglo-Irish relations under the previous administration. The attempt to abolish the oath was a breach of this agreement. The British side, moreover, were not prepared to negotiate a new arrangement with the Irish government. They felt a new arrangement would only embolden republicans, eliminate the possibility of Cumann na nGaedhael's return to power, and could also be seen as a betrayal of the former administration.[106] Their unease had been intensified by Fianna Fáil's refusal to hand over land annuities. These disputed sums

[104] Deirdre McMahon, "'A Transient Apparition': British Policy towards the de Valera government, 1932–5," *Irish Historical Studies* 22, no. 88 (1981): 331–332.

[105] David Harkness, "Mr de Valera's Dominion: Irish Relations with Britain and the Commonwealth, 1932–1938," *Journal of Commonwealth Political Studies* 8 (1970): 206 at 207–208. The most extensive coverage of Anglo-Irish relations in the 1930s may be found in Deirdre McMahon, *Republicans and Imperialists: Anglo-Irish Relations in the 1930s* (New Haven: Yale University Press, 1984), 43–107.

[106] In a meeting with the political secretary of the South African high commission, Harry Batterbee, assistant under-secretary at the Dominions Office, stated 'representations had already been received from individual supporters of Mr. Cosgrave's party, pointing out that any intended compromise towards the De Valera government would to that extent be breaking faith with the former governing party'. See National Archives of South Africa: BTS

were the result of British loans to Irish farmers under the Irish Land Acts 1891–1909. Ernest Blythe, Minister for Finance in the Free State, had signed an agreement with Winston Churchill, Chancellor of the Exchequer, on 19 March 1926. The agreement provided that the Irish government would pay the annuities accruing. The Fianna Fáil government argued that this agreement had never been ratified by the Oireachtas and they were therefore under no obligation to pay them to the British exchequer.

On 22 March 1932, John Dulanty, Irish High Commissioner in Britain, formally communicated the position of the Fianna Fáil government in relation to the oath of allegiance.[107] Dulanty summarised his constitutional arguments in the following terms:

1. The oath is not mandatory in the treaty.
2. We have an absolute right to modify our Constitution as the people desire.
3. The Constitution is the people's Constitution and anything affecting it appertains to our internal sovereignty and is a purely domestic matter.

On 23 March, James Thomas, the secretary of state for dominion affairs, responded: 'In the opinion of His Majesty's government … it is manifest that the oath is an integral part of the treaty made ten years ago between the two countries and hitherto honourably observed on both sides.'[108] De Valera maintained on 5 April that the oath was 'a matter of purely domestic concern', one which fell within the remit of the internal affairs of the state. Thomas responded by reiterating the point made in this earlier message.[109]

The negotiations between the British and Irish sides were complicated by the fact that the dispute had a Commonwealth dimension: did the Free State possess 'equal status' with the United Kingdom? If so, why could it not amend its constitution internally as it saw fit—had not all limitations been swept away by the Statute of Westminster? This point was made on a number of occasions by de Valera. Moreover, the British government was

1/31/1 (letter from high commissioner to prime minister dated 1 April 1932. The meeting took place on 24 March 1932).

[107] The text may be found in *Papers Relating to the Parliamentary Oath of Allegiance in the Irish Free State and the Land Purchase Annuities* cmd. 4056.

[108] He also raised the question of payment of the land annuities.

[109] 9 April 1932. It is interesting to note that the first message referred to 'the Treaty', while the second referred to 'the Treaty Settlement.' The former was consistent with the Irish view as to the legal basis of the Free State; the latter was consistent with the British view.

aware that the conflict would necessarily have to involve the Dominions to some degree, and this acted as a restriction on British behaviour.[110] However, the British attempt to engage Commonwealth support on their side ran into immediate difficulty: J.B.M. Hertzog, the South African prime minister, was rebuked by de Valera for a telegram sent to Dublin, which led to some embarrassment.[111] New Zealand had sent an initial telegram in favour but then indicated to the British government that they did not intend to act further. As a result, the British government decided to proceed on a bilateral basis in the dispute with the Free State. Deirdre McMahon notes that this meant that 'the effectiveness of [Commonwealth] "common responsibility" depended on how far their views would be acceptable to the British cabinet'.[112]

In July 1932, talks were held between British and Irish delegates in Dublin and London on the disputed issues. The British side proposed that the annuities issue be sent to a Commonwealth tribunal for mediation.[113] De Valera agreed but on the condition that the personnel of the tribunal were not restricted to citizens of the Commonwealth and that it would consider all disputed matters between the two countries. The British were not willing to accept either of these conditions.

It had been brought to de Valera's attention in a meeting with Dulanty on 18 March that Thomas had intimated the possibility of 'an economic boycott' if the Free State government proceeded to abolish the oath without consultation.[114] This led to the imposition of duties of 20% on Irish imports to Britain. A retaliatory duties scheme was imposed by the Irish Free State in June and July 1932. Despite a number of meetings between representatives of the British and Free State governments, no agreement was possible on the issues of the oath or the annuities.

Anglo-Irish relations were further strained in 1932 by the controversy involving the office of governor-general, as the following section makes clear.

[110] See also Donal K. Coffey, "The Commonwealth and the Oath of Allegiance Crisis: A Study in Inter-War Commonwealth Relations," *Journal of Imperial and Commonwealth History* 44, no. 3 (2016): 492–512.

[111] See McMahon, *Republicans and Imperialists*, 48–49.

[112] McMahon, 50.

[113] This was in line with the recommendation of the 1930 Imperial Conference; see cmd. 3717, at 22–24.

[114] NAI: DFA s.1.

The Governor-Generalship Controversy

In April 1932, Frank Aiken, minister for defence, and Sean T. O'Kelly, minister for local government and public health, left a function given at the French legation after the arrival of James McNeill, the governor-general.[115] McNeill wrote to de Valera on 26 April protesting against both at the discourtesy and at the subsequent coverage of the incident in the *Irish Press*.[116] De Valera responded that he refrained from interfering with the editorial policy of the paper and suggested that McNeill inform the Irish government of future social engagements so as to prevent a recurrence of such an incident.[117] McNeill pressed for an apology in May but de Valera refused to give one. McNeill was subsequently excluded from the state reception during the Eucharistic Congress. He wrote to de Valera on 7 July demanding an apology for this and the prior insults and threatening to publish their previous correspondence within three days if such an apology was not forthcoming. De Valera responded that the letters were confidential state documents and directed McNeill not to publish them. McNeill indicated he intended to publish the documents. On 12 July, the broadsheets of the Free State carried the documents and a government-approved statement.[118]

On 9 September, de Valera asked the king to terminate the appointment of McNeill from 1 October 1932 and indicated that from that date the powers of the governor-general would be exercised by the Chief Justice. This action was based on the letters patent constituting the office of governor-general, which stated 'in the event of the death, incapacity, removal or absence from the said State for any period exceeding one month' the powers of the governor-general were to devolve on such other person as was appointed for the purpose or, in the event that no person was appointed, on the chief justice.[119] The first possibility would require the executive council to nominate someone to take over the powers of the

[115] On the Governor-General controversy in 1932, see Deirdre McMahon, "The Chief Justice and the Governor General Controversy in 1932," *Irish Jurist* 17 (1982): 145 and Brendan Sexton, *Ireland and the Crown 1922–1936: The Governor-Generalship of the Irish Free State* (Dublin: Irish Academic Press, 1989), 125–151.

[116] NAI: Taois s.8531.

[117] De Valera to McNeill, 30 April 1932 (NAI: Taois s.8531).

[118] The executive council originally sought to suppress the publication of the documents in question but bowed to the inevitable after publication of the correspondence in foreign newspapers; see Sexton, *Ireland and the Crown*, 129–131.

[119] A reproduction of the letters patent may be found in Sexton, 181–182.

governor-general.[120] This was obviously distasteful to Fianna Fáil, which wanted to remove the office of governor-general, not perpetuate it. In default of appointment by the executive council the office would devolve, under the letters patent, on the chief justice. De Valera's hope was that the function be transferred to someone other than a governor-general, and that the office of governor-general would disappear.

The king sought to ascertain the reason for McNeill's proposed dismissal and as a consequence Dulanty was received at Balmoral, where he indicated the government's reasons and proposed that the chief justice take over the powers of the office temporarily. As a result of the meeting, McNeill was given the opportunity to resign rather than be dismissed. McNeill agreed to do so on 3 October. This was to take effect from 1 November. One difficulty was that the chief justice, Hugh Kennedy, had not been kept informed of the government's proposals. He wrote to de Valera on 6 October and indicated his 'great anxiety' about any proposal to invest the chief justice with the powers of the governor-general, and suggested the establishment of an 'attorney of the king' who could take over the role of the governor-general.[121]

It was clear, therefore, that Kennedy had no intention of taking over the role of governor-general and the letters patent provided for no other possibility. On 25 October, de Valera indicated that Kennedy had indicated his unwillingness to take over the office and proposed to assimilate the powers of the governor-general into the presidency of the executive council.[122] This proposal would require the assent of the king as it was not provided for under the letters patent. The king questioned whether such an arrangement would be in accordance with the Free State Constitution. On 1 November, McNeill resigned. On the same day, Kennedy wrote to de Valera and stated his opposition to the fusion of the judicial and executive branches of government. He informed him that he did not believe the king had any power to 'compel any individual in this State to act as his deputy'. Michael McDunphy, assistant secretary of the department of the president of the executive council, wrote a memorandum in which he stated that the powers of the governor-general had, under the letters pat-

[120] See memo by Hearne; NAI: DFA 4/1, 5 September 193.

[121] The text of the memo may be found in Sexton, *Ireland and the Crown*, 135–138.

[122] As we have seen this proposal was also made at the 1931 Fianna Fáil ard-fheis. De Valera also proposed that the oath of allegiance 'should be eliminated from the procedure of investment'.

ent, devolved upon the chief justice on 1 November but, as a result of his failure to take the oath proscribed in the letters patent, those powers could not be exercised by him.[123] As a result of this, the Irish government suggested that the king issue a warrant which would allow Kennedy to assume the powers of the governor-general without taking oath, with a corresponding amendment of the letters patent. The king was not willing to accede to this request. A further suggestion that the powers of the governor-general might be vested in a commission composed of the president of the executive council, the speaker of the Dáil and the chairman of the Senate was also refused. On 24 November, the executive council advised the king to appoint Domhnall Ó Buachalla to the post of governor-general. The attempt to replace the governor-general had failed.

Conclusion

The year 1932 must be ranked as one of constitutional disappointments for de Valera. His attempt to remove the oath of allegiance had been frustrated by the Senate. His attempt to prevent the appointment of a new governor-general had also ended in failure. At the end of his first year in office, de Valera's constitutional project had been stymied. This failure was of a piece with the constitutional failures in relation to the oath and the Initiative which Fianna Fáil suffered while in opposition. In each case, the Free State Constitution operated as an institutional check on the ambitions of Fianna Fáil. The slender parliamentary support which the party had in 1932 meant that they were unable to take full advantage of the power to amend legislation granted under Article 50.

De Valera resolved to hold a general election, calling one suddenly in 1933 just as talks were ongoing between opposition parties to form a possible united front against Fianna Fáil. There were three reasons, beyond the disorganisation amongst opposition parties, for this action.[124] First, de Valera felt that a Dáil majority would strengthen his position in negotiations with the British government. Second, a dissolution followed by re-election would activate the process under Article 38A, which would provide a means of breaking the deadlock with the Senate by providing for a truncated legislative period where a Bill was re-introduced following a dissolution. Third,

[123] NAI: Taois s.8541, 2 November 1932.

[124] This was to cost Cumann na nGaedheal in the 1933 election; see Mel Farrell, "From Cumann na nGaedheal to Fine Gael: The Foundation of the United Ireland Party in September 1933," *Éire-Ireland* 49 (2014): 156–158.

a Dáil majority would provide the numbers necessary to use the power granted under Article 50. The wide interpretation given to this power would leave the Constitution of the Free State at the mercy of Fianna Fáil.

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CHAPTER 2

Advancing the Republican Project

Introduction

In 1933, Fianna Fáil held an election which returned them to power with an absolute, albeit tenuous, majority. The government immediately used this majority to abolish the oath of allegiance. Where previously the Fianna Fáil party had been unsuccessful in their attempts to bend the constitutional machinery to their purposes, their election success allowed them to make use of the amendment procedure of Article 50 of the Constitution. The party had never been comfortable with the constitutional settlement embodied by the Free State Constitution and set out to undermine it gradually. The successive sapping of the foundations of the Free State was strategically sound for a number of reasons. First, it blunted any accusations that the party was exceeding its mandate. Second, it allowed for Fianna Fáil to argue that, in many instances, they were simply bringing constitutional theory into line with established political fact. Third, it made possible the weakening of institutions, such as the Judicial Committee of the Privy Council and Senate, which could otherwise have halted or delayed the aims of the government. As we have seen, the Senate had proven a barrier in relation to the oath of allegiance in 1932. Fourth, it proved an insidious method of undermining the Free State Constitution. Each amendment was relatively discrete, but the cumulative effect was to

D. K. Coffey, *Constitutionalism in Ireland, 1932–1938*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76237-1_2

render the 1922 Constitution unfit for purpose.[1] Finally, the fact that there was no single distinct rupture meant that relations with the British government, while distinctly frosty, did not reach a level where the British could argue that the Free State had seceded from the Commonwealth.

The Snap Election of 1933

It is important to note one specific constitutional matter which played a part in the 1933 election.[2] The Constitution as amended provided an expedited timetable for legislation passed both before and after a general election. Article 38A provided for a special procedure for the Dáil to reintroduce a measure which had been passed by the Dáil but rejected or amended by the Senate. This was contingent on a 'stated period':

> The said stated period is the period commencing on the day on which the said Bill is first sent by Dáil Éireann to Seanad Eireann and ending at … the date of the reassembly of the Oireachtas after a dissolution occurring after the commencement of such period.[3]

Such a measure could be passed by the Dáil on its own motion 60 days after the re-submission of the Bill to the Senate. This measure, which allowed a mandate to be received from the electorate on a disputed issue, could be used to remove the oath in the face of intransigence from the Senate.

In an attempt to secure a majority of seats, de Valera dissolved the Dáil and called elections for 24 January 1933. This was less than 11 months since the previous election and represented a considerable gamble for a party which had only just attained office after years in the political wilderness. The mandate which Fianna Fáil asked for was, in certain respects, one aimed at constitutional change. The manifesto, issued to the electors on 21 January, emphasised the essential continuity with the previous election campaign.[4] It promised to remove the oath, to protect the per-

[1] The use of this method was grasped by Cumann na nGaedheal politicians from the outset—see, for example, the speech by Desmond Fitzgerald 47 *Dáil Debates* col. 423 (3 May 1933).

[2] On the 1933 election, see Peter Mair, "De Valera and Democracy," in *Dissecting Irish Politics: Essays in Honour of Brian Farrell*, ed. Tom Garvin, Maurice Manning and Richard Sinnott (Dublin: University College Dublin Press, 2004).

[3] This had been inserted by Section 2 of the Constitution (Amendment No. 13) Act 1928.

[4] *Irish Independent*, 21 January 1933.

sonal and property rights of individuals, and to guarantee equality before the law. It also proposed to 'abolish the Senate as at present constituted, and if it be decided to retain a second legislative chamber […] to reduce considerably the number of members'. Further, it stated that the only method for agreement between Great Britain and Ireland was 'that the people of Ireland shall determine freely for themselves what their governmental institutions are to be and what shall be the extent of their co-operation with Britain on matters of agreed common concern'.

In the event, Fianna Fáil succeeded in getting 76 deputies elected—the same number as the other parties combined. However, the fact the ceann comhairle was automatically returned meant that Fianna Fáil had an effective majority of one. On 1 March 1933, de Valera introduced a motion to send the Constitution (Removal of Oath) Bill 1933 to the Senate for a second time.[5] Under the terms of Article 38A of the 1922 Constitution, the Senate had 60 days to pass the Bill or the Dáil could, upon a subsequent motion, pass the Bill in the form in which it had been sent to the Senate. On 3 May 1933, de Valera introduced a motion for exactly this purpose.[6] The motion passed by 76 votes to 56, with the support of the Labour Party, and the Bill accordingly became law.[7] The Senate had proven successful in blunting the abolition of the oath in 1932, but it could not sustain its defence in the face of Fianna Fáil's continued electoral success. As Thomas Mohr has noted, the repeal of Section 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act was the most legally significant element of the Act.[8] This made the 1922 Constitution subject to the provisions of the Articles of Agreement for a Treaty, and would have rendered any amendments inconsistent with the treaty legally invalid. As we shall see, this issue was to reappear in 1935 in *The State (Ryan) v Lennon*.

Later in 1933, the government amended the Constitution in three further ways. First, they removed the governor-general from the appropriation of moneys. Second, they eliminated the discretion available to the governor-general to reserve Bills or withhold assent from Bills. Third, the government abolished the judicial right of appeal to the Judicial Committee

[5] 46 *Dáil Debates* col. 68–76 (1 March 1933). It was under the second head that de Valera acted.

[6] 47 *Dáil Debates* col. 422 (3 May 1933). See also NAI: AGO/2002/14/492.

[7] Ward mistakenly suggests that a new oath was thereafter introduced; see Alan J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1872–1991* (Dublin: Irish Academic Press, 1994), 227.

[8] Thomas Mohr, *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Dublin: Four Courts Press, 2016), 132–134.

of the Privy Council.[9] These steps weakened two institutions which were important practically and symbolically. On a practical level, the Privy Council could declare a constitutional amendment *ultra vires*, although the Free State had form in failing to comply with adverse decisions from that body. On a symbolic level, the two institutions were derived from the British crown: the governor-general was the crown's representative in the Free State, while the privy council acted as a judicial advisory body to the crown. The reduction, or destruction, of the influence of these bodies promised to remedy these perceived defects.

The Governor-General and the Appropriation of Moneys

The other constitutional amendments initiated in 1933 were considerably less contentious than the abolition of the oath. While opposition deputies continued to argue for the retention of the oath as a matter of honour, they were remarkably compliant with the other changes proposed.

The Constitution (Amendment No. 20) Act 1933 removed the 'representative of the crown' from Article 37 dealing with the appropriation of moneys and replaced it with an 'executive council signed by the president of the executive council'.[10] In 1932, there had been correspondence between departments about the fact that when the governor-general signed the Central Fund Acts he 'thank[ed] Dáil Éireann for the moneys granted' but did not thank the Dáil when assenting to other Bills. The objection was that the convention assumed that executive power was vested in the king's representative. On the advice of the attorney-general, this convention was removed.[11] The Bill passed its first stage on 9 August 1933.[12] At the second stage, de Valera stated that the 'constitutional power lies with the executive council, and the purpose of the change is to

[9] Mohr, 130–147.

[10] S.1 of the Constitution (Amendment No. 20) Act 1933. On the principle underlying the original Article, see John Gordon Swift MacNeill, *Studies in the Constitution of the Irish Free State* (Dublin: Talbot Press, 1925), xii–xiii. For drafting, see National Archives of Ireland (hereafter NAI): AGO/2002/14/1401.

[11] Conor Maguire to McDunphy, 16 July 1932 (NAI: AGO/10/32). In the former case, the phrasing was 'In the King's name, I, Governor-General of the Irish Free State *thank Dáil Éireann for the monies granted* and hereby assent to this Bill' (emphasis added). In the latter case the governor-general simply stated 'In the King's name, I, Governor-General of the Irish Free State, hereby assent to this Bill.' For the formulations used under British law relating to assent, see William Reynell Anson, *The law and custom of the constitution*, Vol. 1 (Oxford: Clarendon Press, 1886), 254–257.

[12] 49 *Dáil Debates* col. 1427–1428 (9 August 1933).

transfer the legal function also to the executive council […] It is generally wise to get rid of unnecessary forms.'[13] The opposition agreed and the Bill easily passed the second stage; it was only briefly delayed at the committee stage while de Valera refused to say whether his constitutional amendments were thereby at an end.[14] The argument advanced, that it was necessary to bring constitutional forms into line with constitutional usage, was a particularly telling one as the previous government had used it within the Commonwealth to achieve constitutional advances.

The Governor-General's Legislative Prerogatives

The Constitution (Amendment No. 21) Act 1933 amended Article 41 so as to prevent the governor-general from refusing to assent to a Bill or to withhold the Bill for the king's signification.[15] The crown typically had four options relating to legislation passed by a dominion:

1. assent to the Bill,
2. withhold assent to the Bill,
3. reserve the Bill for the signification of the pleasure of the crown, or
4. assent to a Bill but, within a specified time period, disallow the Act.

While the first three powers were available to the crown under the 1922 Constitution, the final option was not.[16] The first option simply made the Bill law. The second prevented the Bill from becoming law. The third concerned matters which were thought to be of such special interest that they required the attention of the crown rather than the governor-general. The final option meant the Bill became law but the disallowance subsequently deprived the Act of the force of law.[17]

[13] 49 *Dáil Debates* col. 2113 (4 October 1933). This rather blasé attitude contradicts his description of the changes in this, and the other amendments, as 'urgent' in the first stage: 49 *Dáil Debates* 1428 (9 August 1933).

[14] 49 *Dáil Debates* col. 2382–2383 (12 October 1933).

[15] Section 1 of the Constitution (Amendment No. 21) Act 1933.

[16] See NAI: AGO/51/25, 2 March 1925.

[17] See, e.g., Article 59 of the commonwealth of Australia Constitution Act, 1900, which stated:

> The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

In the imperial conference of 1926, the Irish Free State specifically sought to 'elucidate the constitutional practice in relation to Canada' regarding disallowance and reservation.[18] The conference recorded that, apart from specific positive legal obligations,

> [I]t is recognised that it is the right of the government of each dominion to advise the crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's government in Great Britain in any matter appertaining to the affairs of a dominion against the views of the government of that dominion.[19]

The issue of reservation was tackled again at the 1929 conference on the operation of dominion legislation. The conference distinguished between discretionary and obligatory reservation; it was only the former which was possible under the Canadian and Free State Constitutions.[20] The conference based its recommendations upon the parameters of the 1926 Conference and found:

> [I]t is established first that the power of discretionary reservation if exercised at all can only be exercised in accordance with the constitutional practice in the dominion governing the exercise of the powers of the governor-general; secondly, that His Majesty's government in the United Kingdom will not advise His Majesty the King to give the governor-general any instructions to reserve Bills presented to him for assent, and thirdly, as regards the signification of the King's pleasure concerning a reserved Bill, that it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's government in the United Kingdom against the views of the government of the dominion concerned.[21]

The conference also pointed out that certain dominions had the power to abolish reservation and it was 'therefore, open to those dominions to take the prescribed steps to that end if they so desire'.

The second option, the withholding of assent, was also changed by Commonwealth developments. The 1926 conference recognised that a governor-general in the dominions held the same position as the king in Great Britain, and was therefore not the representative of the government

[18] *Imperial Conference, 1926: Summary of Proceedings* [Cmd. 2768], 17.

[19] *Imperial Conference, 1926*, 17.

[20] *Report of the Conference on the Operation of dominion Legislation and Merchant Shipping Legislation, 1929* [Cmd. 3479], 13.

[21] *Report of the Conference on the Operation of Dominion Legislation*, 14–15.

of Great Britain.[22] This meant the governor-general was essentially obliged to acquiesce in dominion legislation; as a result, withholding assent ceased to be a live issue.

Thus, the issue of disallowance or reservation had, by 1933, become a dead letter in practice. This was largely as a result of the endeavours of the Cumann na nGaedheal government, essentially ensuring cross-party support for constitutional abolition of disallowance and reservation.[23] The Bill passed its first stage in the Dáil on 9 August 1933.[24] It was presented as a measure to remedy a legal fiction and passed the second and subsequent stages unanimously and without opposition.[25]

The Appeal to the Privy Council

The cabinet voted to abolish the appeal to the privy council on 27 May 1932.[26] The wording of the Constitution (Amendment No. 22) Act 1933 was a refinement upon earlier drafts dealing with the same issue. The attorney-general received a number of draft Bills which had been prepared by John Hearne for the Cumann na nGaedhael administration on the matter.[27] Hearne also prepared a memorandum on 4 June which dealt with the proposed Bill. Hearne outlined the proposals in the 1931 Bills. He recommended that the Bill delete the provision of Article 66, which allowed the appeal to the privy council, and also a declaration that 'no appeal and no application for leave to appeal should lie to His Majesty in Council from any judgment, etc., of the Supreme Court'.[28]

[22] *Imperial Conference, 1926*, 16.

[23] On the Cumann na nGaedheal government and imperial diplomacy, see D.W. Harkness, *The Restless Dominion: The Irish Free State and the British Commonwealth of Nations, 1921–31* (London: Macmillan, 1969), 80–172.

[24] 49 *Dáil Debates* col. 1428 (9 August 1933).

[25] 49 *Dáil Debates* col. col. 2115, and 49 *Dáil Debates* col. 2383 (12 October 1933). Kenneth Clinton Wheare argued that the Free State did not have the legislative power to pass this amendment as reservation still existed in Canada; see *The Statute of Westminster and dominion Status* (Oxford: Oxford University Press, 1938), 261–262.

[26] NAI: Taois s.4469/19. See Thomas Mohr, *Guardian of the Treaty*, 130–147, Vol. II, 213–216; Arthur Berriedale Keith, *The Constitutional Law of the British dominions* (London: Macmillan and Company, 1933), 277–281.

[27] NAI: AGO/2002/14/1410.

[28] The other Bills drafted in 1931 had proposed to give the governor-general acting on the advice of the executive council the power to give statutory effect to particular judgments of the supreme court, to prohibit the registration and enforcement of any decisions by the privy council which had been already decided by the supreme court, to repeal Section 2 of the Constituent Act save insofar as it gave the force of law to the Anglo-Irish Treaty, and to delete the proviso in Article 50 that amendments had to be within the terms of the scheduled Treaty.

Hearne was unsure, however, about the 1931 Bill, which had proposed repealing the Judicial Committee Acts of 1833 and 1844.[29] The 1833 Act provided for the establishment of the Judicial Committee of the Privy Council and provided it with appellate jurisdiction. The 1844 Act extended this jurisdiction to all courts in the colonies. Hearne drew attention to the judgment of Cave LC in *Nadan v The King*.[30] In that case, Cave LC declared Section 1025 of the Canadian criminal code invalid on two grounds.[31] First, he stated that the powers of the Canadian parliament did not extend to the annulment of 'the prerogative power of the King in Council to grant special leave to appeal'.[32] Second, he held that the Canadian Act was repugnant to the 1833 and 1844 Acts insofar as it purported to exempt Canadian courts from the appellate jurisdiction of the privy council and was therefore void by virtue of the Colonial Laws Validity Act 1865.[33] Hearne pointed out that the Colonial Laws Validity Act had been repealed by the Statute of Westminster but questioned whether the privy council might treat the 1833 Act as if it were law in the Free State. The privy council might decide cases on the basis of the 1833 Act unless it was specifically repealed. The 1833 Act could be used as a statutory basis to ground appeals to the privy council even if the constitutional machinery for such appeals were repealed.[34] Hearne stated his preference for eliminating all doubt, but left the matter for the attorney-general to decide.

[29] 3 & 4 William IV c. 41, hereafter 'the 1833 Act'; 7 & 8 Vict c. 69, hereafter 'the 1844 Act'.

[30] [1926] AC 482.

[31] The section stated:

> Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

[32] [1926] AC 482, 492.

[33] He specifically referred to the preamble to the 1833 Act which stated 'from the decisions of the various courts of judicature […] in the […] other dominions […] an appeal lies to His Majesty in Council'. He also referred to Section 1 of the 1844 Act, which provided for the admission of any appeal 'from any judgments, sentences, decrees or orders of any court of justice within any British colony or possession abroad'. Hearne stated in 1932 that Cave LC's judgment was based upon Section 3; see NAI: AGO/2002/14/1410. This was incorrect.

[34] Section 3 of the 1833 Act provided:

> All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before his Majesty or his Majesty in council from or in respect of the determination, sentence, rule, or order of

Although the attorney-general was instructed to prepare a Bill 'immediately', this measure was not, in fact, prepared until 5 April 1933. The complications experienced relating to the oath and governor-general must have delayed the production of the Bill.[35] When it finally appeared, the draft Bill provided 'no appeal shall lie for a decision of the Supreme Court or of any other court in the Irish Free State … to His Majesty in Council, and it shall not be lawful for any person to petition His Majesty for leave to bring any such appeal'.[36] Although the Bill did not specifically refer to the 1833 and 1844 Acts, this unambivalent constitutional declaration would prevent any possible statutory claim being made on the basis of the 1833 and 1844 Acts.

It passed its first stage on 9 August 1933.[37] During the debate on the Bill, it became clear that it would not prevent appeals that were then pending. Therefore, an amendment was made to the Bill to prevent such cases being heard by the privy council.[38] It became law on 23 November 1933. The legality of the Act was to be subsequently challenged in the privy council itself.

1934: Five Unpublished Measures and the Constitution Review Committee

In 1934, the Fianna Fáil government concerned itself with two divergent elements of constitutional action. The first was the examination of a series of proposed constitutional amendments which were canvassed in 1934

> any court, judge, or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by his Majesty to the said judicial committee of his Privy Council, and such appeals […] shall be heard by the said judicial committee, and a report […] thereon shall be made to his Majesty in council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his Majesty to the whole of his Privy Council or a committee thereof (the nature of such report or recommendation being always stated in open court.

[35] Indeed, 1932 produced the fewest public acts of any year in the 1930s.
[36] NAI: Taois s.4469/19.
[37] 49 *Dáil Debates* col. 1428 (9 August 1933).
[38] It stated:

> The amendments made in this Act in Article 66 of the Constitution shall, in relation to judgments and orders pronounced or made by the Supreme Court before the passing of this Act, apply and have effect in regard to the institution and prosecution, after the passing of the Act, of an appeal or a petition for leave to appeal from any judgment or order and to the further proceeding after the passing of this Act, of an appeal or a petition for leave to appeal from any judgment or order which was instituted before such passing.

but, in the end, not laid before the Oireachtas. These amendments would have amounted to a major revision of the power of the governor-general, and would have been a natural progression from the controversy associated with that position in 1932.

The second was concern in 1934 at the degradation of the personal freedoms contained in the Free State Constitution. The Free State Constitution had allowed for its own amendment by ordinary legislation under Article 50. The legislative amendment power had undermined the fundamental rights provisions of the Constitution. The most notorious instance of this occurred in 1931 when Article 50 had been used to pass a constitutional amendment—the Constitution (Amendment No. 17) Act—which was widely regarded as having compromised the constitutional right to personal liberty.[39] In 1934, the government established a Constitution Review Committee to recommend ways of rescuing the fundamental rights protections of the Constitution.

Five Unpublished Constitutional Measures

On 21 March 1934, Michael McDunphy circulated Bills to transfer the power of formally appointing judges from the governor-general to the executive council, to vest the power of appointing the executive council in the Dáil, to vest the power of summoning and dissolving the Oireachtas in the president of the executive council, and to transfer the function of the signifying the king's assent from the governor-general to the president of the executive council.[40] Significantly, all of these Bills were subsequently shelved in order for the reform of the Senate to be undertaken. Given that all these proposed constitutional amendments were directed at the powers of the governor-general, however, they do give an indication of the extent to which the constitutional purging of imperial symbols was under review.

One further amendment was proposed in 1934 but cannot be dated as precisely as the others. This amendment was to apply to Article 50 of the Constitution.[41] It was modelled on Articles 47 and 48 of the 1922 Constitution, which had been deleted by the Constitution (Amendment No. 10) Act 1928. The new amendment proposal provided that any

[39] See, for example, Arthur Berriedale Keith, "Notes on Imperial Constitutional Law," *Journal of Comparative Legislation and International Law* 14 (1932): 112.

[40] NAI: Taois s.2793; NAI: Taois s.2794; NAI: Taois s.2795; NAI: Taois s.2796.

[41] NAI: AGO/2002/14/578.

attempt to amend the Constitution by ordinary legislation would be suspended for 90 days if two-fifths of the total membership of the Dáil or a majority of the Senate formally requested this within nine days of the passage of such a Bill.[42] If three-fifths of the total membership of the Senate or 75,000 people requested that it be referred to the people during the 90-day period then it was to be so referred.[43] The amendment would have to be passed by a majority of voters on the register or two-thirds of the actual voters.

These proposed amendments, which were neither publicised nor proceeded with, illuminate the extent to which Fianna Fáil's constitutional project remained incomplete in 1934: governor-general still existed. Moreover, the 1932 controversy surrounding the governor-general appears to have convinced the government that a further marginalisation of the office was needed.

The proposed amendment, which provided for safeguards in relation to the process of constitutional amendment by legislation, was concerned with the theme to which we will now turn—the problem of the degradation of the Constitution through legislative amendment.

The Constitution (Amendment No. 17) Act 1931

Article 50 of the Free State Constitution provided that amendments which were consistent with the treaty could be made for eight years by way of ordinary legislation. In 1929, Article 50 was amended to extend the term under which amendments could be made by way of ordinary legislation to 16 years.[44] The effect of Article 50 was that the 1922 Constitution was not a rigid constitution; it could be changed easily. This change in the constitutional structure was utilised in 1931 to pass an expansive amendment which undercut the rights of individuals and the separation of powers.

In September 1931, it became known that the government intended to introduce a Public Safety Bill to deal with the perceived rise in extraordinary, essentially paramilitary, crime; this, it was felt, could not be dealt with by the ordinary criminal justice system.[45] In October, the govern-

[42] The original Article 47 could be invoked for any Bill passed by the Oireachtas.

[43] This number was taken from Article 48 of the 1922 Constitution.

[44] Constitution (Amendment No. 16) Act 1929.

[45] *The Irish Press* (24 September 1931). See further Bill Kissane, "Defending Democracy? The Legislative Response to Political Extremism in the Irish Free State, 1922–39," *Irish Historical Studies* 34 (2004): 156.

ment introduced the Constitution (Amendment No. 17) Bill 1931. It was initially believed that the measures would pass as a Public Safety Act so there was some surprise when they were introduced as an amendment to the Constitution itself.[46] The Act inserted a new Article 2A into the Constitution.[47] The text of the new article was contained in a schedule to the amending Act.[48] It was primarily directed at those provisions of the Free State Constitution which guaranteed the personal rights of the citizen.[49]

The schedule contained five parts. Part I provided that Parts II–V could be brought into effect by an order of the executive council.[50] It also provided that Article 3 and all subsequent articles of the Constitution were to be construed by reference to Article 2A and in the event of any inconsistency Article 2A was to prevail.[51] Part II provided for the establishment of the constitution (special powers) tribunal. It was to be a military tribunal composed of five members of the defence forces of the rank of at least commandant.[52] The tribunal was to have jurisdiction over the offences listed in the appendix to the Act, there was to be no appeal from the judgment of the tribunal, and the tribunal was allowed to impose any punishment, including death. Part III provided special powers for the police to detain and interrogate persons suspected of committing those offences listed in the appendix to the schedule. Non-compliance with the questioning was an offence which was to be heard by the tribunal and was punishable by 'such punishment as the tribunal shall think proper to inflict'.[53] Part IV dealt with unlawful associations. The executive council could declare an organisation illegal under a set of criteria detailed in Section 19(1). Membership of an illegal organisation or possession of documents relating to an illegal organisation were offences which could be punished

[46] *The Irish Press* (24 September 1931).

[47] See Fergal Francis Davis, *The History and Development of the Special Criminal Court, 1922–2005* (Dublin: Four Courts Press, 2007), 44–46 and 48–50.

[48] S. 2 of the Constitution (Amendment No. 17) Act 1931.

[49] The most obvious Articles that were infringed included Article 6, which held that '[t]he liberty of the person is inviolable'.

[50] S. 1 of the Schedule. All subsequent references are to the Schedule unless otherwise indicated.

[51] S. 2. This did not interfere with Articles 1 and 2 of the 1922 Constitution. See Seosamh Ó Longaigh, *Emergency Law in Independent Ireland 1922–1948* (Dublin: Four Courts Press, 2006), 126–135.

[52] Section 4(2).

[53] S. 16(2).

'by such punishment as the tribunal shall think proper to inflict'.[54] Part V provided inter alia powers to prohibit meetings, to close a building, and to declare a publication to be seditious.[55] Breach of any of these orders were offences. In the event of the unlawful death or obstruction of a member of the Oireachtas, the governor-general was empowered to appoint a replacement 'having regard to the known opinions' of the original person or to suspend the Oireachtas for a period not exceeding one month.[56]

This reduction in the protection of individual rights was facilitated by the ability to change constitutional articles by legislation under Article 50 (as extended by the Constitution (Amendment No. 16) Act 1929). De Valera had expressed concern about the dilution of the rights provisions of the Constitution since the beginning of the decade. Speaking in Tulla during the 1932 general election campaign, he was reported as saying that:

> The Constitution Act […] had suspended the Constitution, and had taken away the people's protection. Changes made in the Constitution up to the present had been made to deprive people of their rights, but Fianna Fáil proposed to change that situation.

The Irish Press reported that the speech was interrupted as 'the Angelus bell in Tulla tolled out. Mr. de Valera immediately ceased speaking, blessed himself and silently said the Angelus prayer, [and] the crowd reverently followed his example.'[57] The link between constitutionalism and religion, established more clearly in the 1937 Constitution, could not have been better epitomised if it had been stage-managed.

De Valera's concern that the constitution had been suspended led to his next move, the establishment of the Constitution Review Committee 1934.

[54] S. 20 and 21.

[55] For prohibiting meetings, S. 24, This power was vested in the executive council. For closing buildings, S. 27. For sedition, see S. 26.

[56] S. 25.

[57] *The Irish Press* (9 February 1932). This speech is also described in Joseph Lee, *Ireland 1912–1985: Politics and Society* (Cork: Cambridge University Press, 1989), 170.

The Constitution Review Committee 1934

The establishment of the committee was prompted by the debates on the abolition of the Senate in May 1934.[58] Deputy John A. Costello pointed out that in a unicameral legislature 'the Dáil could […] sweep away the entire Constitution of the state by an ordinary Act of the Dáil passed in a few hours'.[59] He therefore tabled a motion to alter the amendment power of Article 50 of the Constitution. The motion would have placed certain named articles in a special protected position, preventing them from being amended by ordinary legislation *simpliciter*. The Oireachtas could pass amendments by ordinary legislation to the named articles but they would not take immediate effect. To come into force, they would require a resolution passed by the executive council after a general election.[60] This procedure would allow the people to indicate their approval or disapproval to the proposed amendments. Costello proposed the protection of 21 articles of the 1922 Constitution; these included inter alia the individual rights to freedom of expression, liberty of dwelling and of conscience, the dissolution of the Oireachtas and privileges enjoyed by the members of the Oireachtas, the regulation of the armed forces, the amendment process, the office of the comptroller and auditor-general, and the articles dealing with the judiciary.[61]

De Valera rejected these proposals for two reasons. First, he opposed the particular procedure proposed by Costello. He believed that in a general election a variety of considerations would be laid before the people.[62] He thought that constitutional issues should 'be sent alone to the people for consideration' and indicated his preference was for amendment by means of referendum. Second, he was not convinced that some of the articles proposed by Deputy Costello were 'not without being entangled with the Treaty'.[63] Crucially, however, he accepted the distinction between

[58] On the 1934 Committee, see Gerard Hogan, "The Constitution Review Committee of 1934," in *Ireland in the Coming Times: Essays to Celebrate T.K. Whitaker's 80 Years*, ed. Fionán Ó Muircheartaigh (Dublin: Institute of Public Administration, 1997); and Gerard Hogan, *The Origins of the Irish Constitution, 1928–1941* (Dublin: Royal Irish Academy, 2012), 33–100.

[59] 52 *Dáil Debates* col. 1170 (17 May 1934).

[60] 52 *Dáil Debates* col. 1168.

[61] The Articles that would have been protected were 6, 7, 8, 9, 18, 19, 24, 28, 43, 46, 49, 50, 61, 62, 63, 64, 65, 66, 68, 69 and 70.

[62] 52 *Dáil Debates* col. 1192.

[63] 52 *Dáil Debates* col. 1193.

these articles, which he regarded as having been imposed, and those which were necessary to protect the rights of the individual:

> Now, I think, there is one ground on which we can get agreement between both sides of the House and I propose to have carefully examined these fundamental Articles dealing with the democratic foundations of the State. I do not mind if these are fixed so that they cannot be changed by ordinary legislation without some such provision as a referendum to the people, but I do not want that done by way of an amendment introduced without proper examination and in which there is no attempt whatever to deal with all these Articles.[64]

On 24 May de Valera established the Constitution Review Committee. This body was tasked with:

1. Ascertaining which of [the Articles of the 1922 Constitution] should be regarded as fundamental in the sense that they safeguard democratic rights; and
2. Submitting a recommendation as to how these Articles might be especially protected from change.[65]

These directions closely mirrored the points which de Valera had made in the Dáil in response to Costello's proposed amendment. They also illustrate two intertwined difficulties with the 1922 Constitution: fundamental rights were insufficiently protected and the amendment process was too malleable. The Constitution Review Committee was composed of Stephen Roche, John Hearne, Philip O'Donoghue and Michael McDunphy.[66] These civil servants were to provide assistance in the subsequent drafting of the 1937 Constitution. The review committee initially conceived of their function as proposing a draft of a new constitution, but after consultation with de Valera they narrowed the scope of the enquiry

[64] 52 *Dáil Debates* col. 1193.

[65] NAI: Taois s.2979.

[66] Roche was Secretary of the Department of Justice. and Hearne was Legal adviser to the Department of External Affair. O'Donoghue was Assistant to the attorney-general. His influence was the weakest on the committee as he missed the first three meetings due to illness. McDunphy was Assistant secretary of the Department of the President of the Executive Council.

to the above-mentioned two grounds.[67] In May 1934, de Valera was not yet committed to the idea of introducing a new constitution.

The committee conducted a wide-ranging review of the Constitution and examined 22 Articles in the first appendix to the report.[68] There was a large degree of overlap between these articles and those proposed by Costello; the only extra article which they examined dealt with the signification of the king's assent to a Bill.[69] A first draft was prepared by McDunphy on 9 June, and a second was prepared for 25 June. This formed the basis of the final report.[70] The committee acted with considerable speed. It met for the first time on 28 May and produced its final report on 3 July, a period of a little over one month.

It is not possible to treat these 22 articles individually, but it is worth noting that of the articles examined ten were singled out for amendment. Some of these proposed amendments targeted those parts of the Constitution which were inconsistent with anti-imperial constitutional ideology: the committee recommended that the summoning and dissolution of the Oireachtas by the representative of the crown was not fundamental and should be removed. Article 49 provided that, except in case of invasion, the state would not be committed to 'active' participation in a war without the assent of the Oireachtas. Under the British theory of the Commonwealth, a declaration of war by the king automatically engaged all other members of the Commonwealth in that war.[71] There was a potential conflict between the British theory and the text of the Free State Constitution: while Article 49 meant that the state would not become an active participant in a war without legislative resolution, it did not prevent the Free State from being committed to passive participation without a

[67] See minutes of meeting of 29 May 1934 (NAI: Taois s.2979): 'It was agreed that the report of the Committee should take the form of an entirely new Constitution.' Roche, McDunphy and Hearne were present at this meeting; O'Donoghue was absent due to illness. This initial position was modified in June, see minutes of meeting of 1 June: '[i]t was now clear that what the president wanted was not a new Constitution.'

[68] One interesting feature of the committee's work is that the articles necessary for a new Constitution were isolated in two hours on 29 May; this was winnowed down for the report in one hour on 1 June.

[69] Article 41.

[70] One interesting development was that Roche's desire to draft a scheme dealing with emergency powers was removed from him on 29 June 1934; McDunphy drafted the final version of the appendix.

[71] See Malcolm Lewis, "The International Status of the British Self-Governing dominions," *British Yearbook of International Law* 3 (1922–1923): 21–38.

legislative resolution. The Free State could find itself technically at war with another country in the event of a British declaration of war. The committee recommended that the anomaly be remedied.

Some articles were recommended for amendment simply because of poor drafting. For instance, Article 9 guaranteed the right of freedom of assembly 'for purposes not opposed to public morality'. This did not provide for regulation of assemblies on other grounds, such as where open-air meetings could prove a nuisance or danger to the general public. Article 64 provided that judicial power should be 'exercised […] by judges'. The committee recommended the revision of this article to allow for the exercise of judicial or quasi-judicial functions by non-judges, for example the revenue commissioners.

The Free State Constitution had undergone 22 amendments between 1922 and 1934, primarily dealing with the institutions of the state. Despite these amendments, when the committee reduced the Free State Constitution to its essential elements almost one-half of the relevant articles were deficient to some degree. This demonstrated the necessity for a wholesale revision of the Constitution or the enactment of a new Constitution.

The first appendix of the committee's report dealt with inter alia fundamental rights. The committee also considered circumstances in which fundamental rights could be abrogated. This was examined in a separate appendix on emergency powers. This issue particularly exercised Stephen Roche, who was responsible for early drafts of the appendix.[72] Appendix b proposed two schemes. The first was the establishment of a body like the current special criminal court to be part of the permanent judicial branch of the State; this would hear cases where 'it is desirable, in the interests of justice, that the trial should be removed to a special court set up under this scheme'. The second scheme proposed the amendment of the Constitution to allow the Oireachtas by ordinary law to override the Constitution during 'any period during which the ordinary laws are not adequate for the preservation of public order'. This new scheme underlined two important points. First, the powers exercised by the government under Article 2A were undesirable. Second, there was nonetheless a necessity to provide some constitutional mechanism to grant emergency powers to the government. This appendix illustrated the unsatisfactory nature of the 1922 Constitution's scheme of emergency powers.

[72] He composed a preliminary draft on 14 June. This was subsequently revised by Roche and the final version was prepared by McDunphy.

The committee's report also included an appendix which reviewed three further articles; these dealt with the national language, the right to elementary education and the right to trial by jury. The committee recommended that the national language and elementary education should not be constitutionally protected.[73] The committee was exercised with the grave difficulties associated with the right to trial by jury, under Article 72, as it existed in the Free State. These difficulties stemmed from an anti-treaty campaign to encourage jurors not to convict republicans which had resulted in attacks on jurors who convicted.[74] These provisions had not been the subject of Costello's proposed amendment.[75] The committee enumerated two primary concerns with the right to jury trial. First, trial by jury should not require 12 jurors or a unanimous verdict. Second, if an offence was classed as 'minor', and thus capable of being summarily tried, a defendant should not be able to claim the offence was so serious that it could not be called 'minor' and thus the statute creating the offence was invalid.

The 1934 Constitution Review Committee was significant for a number of reasons. First, it shows that in 1934 de Valera was not primarily concerned with drafting a new constitution. The terms of reference and subsequent clarification of those terms made it clear to the committee members that de Valera wanted a review of the existing constitutional structure rather than a new document. Second, the terms of reference clearly show two fundamental difficulties in the constitutional structure of the Free State: the failure to adequately protect individual rights and institutional structures, and the ease with which the Constitution could be amended. Third, the review exposed the limitations of the 1922 Constitution. Of the 22 articles considered fundamental, almost half were deficient for some reason. Furthermore, the second appendix to the report illustrated the necessity for some constitutional provision to provide for

[73] The national language was not to be protected in order to allow the modification of 'the recognition which it accords to English as an equally official language'.

[74] See Ó Longaigh, *Emergency Law*, 88–94, above note 29.

[75] The report contained further appendices on the regulation of the right to freedom of assembly, the annual assembly of parliament, the declaration of war, the views of the department of education on the right to free elementary education, and the financial provisions dealing with estimates and financial resolutions. The first three appendices are interesting as the committee engaged in comparative constitutional analysis, which indicates the relative cosmopolitanism of the review committee. Further evidence may be seen in provision of a draft of the Spanish Constitution (in Spanish) to McDunphy on 23 June by the Department of External Affairs; see NAI: Taois s.2979. This note also made reference to the German Constitution.

emergency powers. This would have necessitated a wholesale revision of the 1922 Constitution or the construction of a new constitution.

In 1935, the latter course was chosen and John Hearne produced his first draft of the Irish Constitution of 1937, albeit using a model premised on the former course, that is, largely based on a revision of the 1922 Constitution. There were two further major constitutional developments, however, which are relevant to the decision to introduce a new constitution; one related to British subjecthood, and one to a court case of the Irish Supreme Court.

1934–1935: Imperial Citizenship and *The State (Ryan) v. Lennon*

1935 saw the introduction of a separate Irish citizenship. However, the same period also saw the emergence of doubts about the validity of de Valera's constitutional amendments. In *The State (Ryan) v Lennon*, the Supreme Court cast doubt on the legal basis of some of the anti-imperial amendments enacted since 1932, suggesting that they were *ultra vires*.[76] This undermined the constitutional progress made since 1932. The consequences of the theory in *Ryan* contributed to the decision to begin drafting a new constitution.

Dominion Citizenship in Irish Law

Under Commonwealth law there was a difference between citizenship and nationality. Citizenship was a matter for determination by the dominions. The 1922 Constitution defined citizenship in Article 2.[77] All citizens of

[76] [1935] IR 170.

[77] It stated:

> Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years, is a citizen of the Irish Free State (Saorstát Eireann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann) enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstát Eireann) shall be determined by law.

the dominions, however, were regarded as British subjects; they possessed British nationality. According to the renowned constitutional theorist of the inter-war period, Arthur Berriedale Keith, 'Dominion citizenship is a matter of differentiation within the greater whole of British nationality.'[78] It was not necessary for a dominion to provide equal rights for British subjects within its jurisdiction; a dominion was free to restrict its franchise to its own citizens. British subjects enjoyed the right to enter Great Britain and full political rights within that country.

The problem was with the concept of British nationality. The basis for British nationality was the allegiance that a subject owed to his monarch.[79] This formula was obviously anathema to republicans. Article 2 of the 1922 Constitution provided for a separate Irish citizenship. However, this citizenship was limited to the jurisdiction of the Free State. The oath of allegiance referred to 'the common citizenship of Ireland with Great Britain'. In the early years of the Irish Free State, the Cumann na nGaedhael government became embroiled in a conflict with the British government over the issuing of Free State passports.[80] The British government demanded that any such passport would identify the holder as a British subject. The Free State government was unwilling to accede to this request and preferred the term 'citizens of the Irish Free State and the British Commonwealth of Nations'. In response, whenever such passports were presented to the British consular officials in London for special endorsement, they withdrew the passports and issued new passports which identified the holder as a British subject.[81]

The 1929 conference on dominion legislation stated:

> The members of the commonwealth are united by common allegiance to the crown. This allegiance is the basis of the common status possessed by all subjects of His Majesty. A common status directly recognised throughout the British commonwealth in recent years has been given a statutory basis

[78] Arthur Berriedale Keith, *Letters on Imperial Relations Indian Reform Constitutional and International Law 1916–1935* (Oxford: Oxford University Press, 1935), 70.

[79] Arthur Berriedale Keith, *The King and the Imperial Crown* (London: Longmans, Green and Company, 1936), 374.

[80] See Joseph O'Grady, "The Irish Free State Passport and the Question of Citizenship," *Irish Historical Studies* 26 (1989): 396.

[81] Mary Daly, "Irish Nationality and Citizenship since 1922," *Irish Historical Studies* 32 (2001): 381.

through the operation of the British Nationality and Status of Aliens Act, 1914.[82]

This brief quotation illustrates the relevant issue. Common allegiance to the crown was the basis of British nationality. Prior to 1914, common British nationality had existed as a common law concept. This notion of common British nationality was given statutory basis by Section 1(1) of the Nationality and Status of Aliens Act 1914, which provided that any person born in a dominion was deemed a natural-born British subject. The 1929 conference recognised that national internal rules relating to citizenship were not inconsistent with common status, but any attempt to confer a status 'operative throughout the Commonwealth' would have to be done pursuant to common agreement.[83] Thus, a dominion could create a form of local dominion citizenship but that could not affect the status of British subject, the common status which operated throughout the Commonwealth, without common agreement. In 1930, the Cumann na nGaedhael government submitted a draft Nationality and Citizenship Bill to the Commonwealth conference.[84] Mary Daly suggests that the introduction of this Bill was delayed because of the impending report of the international conference on nationality and the Free State may have been waiting for the passage of the Statute of Westminster.[85] It was the precursor to the legislation passed in 1935.

The Constitution (Amendment No. 26) Act 1935 amended Article 3 of the 1922 Constitution dealing with citizenship.[86] The Act was passed in conjunction with the Irish Nationality and Citizenship Act 1935 and the Aliens Act 1935. The constitutional amendment itself was introduced in the Dáil on 14 November 1934.[87] When de Valera proposed to take all the stages at once if there were no objection, Deputy McGilligan responded with '[p]ut it through; it is not worth talking about'.[88] It sailed through the Senate without an amendment being proposed or any debate taking

[82] *Report of the Conference on the Operation of Dominion Legislation*, [75–76]. On common status, see also John Mervyn Jones, *British Nationality Law*. 2nd ed. (Oxford: Clarendon Press, 1956), 87–92.

[83] Jones, *British Nationality Law*, 79.

[84] See Daly, "Irish Nationality," 384.

[85] Daly, 384–385.

[86] See NAI: AGO/2002/14/1041.

[87] 54 *Dáil Debates* col. 51 (14 November 1934).

[88] 54 *Dáil Debates* col. 2051 (14 February 1934).

place on the measure.[89] It amended Article 3 of the Constitution to remove any territorial limitations on Irish citizenship.

The most important subsections, for our purposes, of the Irish Nationality and Citizenship Act 1935 were subsections 33(1) and (2), which stated:

> (1) The British Nationality and Status of Aliens Act, 1914, and the British Nationality and Status of Aliens Act, 1918, if and so far as they respectively are or ever were in force in Saorstát Eireann, are hereby repealed.
>
> (2) The common law relating to British nationality, if and so far as it is or ever was, either wholly or in part, in force in Saorstát Eireann, shall cease to have effect.

Subsection 1 deleted Section 1(1) of the Nationality and Status of Aliens Act 1914, which provided that any person born in a dominion was deemed a natural-born British subject.[90] The effect of the subsection in the 1935 Act was to repeal the British statutes which conferred British nationality on dominion citizens within the Free State. Of course, such repeal, even on the terms of the Act, would only have effect within the Free State. In 1933, an anonymous memorandum had been prepared on the subject of secession. In it the author opined that even in the case of secession from the Commonwealth the British Acts conferring British nationality would '(on the British theory) still be in force throughout the Commonwealth and consequently the Irish men and women referred to

[89] Second stage, 19 *Seanad Debates* col. 1395 (20 March 1935); Committee stage 19 *Seanad Debates* col. 1554 (28 March 1935); Report stage, 19 *Seanad Debates* col. 1573 (3 April 1935).

[90] Section 1(1) of the British Nationality and Status of Aliens Act 1914 4&5 Geo V c. 17 provided.

> The following persons shall be deemed to be natural-born British subjects, namely:
>
> (a) Any person born within His Majesty's dominions and allegiance; and
> (b) Any person born out of His Majesty's dominions, who father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted; and …

Section 1(1)(b) was amended by section 2(1) of the British Nationality and Status of Aliens Act 1918 (8 & 9 Geo V ch. 38) with the insertion of the phrase 'or had become a British subject by reason of any annexation of territory, or was at the time of that person's birth in the service of the crown' after the words 'had been granted.'

would, so long as those statutes remain in force, continue to be statutory British subjects'.[91]

Section 33(2) addressed the position after the repeal of the British statutes. These statutes had merely institutionalised the previous common law theory that dominion citizens were British subjects. A repeal of the British statutes could possibly resuscitate the prior British common law position; in this event, Irish citizens would remain British subjects. This difficulty had been adverted to in the 1933 memorandum:

> [T]he Act of 1914 did not create new British nationality, it merely made statutory what was already the common law rule. That rule would, upon a simple repeal of the Acts referred to in so far as they relate to Irish men and women living in Great Britain or any part of the commonwealth, revive in respect of those persons. It would not require a further substantive enactment of the British Parliament to deprive them of their British nationality.[92]

This potential difficulty was canvassed in 1933 but a provision dealing with it was not included in the text of the original Bill. The issue was addressed in an amendment introduced by de Valera at the committee stage.[93] From de Valera's point of view, this was strictly speaking unnecessary but he wished to ensure all possibilities were covered. At the second stage, de Valera stated the position of the Free State government in relation to common citizenship:

> Under Irish law, no Irish citizen will be a British subject when this Act is passed. If somebody else chooses to regard our citizens as his, we will take no cognisance whatever of it as far as our law and legal system is concerned. And as I say, if they were to continue that, after this Act was passed, it would be acting contrary to the principles initiated at previous Imperial Conferences. I might say this Bill is designed to give effect, in the only way effect could be given, to those principles: and so far as it is possible to reconcile our independent rights with that association, or the independent rights of other States in the British commonwealth, with the idea of association, then, this Bill does that.[94]

[91] 2 December 1933 (UCDA: P104/4423). The memorandum is entitled 'Secession of the Irish Free State from the British commonwealth: the position with regard to Irish nationals in Great Britain and elsewhere throughout the commonwealth'.

[92] Emphasis in original.

[93] 54 *Dáil Debates* col. 1490 (14 December 1934).

[94] 54 *Dáil Debates* col. 410 (28 November 1934).

In the House of Commons, James Thomas, the secretary of state for dominion affairs, stated that Irish citizens would, in its eyes, continue to be regarded as British subjects under British law:

> [T]he Bill cannot be regarded as making provision for the maintenance of what is known as 'the common status' of subjects of His Majesty on the basis of common allegiance to the crown as contemplated in the conclusions of the Imperial Conference of 1930 relating to nationality. At the same time I am advised that the Bill does not purport to, and could not in any case, deprive any person of his status as a British subject.[95]

This status was based upon allegiance to the crown and followed the definitions of the 1929 and 1930 conferences.[96] It essentially treated the Irish Free State legislation as a form of local legislation.

From de Valera's point of view, the British attitude to common status was 'not one in which representatives of this State at any time concurred'.[97] After the passage of the Bill through the Dáil, the department of external affairs issued a memorandum to the national press which pointed out the 'absurdity of a situation' wherein one could have dual citizenships of two countries at birth.[98] The department averted to the Statute of Westminster

[95] 295 *House of Commons Debates* 645 (27 November 1934).

[96] See Thomas' speech at Derby reported in *The Irish Times* (3 December 1934). The British point of view has been overlooked in subsequent treatment of the issue. O'Grady states:

> Because the term 'common citizenship' appeared in both the treaty and the constitution, in theory the citizens of the Irish Free State remained British subjects until 1935 when the Irish passed the Irish Nationality Act; but in practice the change came much earlier […] when the Irish government rejected the British demand that the description 'British subject' be printed on each Irish passport.

J. O' Grady, "The Irish Free State Passport and the Question of Citizenship, 1921–4," *Irish Historical Studies* 26 (1989): 397 (footnotes omitted). The British position was that Irish citizens remained British subjects even after the passage of the Nationality and Citizenship Act in 1935. It was only in Ireland that Irish citizens were not British subjects.

[97] De Valera to Thomas, 23 August 1934 (NAI: DFA 1/56A).

[98] 24 August 1935 (UCDA: P150/2320). The author is unknown but it is likely to be Michael Rynne or John Hearne. Keith acknowledged the validity of the Act but further pointed out that 'outside it comes into conflict with Imperial legislation, and, even with full allowance for the power of the State to give its legislation extraterritorial effect, there is no reason to suppose that it is sufficient to negative British law'. *The King and Imperial Crown* (London, 1936), 450–451. The point had been made in a letter to *The Manchester Guardian*

but based the legitimacy of the 1934 Act on Irish constitutional and international, not Commonwealth, norms. This stated that the authority to pass such a statute was 'recognised by the Statute of Westminster, and exists apart from that statute. It is founded in the Constitution itself.'[99] The opinion also justified the amendment by reference to international rather than Commonwealth law. The Permanent Court of International Justice had established in 1923 that nationality was 'solely within the domestic jurisdiction' of the State.[100] In 1930, this was codified in the Hague Convention on certain questions relating to the conflict of nationality laws. Under this Convention, each state was to determine who were nationals of that state under their domestic law. The claim of the Free State to full international sovereignty meant the state followed the international position, as against the Commonwealth view.

On 12 April 1935, the executive council promulgated the Aliens (Exemption) Order 1935.[101] Under the power granted by Section 10 of the Irish Aliens Act, this exempted the nationals of the countries of the Commonwealth from Sections 8 and 9 of the Aliens Act. These provisions dealt only with changing one's name. The Exemption Order, however, also provided that the Aliens Order 1935, which was signed on the same day, did not apply.[102] This provided for inter alia restrictions on immigration and obligations to register with the authorities.[103] This exemption of Commonwealth citizens meant they were not treated as aliens in the Irish Free State.

Constituent Assemblies

In 1934 the Irish Supreme Court decided the case of *The State (Ryan) v Lennon*.[104] Because the decision was based on the theory that the Dáil which met in 1922 was a 'constituent assembly', it is necessary to address

three years before the passage of the Act when the subject of the declaration of an Irish Republic was under discussion; see Arthur Berriedale Keith, *Letters on Imperial Relations Indian Reform Constitutional and International Law 1916–1935* (Oxford: Oxford University Press, 1935), 123–124.

[99] 24 August 1935 (UCDA: P150/2320).

[100] [1922] PCIJ 3 (4 October 1922), [38].

[101] S.I. no. 80/1935.

[102] S.I. no 108/1935.

[103] S. 5. For registration requirements, S. 10.

[104] [1935] IR 170.

the issue of constituent assemblies. Two questions need to be considered. First, what is a constituent assembly? Second, how is a constituent assembly dissolved?

A constituent assembly is one which is called for the purpose of enacting a constitution for a country. In inter-war Europe, constituent assemblies were used to enact the 1921 Constitution of the Kingdom of the Serbs, Croats and Slovenes, the 1921 Constitution of the Polish Republic, the 1920 Federal Constitutional Law of the Republic of Austria, the 1920 Constitution of the Esthonian [sic] Republic, the 1920 Constitutional Charter of the Czechoslovak Republic, and the 1919 Constitution of the German Reich. The assemblies had 'full constituent powers, that is to say, with authority to adopt and prescribe a Constitution for the new State and to adopt such other legislation as might be required by the needs of the country while this task was uncompleted'.[105]

The second question is more problematic. In the majority of cases outlined above, the constituent assembly simply continued to sit as an element of the parliament which had been set up under the constitution which they had enacted. The exceptions to this rule were the Esthonians and Czechoslovaks who enacted the Constitution, enabling legislation in order to hold general elections, and then dissolved the assembly.[106] It was questionable whether, for example, the constituent assembly which became the first Reichstag under the new Constitution retained its constituent powers.

The Third Dáil sat as a constituent assembly in order to pass the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 (or Irish Constituent Act).[107] This Act was passed on 25 October 1922 and came into force on 6 December that year. The Third Dáil continued to sit as the first parliament under the new Constitution until 9 August 1923.

Under the theory propounded in *The State (Ryan) v. Lennon*, the Third Dáil was a constituent assembly which enacted the Constitution of the Irish Free State. The Dáils which functioned thereafter existed under the authority of the Constitution of the Irish Free State. The Third Dáil was of higher authority to subsequent Dáils: the first was the parent of the latter. A parliament may repeal the legislation of a parliament of equal *vires*. It cannot repeal the measures of a parliament of greater *vires*. The constituent assembly—the assembly of higher authority—had enacted Section 2 of the Irish Constituent Act. This

[105] S. Rao, ed. *Select Constitutions of the World* (Madras: The Madras Law Journal Press, 1934), 43.

[106] Rao, *Select Constitutions*, 44, 84, 150 and *passim*.

[107] The first meeting of the Third Dáil was held on 9 September 1922.

had rendered void any amendment of the Constitution which was in any respect repugnant to the treaty. The Eighth Dáil had attempted the repeal of Section 2. The argument was that they had no authority to disregard the measures of a superior institution. This could only be done by another constituent assembly.

The argument had been in circulation since the early 1930s. Gavan Duffy had identified the problem in his 1932 opinion on the treaty and the constitution. Arthur Berriedale Keith had also isolated the problem in a letter to *The Scotsman* in April 1932:

> [De Valera] has probably realized that in point of law his position is untenable, no Constitution can override the Treaty, and that he must therefore secure the removal of that clause. But it is clear that the method attempted, simple repeal by an Irish Act, is legally absolutely void. The Irish Free State Parliament has only such legislative authority as was granted to it by the Constituent Assembly, representing the will of the people, in 1922, and the judges are sworn to uphold the Constitution as by law established. They must therefore, when the issue comes before them in due course, rule invalid the attempt to overrule s. 2 of the Act of 1922, or be false to their duty.[108]

This issue was to be addressed in *The State (Ryan) v. Lennon*.[109]

The State (Ryan) v Lennon

On 19 December 1934, the Irish Supreme Court pronounced judgment in *The State (Ryan and Others) v Lennon and Others*.[110] The case was brought as a result of the Constitution (Amendment No. 17) Act 1931, which inserted Article 2A into the Free State Constitution. The impor-

[108] Keith, *Letters on Imperial Relations*, 118–119 (letter originally dated 23 April 1932). Keith made the point repeatedly in the 1930s; see *The Constitutional Law of the British Dominions* (London: Macmillan and Company, 1933), 114–116; and *The Governments of the British Empire* (London: Macmillan and Company, 1935), 47–48.

[109] See Gerard Hogan, "A Desert Island Case Set in the Silver Sea: *The State (Ryan) v. Lennon* (1934)," in *Leading Cases of the Twentieth Century*, ed. Eoin O'Dell (Dublin: Round Hall Sweet & Maxwell, 2000).

[110] [1935] IR 170. On the judiciary of the Irish Free State and judicial review, see Hugh Geoghegan, "The Three Judges of the Supreme Court of the Irish Free State, 1926–36: Their Backgrounds, Personalities and Mindsets" in *Lawyers, the Law and History*, ed. Norma Dawson and Felix M. Larkin (Dublin: Four Courts Press, 2013); and Donal K. Coffey, "The Judiciary of the Irish Free State," *Dublin University Law Journal* 33, no. 2 (2011): 61.

tance of the case, from our point of view, lies in the manner in which it dealt with the following issues. Could the Irish Constituent Act be amended by the Oireachtas? Could, therefore, the Constitution be amended in a manner inconsistent with the treaty?

The case was decided by a majority of two to one. The Supreme Court upheld the power of the Oireachtas to enact the Constitution (Amendment No. 17) Act 1931 over the impassioned dissent of Kennedy CJ. This judgment, therefore, upheld the power of the Oireachtas to erect a parallel system of military tribunals.

No judge disagreed on one crucial issue—the Constitution had been passed by the Dáil sitting as a constituent assembly. The issue was summed up Kennedy CJ: 'Now, the first thing I should emphasis is that the Constitution was enacted by the Third Dáil sitting as a Constituent Assembly, and not by the Oireachtas, which, in fact, it created.'[111] It followed from this point that no amendment of the Constituent Act could be effected by any body with less power than a constituent assembly. In the course of his judgment, Fitzgibbon J referred to the submissions of George Gavan Duffy that the constituent assembly transmitted to the subsequent Oireachtas 'its own supreme legislative authority'.[112] Fitzgibbon J held that Gavan Duffy had overstated his case insofar as the constituent assembly had refused to grant the power to legislate in a manner inconsistent with the treaty, and also did not include the power to amend the Irish Constituent Act.[113]

The implications of the judgment were not readily apparent when it was first announced as the judgment was reserved. The oral holding by Murnaghan J and Fitzgibbon J prompted the *Irish Press* to state: 'The final effect … appears to be that there is no restriction of any kind on the power of the Legislature to amend the Constitution by ordinary legislation.'[114] It

[111] [1935] IR 170, 203. See also Fitzgibbon J at 225–226.

[112] [1935] IR 170, 225.

[113] 112 [1935] IR 170, 226. It is important to bear in mind that this holding did not necessarily mean that the oath of allegiance could be successfully re-imposed. Section 2 of the Constitution (Removal of Oath) Act 1933 attempted to amend the Constituent Act. This was *ultra vires* the Free State parliament under the view propounded by the Supreme Court in *The State (Ryan) v Lennon*. This did not mean that Section 1 of the Constitution (Removal of Oath Act) 1933, which removed the oath from the Constitution, would be declared invalid. The supreme court could have held, if the issue came before them, that no oath was mandated by the terms of the Anglo-Irish treaty.

[114] *The Irish Press* 20 December 1934.

was not until the written judgments were handed down that the implications of the majority judgments became clearer.

The *Irish Law Times & Solicitor's Journal* pointed out when reviewing *Ryan v Lennon*:

> It is clear from the above that [the repeal of section 2 of the Irish Constituent Act] is, *à fortiori*, ineffective and section 2 is still in force. Consequently, amendments of the Constitution can still, under Article 65 of the Constitution, be declared unconstitutional if they are repugnant to the provisions of the Treaty. It is an open question how far recent amendments of the Constitution fall under the vitiating effect of this restriction, but that question lies outside the scope of this article.[115]

The state prepared an interesting memorandum while the case was being litigated.[116] This contained an appendix which dealt solely with the issue of constituent assemblies. It examined a variety of different theories which had been used to justify the sovereignty of the state before concluding that the Free State could only be justified on the basis of popular sovereignty.[117] The author stated that those 'who create, revise or unmake a Constitution by deliberative methods are ipso facto a Constituent Assembly, no matter how they may describe themselves'.[118] This theoretical framework informed the main memorandum dealing with *The State (Ryan) v Lennon*. The author stated that Article 50 gave the Oireachtas full power to amend the Constitution and it was therefore a constituent assembly. In other words, the Oireachtas was a perpetual constituent assembly. It followed from the analysis that if the Oireachtas were a constituent assembly then it could amend the Irish Constituent Act. This theory was not adopted by the Supreme Court, who held that the Oireachtas was no longer a constituent assembly.

[115] "The Amendment of the Saorstát Constitution—Part II," *ILT&SJ*, 69 (1935), 62–63.

[116] NAI: Taois s.6561.

[117] The other theories considered were medieval theories of French and Roman law, the social compact theory, national sovereignty theory, the 'Reichsstat' theory of the State, the Austinian theory of the State, the 'juristic' theory and the denial of sovereignty theory. The author rejected these theories on the basis 'that the right of a people […] to interfere in Constitutional revision is recognised only in those countries which have adopted the theory of popular sovereignty'.

[118] Emphasis in original. The proposition was supported by a translation from Carré de Malberg, *Contribution à la Théorie Générale de l'Etat* (Centre National de la Recherche Scientifique, 1920).

What, according to the Supreme Court, were the characteristics of a constituent assembly? Fitzgibbon J stated:

> If there ever was an assembly which could claim to represent the inhabitants of Saorstát Eireann, it was that Dáil Éireann, sitting as a Constituent Assembly, which every elected representative of every constituency within the Saorstát was free to attend, unfettered by any test, and in which there was no nominated or unrepresentative element.[119]

It is difficult to avoid the conclusion the court acceded to the Dáil's description of itself as 'constituent' without precisely analysing why it had the constituent power. The reference to a 'nominated […] element' relates to the fact that the assembly operated without an upper house with members present by nomination. The problem was that this definition would also have encompassed a degraded parliament without an upper house as a constituent assembly—a position that was to prevail in the Free State after the abolition of the Senate.

Nonetheless, by the end of 1934 the architects of the Irish constitutional reform project had two problems to deal with: (i) there was now jurisdictional doubt over the legal validity of those anti-imperial amendments which had transgressed the treaty; and (ii) any revision of treaty-imposed constitutional institutions would now require the sanction of a new constituent assembly.

Moore v Attorney-General of the Irish Free State

In *The State (Ryan) v Lennon*, the Irish Supreme Court had pronounced its ruling on the legal basis of the Free State. In 1935, the Judicial Committee of the Privy Council delivered its judgment on the same issue.[120] The case of *Moore v The attorney-general of the Free State* had been brought as a result of a dispute over the Erne fisheries.[121] The privy council granted leave to appeal in the case from the judgment of the Irish Supreme Court. On 9 October 1933, the Constitution (Amendment No. 22) Bill 1933 was amended to prevent the case, or others like it, from being heard by the

[119] [1935] IR 170, 225.

[120] See Thomas Mohr, "Law Without Loyalty—The Abolition of the Irish Appeal to the Privy Council," *Irish Jurist* 37 (2002): 187.

[121] [1935] IR 484.

privy council.[122] Therefore, the case turned on whether this amendment was within the powers of the legislature of the Irish Free State, which refused to appear before the privy council.

Appeal to the privy council was not explicitly provided for in the treaty. It was argued that the appeal was implicitly provided for by virtue of the fact that the Free State was, according to Article 2 of the treaty, in the same constitutional position in relation to Westminster as Canada. That country retained the appeal to the Judicial Committee of the Privy Council, so the Free State did so also.[123]

The essence of the decision rests on the following passage in a decision read by Viscount Sankey LC: 'the Treaty received the force of law, both in the United Kingdom and in Ireland, by reason of the passing of an Act of the Imperial Parliament; and the Constituent Act owed its validity to the same authority.'[124] As we have seen from *Ryan*, this was not the view adopted by the Irish Supreme Court—which regarded the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 as the root of title of the State. Greene KC, for the petitioners, circulated copies of *Ryan* during oral argument and the discussion on 11 April 1935 turned on these arguments.[125] However, the privy council refused to accept this line of argument.[126] The Irish Free State was, in its opinion, a creature of British law. It had been created by British statute—the Irish Free State Constitution Act 1922.[127] The authority given to the state in 1922 had been expanded by the Statute of Westminster 1931.[128] This expanded power extended to the repeal or amendment of British statutes that applied to Ireland, including the Irish Free State Constitution Act 1922, which, according to the privy council, gave force of law to the 1922 Constitution. Accordingly, the Irish State was empowered under the 1931 Statute of Westminster to

[122] S. 2 of The Constitution (Amendment No. 22) Bill 1933. This followed in a line of Free State legislation which sought to prevent or reverse court decisions. See Donal K. Coffey, "Comparative and Institutional Perspectives on the exercise of judicial power in the Irish Free State," in *Judicial Power in Ireland*, ed. Carolan (Irish Academic Press, forthcoming).

[123] See Mohr, *Law Without Loyalty*, 189.

[124] [1935] IR 484, 492.

[125] [1935] IR 484, 496–497.

[126] [1935] IR 484, 497.

[127] 13 Geo 5 c. 1.

[128] The privy council explicitly stated that before the passage of the Statute of Westminster the legislature had no competence to legislate in a manner inconsistent with the treaty; [1935] IR 484, 489.

amend the Constitution, as it had done when abolishing the appeal to the privy council.[129]

Drafting

On 30 April and 2 May 1935, de Valera gave verbal instructions to John Hearne to begin drafting a new constitution.[130] The draft was:

1. To include certain basic articles containing fundamental human rights;
2. To place the said articles in a specially protected position, i.e., to render them unalterable save by the people themselves or by an elaborate constitutional process;
3. To provide for the suspension of the said articles during a state of public emergency only;
4. To contain machinery for effectively preserving public order during any such emergency;
5. To provide for the establishment for the office of president of Saorstát Eireann, the holder of which would fulfil all the functions now exercised by the king and the governor-general in internal affairs; and
6. To contain provisions for the retention of the king as a constitutional officer of Saorstát Eireann in the domain of international relations.

The drafting process is considered in greater detail in *Drafting the Irish Constitution 1935–1937*. What is important from our point of view is how these instructions illustrate the themes we have examined in this chapter. The new constitution was to provide for a new post of president, who would replace the position of the governor-general. The draft was also to protect fundamental rights and make them unalterable by ordinary legislation. This was a response to the problem of the degradation of the rights provisions in the Free State Constitution by legislation. Finally, Hearne provided an explanatory memorandum which raised the question of 'whether the new Constitution should (or could) be enacted by the exist-

[129] The petitioners also argued the right of appeal was part of the prerogative which the privy council dismissed on the basis that it was a matter of statutory, rather than common, law and therefore could be amended in that manner; [1935] IR 484, 499.

[130] UCDA: P150/2370.

ing Oireachtas, and, if not, whether a Constituent assembly should be called and, if so, how?'[131] The Supreme Court had indicated that the Constitution could not be enacted by the existing Oireachtas and that it required a new constituent assembly.

1936: University Representation and the Senate

The Constitution (Amendment No. 23) Act 1936 deleted Article 27 of the Constitution, which provided for university representation in the lower house. There had always much antipathy within the Fianna Fáil organisation to university representation.[132] On the second stage of the Bill, deputy Sean T. O'Kelly gave three reasons why university representation was objectionable. First, the whole tenor of representation under the 1922 Constitution was based on proportional equivalence between constituencies—in other words, one representative for approximately 11,500 electors—which could not apply in the case of universities.[133] Second, under a system of proportional representation, which was heavily weighted towards representation of minority interests, one would have to establish that a body which was of a 'particular national interest' could not secure representation on an alternative basis.[134] Ordinarily, minority interests would be expected to secure the operation of proportional representation. Third, the university franchise could be exercised by individuals domiciled outside the country.[135] This amendment must be considered in conjunction with the Electoral (Revision of Constituencies) Act 1935. Section 3 of the Act provided the number of representatives in the Dáil would be reduced from 153 to 138 members. It was inconceivable in light of this proposed reduction, which had been well known, that university representatives, who were consistently anti-Fianna Fáil, would survive. The constitutional amendment became law on 24 April 1936.

The Senate

As early as 1928 de Valera had indicated his opposition to the existence of the Senate: 'We think that the proper thing to do is to end the Senate and

[131] UCDA: P150/2370.

[132] In the 1931 ard-fheis a motion on the clár (or programme) called for the abolition of university representation, see UCDA: P150/2052.

[133] 52 *Dáil Debates* col. 479 (8 May 1934).

[134] 52 *Dáil Debates* col. 480.

[135] 52 *Dáil Debates* col. 482.

not to attempt to mend it. It is costly, and we do not see any useful function that it really serves.'[136] As we have seen, in 1933 de Valera added reform of the Senate 'as at present constituted' to his election manifesto. The Fianna Fáil party viewed the Senate with a deep and abiding distrust. A motion was introduced in the 1932 ard-fheis which demanded that the government give effect 'to the unanimous demand of all Republicans for the abolition of the Free State Senate'.[137] This demand was made on behalf of one local organisation in 1932 but, piqued by the opposition of the Senate to the abolition of the oath, six local organisations re-introduced a similar demand at the 1933 ard-fheis.[138] This time the motion was adopted. In 1933, the government had considered the possibility of reforming the Senate.[139] A Bill was drawn up which proposed that those members of the Senate who were due to retire in 1934, save those elected in a Senate by-election under Article 34, would not be replaced. The cabinet rejected the proposal on 26 May 1933.

The Constitution (Amendment No. 24) Bill was introduced in its first stage on 22 March 1934.[140] Although de Valera based his claim on his electoral mandate and on the difficulties of establishing a second chamber capable of 'independent judgment on public affairs', it was also clear that the manner in which the Senate had opposed the Wearing of Uniform (Restriction) Bill 1934 on the previous day had an impact on the matter:[141]

> This Second Chamber, regardless of its responsibilities, acted in the most partisan manner, the character of which can best be realised by those who observed the speed with which, to assist a former Administration, they passed into law a measure which judges in the Supreme Court or in the High Court only yesterday characterised as extraordinary and unprecedented.[142]

The reference to the former administration was to the willingness of the Senate to insert Article 2A into the Free State Constitution. In contrast, the Senate refused to pass legislation proposed by the Fianna Fáil admin-

[136] 22 *Dáil Debates* col.140 (22 February 1928).
[137] UCDA: P150/2053.
[138] UCDA: P150/2054.
[139] NAI: Taois s.4469/20.
[140] 51 *Dáil Debates* col. 1460 (22 March 1934).
[141] 51 *Dáil Debates* col. 1461. 18 *Seanad Debates* col. 749–874 (21 March 1934).
[142] 51 *Dáil Debates* col. 1462 (22 March 1934).

istration to deal with the Blueshirt movement.[143] Maurice Manning notes that in opposing the Blueshirt Bill, the Senate had 'signed its own death warrant'.[144] The extent of the pique which de Valera felt may be gauged from the fact that it was on that day, 22 March, that the executive council voted to abolish the Senate.[145] The text of the Bill itself was not approved by the cabinet until 17 April 1934.[146] By the second stage, however, de Valera had regained his composure. He justified the measure on the ground that rather than acting as a check on the Dáil, the Senate was paralysing legislative work. He argued that the loss of the Senate could be compensated for by greater engagement by the Dáil.[147]

From de Valera's point of view, the assumption that a Senate was necessary was based upon two false premises:

> One is that it is a check or a brake which will operate at the time that we think brakes and checks ought to act; and secondly, that we can compose a Seanad [senate] of persons who will take a detached view, and will not be affected by political passions at a moment of crisis.[148]

He pointed out it was more liable to act as a brake when it was not needed and that all people were capable of being infected with political passion.

In the Senate, the chairman, T.W. Westropp Bennett, left his seat in order to address the chamber. In response to what he called the 'trump card', which was the haste with which the Senate had passed the Constitution (Amendment No. 17) Act 1931, Westropp Bennett indicated that the Senate had acceded to intimations by Fianna Fáil in relation to Bills which were sensitive from their point of view.[149] He claimed that the Senate's actions in those instances showed it was a non-partisan body. The crux of the conflict may be isolated in the following passages:

[143] Two years later, the British parliament successfully passed the Public Order Act 1936 to deal with a similar issue with uniformed movements.

[144] Maurice Manning, *The Blueshirts* (Dublin: Gill & Macmillan, 2006), 123.

[145] 22 March 1934 (NAI: Taois CAB/1/5).

[146] 17 April 1934 (NAI: Taois CAB/1/5).

[147] 51 *Dáil Debates* col. 1829–1831 (18 April 1934).

[148] 52 *Dáil Debates* col. 1851 (25 May 1934).

[149] 18 *Seanad Debates* col. 1245–1246 (30 May 1934).

> Here is a frankly revolutionary government, an anti-British government, attempting to function as a Republican government within the British Commonwealth of Nations. Senators were elected under the Constitution and swore an oath to be faithful to it. It is the duty of a Second Chamber to prevent violent change. And yet out of 109 Bills they have held up only four! […] Bills which alter the Constitution in such a way that, if they do not actually break the letter of the Treaty of 1921, they certainly violate its spirit, have been passed without a division and almost without debate. Only has the Seanad interfered when it was either a matter of conscience with them to act as they did or else because they felt that their interference was necessary to protect the people from tyranny or to prevent the government doing something cynically wrong to serve purely political ends.[150]

Of course, the question here is one of perception.[151] From Fianna Fáil's point of view, the Senate had acted to frustrate their republican constitutional crusade in opposing the oath Bill and only blocked emergency legislation on substantive grounds when Fianna Fáil came into power.[152] From the Senate's point of view, they were acting to uphold their oath of office and to ensure compliance with the treaty.

The most important historical source on the Irish Free State Senate remains Donal O'Sullivan's *The Irish Free State and its Senate*.[153] O'Sullivan was the clerk of the Senate during its existence and the book was an attempt to refute de Valera's arguments for the abolition of the Senate. He did so, with some considerable success, by considering the arguments put forward by de Valera for the abolition of the Senate and arguing they were unconvincing.[154] O'Sullivan's greatest weakness, however, was that he did not refute the charge that the Senate behaved in a partisan fashion. He produced no defence of its supine conduct in enacting the Constitution

[150] 18 *Seanad Debates* col. 1243–1244.

[151] The triumphalism of the Fianna Fáil party at this action may be gauged from a motion introduced at the 1934 ard-fheis which demanded that 'there be no reprieve for the senate', UCDA: P150/2055.

[152] See the statement by Conor Maguire, the attorney-general: 'This ramp of putting the Seanad forward as being the guardian of the liberties of the subject is so absurd and ridiculous that I do not believe it appeals even to the most ordinary man in the street.' 52 *Dáil Debates* col. 1202 (17 May 1934).

[153] Donal Joseph O'Sullivan, *The Irish Free State and its Senate* (London: Faber & Faber, 1940).

[154] See, for example, his arguments about de Valera's use of authorities; O'Sullivan, 390–402.

(Amendment No. 17) Act. He simply stated that it was passed by 'men of the most diverse views, many of whom frequently voted against the government'.[155] A more balanced assessment of the Senate may be found in a contemporaneous article by Keith:

> The grounds on which abolition has been determined are simple; the Senate, in the opinion of the government […] has acted without due impartiality. The Constitution unquestionably assumed that the Senate would be a body in some degree representative of the mature wisdom of the land; in fact, it has never shown itself anything but a replica in partisanship of the Lower House. The most serious blunder which it committed was undoubtedly the assent given to the Constitution (Amendment No. 17) Act, 1931. That measure was a dangerous inroad on the security of personal liberty, and it should have been drastically revised by the Upper Chamber, if not rejected outright. It was, however, under the impression that it could be used to strengthen the position of the then government. It failed in its operation, and all criticism of its employment by Mr. de Valera has been gravely weakened by the fact that it was enacted by its predecessors. In addition, the Senate undoubtedly showed no discretion in its treatment of Mr. de Valera's Bills, in special that dealing with the wearing of uniforms which struck at a plain and obvious evil.[156]

The Constitution (Amendment No. 24) Act 1936 contained only three sections, with the majority of the necessary amendments or deletions contained in a schedule to the Act.[157] The only article actually amended in the sections of the Act was Article 12, which constituted the legislature.[158] It became law on 29 May 1936. De Valera did, however, leave open the possibility of a reintroduction of an upper house constituted along different lines. He appointed a commission to consider what form, if any, such an upper house might take. The report was published in 1936 and was influential in the drafting of the articles relating to the Senate in the 1937 Constitution.[159]

[155] O'Sullivan, 276.

[156] Arthur Berriedale Keith, "Notes on Imperial Constitutional Law," *Journal of Comparative Legislation and International Law* 18 (1936): 114–115 (footnotes omitted).

[157] Sixteen Articles were wholly deleted, while 12 were amended.

[158] S. 1 of the Constitution (Amendment No. 24) Act, 1936.

[159] *Report of the Second House of the Oireachtas Commission* (Dublin, 1936).

The measures of 1936 were part of a wider campaign which had been advanced since 1932. On 2 August 1936, de Valera provided an account of the progress made since 1932:

> Is it necessary to repeat to you what has been done? The oath has gone; the appeal to the British Privy Council has gone; the Governor-Generalship is nine-tenths gone and the remaining tenth will soon be gone; legal recognition of the separateness of Irish nationality has been given in the Nationality and Aliens Acts, and with the new Constitution we shall have so consolidated the position reached that no future party is ever likely to get the nation to retrace its steps.[160]

A New Constitution

In a recent work, Bill Kissane has stated: 'It is difficult to identify exactly when de Valera decided to write a new Constitution.'[161] If we can identify when de Valera to write a new Constitution, we can also reach some conclusions as to why he decided to write it.

John Hearne produced the first draft Constitution on 18 May 1935.[162] On 29 May 1935, de Valera declared in the Dáil: 'I hope before our term expires that we will be able to bring in a Constitution which, so far as internal affairs at any rate are concerned, will be absolutely ours.'[163] This was almost exactly a year from the date when de Valera had created the Constitution Review Committee of 1934. At that point, de Valera had indicated that he did not want the civil servants to draft a new Constitution; his preference was for a review of the existing structure. We can therefore conclude that the decision was made between May 1934 and May 1935.[164] Why was a new Constitution necessary?

[160] *National Discipline and Majority Rule* (n.p., 1936), 4. The speech was originally given on 2 August 1936 and may be found in the *Irish Independent* 3 August 1936. The speech was given for a convention of several thousand people to choose a by-election candidate.

[161] Bill Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland* (Dublin: University College Dublin Press, 2011), 59.

[162] UCDA: P150/2370.

[163] 56 *Dáil Debates* col. 2088 (29 May 1935).

[164] Keogh and McCarthy also identify this as the crucial time period; see Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution: Bunreacht na hÉireann* (Cork: Mercier Press, 2007), 75.

De Valera's official biography puts forward two reasons for the decision to draft a new Constitution. First, the sheer number of amendments 'meant the Free State Constitution was no longer a fit document to be regarded as the fundamental law'.[165] Second, the Free State Constitution 'could never escape its basis in British law'.

These suggestions accurately describe part of the picture. However, it must be noted that that the only constitutional amendment which occurred between May 1934 and May 1935 related to citizenship.[166] It seems strange to suggest that the Constitution became an unfit document as a result of the passage of this relatively minor amendment. What provided the impetus then? Let us start with the lost amendments of 1934. These were designed to divest the governor-general of significant powers. They were not, however, enacted. The governor-generalship had survived de Valera's attempts to abolish the office in 1932 and 1934. It seems plausible that as long as this institution survived, the Fianna Fáil campaign against external interference could not be regarded as a success. The abolition of the office of governor-general would have meant numerous amendments to the 1922 Constitution. De Valera may have felt that enacting a new Constitution would provide a more coherent legal form for the new political organisation that he sought to create. Moreover, two grounds of the verbal instructions that de Valera gave to Hearne in May 1935 related to the replacement of the governor-general with a president and the role of the crown in the new constitutional arrangement.[167]

A second reason was concerned with the protection of fundamental personal rights. The power of amendment provided for in the Constitution of the Irish Free State permitted the easy statutory amendment of individual rights. The terms of reference of the 1934 Constitution Review Committee illustrate the concerns de Valera had with the protection of personal rights from casual statutory abridgement—the committee was to ascertain which rights were fundamental, and determine how those rights could specially protected from change. The report of the Constitution Review Committee had persuaded him that this institutional problem

[165] See Earl of Longford and O'Neill, *Eamon de Valera* (Dublin: Gill & Macmillan, 1970), 289–290.

[166] This point has also been made by Keogh and McCarthy, *The Making of the Irish Constitution*, 75, but without consideration of the subsequent points.

[167] UCDA: P150/2370.

could best be addressed by a new constitution. Again, the first two grounds of verbal instruction given by de Valera to Hearne in 1935 related to fundamental rights protection.

Third, in *The State (Ryan) v Lennon* the Supreme Court had held in December 1934 that the Oireachtas could not legislate outside the terms of the Anglo-Irish Treaty. This placed the entire Fianna Fáil constitutional project in jeopardy. The decision of the Privy Council in *Moore* provided an avenue of escape from this difficulty, but only by abjuring the Irish constitutional theory about the basis of the Free State.[168] This was unacceptable and seems to be the basis for the claim in de Valera's official biography that the Free State could 'never escape its basis in British law'. As we have seen, the constitutional position was more complex than this bald statement, but neither Irish nor British courts provided acceptable avenues of constitutional development from de Valera's perspective. This surely provided another reason to enact a new Constitution. The link between the new Constitution and the treaty was raised by Hearne as a particular issue in his memo of 17 May 1935 in relation to enacting a new Constitution.[169]

Finally, the Constitution Review Committee had isolated the problem of the poor drafting of the 1922 Constitution by the number of suggestions that they made regarding amendments. This was most likely the impetus behind the statement in de Valera's official biography: the Constitution was unfit for purpose.

All of these events occur between the crucial dates of May 1934, when de Valera did not apparently wish to enact a new Constitution, and April 1935, when he did. In 1936, the Fianna Fáil party stood amidst the wreckage of the 1922 Constitution determined to provide a lasting solution to the problems of institutional weakness and the protection of fundamental rights. They were to face one last hurdle before the enactment of the Constitution—the abdication of King Edward VIII.

[168] See Gerard Hogan, *The Origins of the Irish Constitution, 1928–1941* (Dublin: Royal Irish Academy, 2012), 15 and 19–20.

[169] UCDA: P150/2370. Hogan describes the decision as follows: 'It may fairly be said that the decision of the Supreme Court in *The State (Ryan) v Lennon* ultimately led to the entire downfall of the Irish Free State Constitution and paved the way for the enactment of the present Constitution.' Ibid., 101. This seems to overstate the importance of the case. *Ryan* was important, and may even lay claim to primacy amongst the reasons advanced here, but there were certainly other considerations in play.

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CHAPTER 3

The Abdication of King Edward VIII

In late 1936, the Commonwealth was rocked by the abdication crisis.[1] This also proved a decisive point in the constitutional development of the Irish Free State. The early drafts of the Constitution from summer 1936 disclose a preoccupation with the Commonwealth dimension; potential problems were foreclosed by the development of the abdication crisis. Moreover, the Irish response to the crisis, outlined below, hollowed out most of the British influence on the Irish Constitution. This was to be replaced, during the drafting process, with a more continental focus as is detailed in *Drafting the Irish Constitution*. This procedure had already been in train before the abdication crisis itself, from at least October 1936, but the vitality of British constitutionalism ebbed from the Free State in the aftermath of the crisis.

There were three legal elements to the crisis. First, in the United Kingdom, the British parliament responded with a statute in order to amend the line of the succession to the throne. Second, as a result of the Statute of Westminster, the dominions became involved in the legislative process and had to comply with their internal constitutional law in order to give legal effect to the abdication. The demands placed on each dominion also varied in accordance with the extent to which they had adopted the Statute of Westminster. This influenced the British dimension, as the

[1] A version of this chapter was published as "British, Commonwealth and Irish Responses to the Abdication of King Edward VIII," *Irish Jurist* 44, no. 1 (2009): 95–122.

D. K. Coffey, *Constitutionalism in Ireland, 1932–1938*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76237-1_3

dominions had to consult with the other members of the Commonwealth in order to pass the British legislation. Third, only one member of the British Commonwealth failed to assent to the British legislation. This was the Irish Free State. In Ireland, the abdication crisis was perceived as an opportunity to remove the representative of the crown from the internal affairs of the State. Despite this, the British government were prepared to accede to the Irish response to the abdication crisis. This reaction was to provide considerable latitude to the government of the Free State in the drafting process for the Constitution. It is therefore necessary to understand how it came about.

The relations between the Free State and Britain proceeded along three dimensions—Irish, British, and Commonwealth. It is necessary to consider each of these dimensions in order to understand fully the implications of the abdication crisis.[2]

The Internal British Crisis

Edward VIII had been introduced to Wallis Simpson in 1931, when she was still married and he had yet to accede to the throne. The two gradually came to spend more time in each other's company, eventually doing so without the presence of Ernest Simpson.[3] On 20 January 1936, George V died and Edward succeeded as king. Wallis Simpson accompanied the king on a Mediterranean cruise in the summer of 1936. It was widely covered by foreign newspapers but the British press, displaying a reticence which was to last until December 1936, decided not to cover the story.[4]

In October 1936, Wallis Simpson filed for a divorce decree. Edward VIII invited the prime minister, Stanley Baldwin, to Buckingham Palace on 16 November, and indicated his intention to marry Mrs Simpson at the

[2] A useful chronology of the events may be found in William Keith Hancock, *Survey of British Commonwealth Affairs. Volume One: Problems of Nationality 1918–1936* (Oxford: Oxford University Press, 1937), 621–627. This account was authored by Latham, who submitted a draft of this paper to the dominion office for comment. See the National Archives: Public Records Office (hereafter TNA: PRO) DO/35/531/2/31. Latham did not have access to the departmental papers on the abdication so I have corrected his account where appropriate. Hereinafter the references to the appendix in the above volume will be to Latham, while references to the main body of the text will be to Hancock.

[3] Simpson was a maritime broker.

[4] See generally on press coverage, F. Siebert, "The Press and the British Constitutional Crisis," *The Public Opinion Quarterly* 1 (1937): 120.

first available opportunity. Baldwin had already received legal advice from Sir Maurice Gwyer, first parliamentary counsel to the treasury, on 5 November 1936.[5] Gwyer began his analysis by noting '[f]or every act or omission of the king which has any political significance, ministers must be prepared to assume responsibility'.[6] Gwyer stated that 'ministers would have constitutionally both a right and a duty to advise the king against an imprudent marriage, or against a marriage distasteful to the king's subjects at large and regarded by them as tending to bring discredit upon the monarchy'.[7] Gwyer noted that in the event that such advice was not accepted then the members of the government could offer their resignation. He pointed out that the government should consult with the opposition before tendering the advice to the king. This would mean that the king could form no alternative government and would therefore have to accept the advice or abdicate. Gwyer ended by noting the delicacy of the matter. He pointed out a that de facto abdication, without legislative grounding, would leave the country without an executive government, which was formally vested in the king. Even an abdication which was formalised in a statute would not provide a complete solution 'in the case of the dominions and especially of those which assert the divisibility of the Crown'. Fortified by Gwyer's advice, Baldwin prepared to tender his advice to the king.

The Act of Settlement 1701

The line of succession to the English throne had been settled by the Act of Settlement 1701.[8] The primary purpose of the Act was to prevent Roman Catholics from acceding to the throne. Section 1 provided that the line of succession was to be through William III and his issue, Anne and her issue, and then the elector Sophia of Hanover 'and the heirs of her body, being Protestants'. This section fixed the line of succession. Any alteration in the line of succession would therefore require a statutory

[5] Gwyer was to become Chief Justice of India shortly after the abdication crisis.

[6] TNA: PRO PREM 1/449.

[7] He stated that the preamble to the Royal Marriages Act 1792 (12 Geo III, c 11) bolstered this point, although he conceded it did not apply to the king. The relevant section states: 'marriages in the royal family are of the highest importance to the state.'

[8] 12 & 13 Will III, c 2.

amendment. Section 2 provided that if a Roman Catholic held the throne, or if the monarch married a Catholic, then a demise of the crown would take place and the next in line to the throne who was a Protestant would accede.[9] Section 3 stated, 'whosoever shall hereafter come to the possession of this Crown, shall join in communion with the Church of England, as by law established'.[10]

The position under the Act of Settlement was as follows. First, the line of succession was set by the legislation; the only qualification was that it could pass only through a Protestant. Second, whoever acceded to the throne had to be a member of the Church of England. Third, a monarch could lose the throne by becoming a Catholic or marrying a Catholic.[11]

Edward VIII was therefore legally the British king and, as long as he did not convert to Roman Catholicism or marry a Catholic, could not be legally deprived of his title. Gwyer's advice was based on constitutional convention and on the principle of the king's duty to have regard for the advice of his ministers. That ministerial advice was political, rather than legal. One potentially embarrassing consideration was that Wallis Simpson had only secured a provisional decree nisi at the time of the abdication crisis. The decree absolute could be granted only after six months had elapsed and during that time the king's proctor could investigate Wallis Simpson. In 1936 a divorce could not be granted if both sides had committed adultery; there was a real danger that an investigation could interfere with the king's marriage plans.[12]

In his meeting of 16 November, Baldwin attempted to discourage Edward from his intentions by pointing out these facts. Edward accepted this point—this was to prove a telling blow against Edward's ambitions to

[9] The Act of Settlement 1701 made reference to the Bill of Rights 1689. The procedure outlined is drawn from the Bill of Rights. On a demise of the crown, see Arthur Berriedale Keith, *The King and the Imperial Crown* (London: Longmans, Green and Company, 1936), 29–30.

[10] There were further elements to the Act of Settlement dealing with matters such as limitations on the right of the king to travel and the privy council, but they fall outside the remit of this chapter.

[11] Maitland noted: 'There is no clause saying that he forfeits the crown if he ceases to be a member of the English Church, if, for instance, he becomes a Wesleyan Methodist.' Frederic William Maitland, *The Constitutional History of England* (Cambridge: The University Press, 1909), 344.

[12] See Stephen Cretney, "Edward, Mrs. Simpson and the Divorce Law," *History Today* 53, no. 9 (2003): 26.

marry Wallis Simpson. At the meeting of 16 November Edward leaned towards abdication in favour of the duke of York, Prince Albert.

The proposal for morganatic marriage originated with Viscount Rothermere, the editor of the *Daily Mail*, and was communicated to the king through viscount's son, Esmond.[13] A morganatic marriage is one in which individuals of different social standing marry and the lesser party achieves a lesser rank, while the rights of the superior party do not pass to his or her issue. If Edward married Simpson in a morganatic marriage then their children could not succeed to the throne. As the line of succession was fixed by the Act of Succession 1701, a morganatic marriage would therefore require a statutory amendment. This would have to do two things. First, it would have to amend the Act of Succession to bar all the issue of the marriage of Edward and Wallis Simpson. Second, it would need to provide for a new line of succession to proceed through the duke of York and his heirs.

It was this suggestion which Edward VIII next pursued. On 25 November, Baldwin once again met the king, who proposed morganatic marriage as a solution which fell short of abdication. The prime minister pointed out that, in the event of legislation, the dominions would need to be contacted. Baldwin received the assent of the king to offer three alternatives to the dominion governments:

1. The king's marriage to Mrs. Simpson, she becoming queen.
2. The king's marriage to Mrs. Simpson, Mrs. Simpson not becoming queen, and the necessary legislation.
3. A voluntary abdication of the king in favour of the Duke of York.[14]

The Abdication Crisis Breaks

In the aftermath of the 25 November meeting, Baldwin suggested the three approaches to the dominion governments. At this point in the correspondence, the replies were the individual private responses of the heads of the dominion governments, rather than of the dominion governments as a whole. Baldwin discerned on 27 November that his own cabinet had no intention of agreeing to a morganatic marriage and the discussion thereafter focused on the necessary legislation in order for the king to abdicate voluntarily. On 2 December, Baldwin informed the king that the

[13] The provenance of the idea, had it been known, would hardly have endeared the idea to Baldwin, who had been a strong critic of media barons since the early 1930s.

[14] NAI: DFA/s.57.

morganatic approach had been rejected by the government and the dominions, and advised him that his options were to finish his relationship with Simpson, marry Ms Simpson (which would lead to the resignation of his ministers on the basis of the principle of responsible government) or abdicate.

On 3 December, the British press finally broke their silence on the issue. That evening the king again met with Baldwin and indicated his desire to appeal directly to the Commonwealth through a broadcast in which he would point out 'he wanted to be happily married, and that he was firmly resolved to marry the woman he loved when she was free to marry him, and that neither she nor he had ever sought to insist that she should become Queen'.[15] Baldwin consulted his cabinet colleagues the next day. They agreed that the king's suggestion was impossible as the broadcast could embarrass the cabinet: if the king were to make such a broadcast, and it were to succeed, it would leave the entire cabinet in an untenable position since they had indicated their intention to resign rather than introduce the necessary legislation.

Drafting

Baldwin received legal advice on the possibility of an abdication statute in a memorandum dated 23 November 1936.[16] The memorandum was drafted by Maurice Gwyer, who had represented the United Kingdom as treasury solicitor at the 1929 conference on the operation of dominion legislation and merchant shipping legislation. This knowledge of Commonwealth affairs was to prove important in the drafting process (we will consider the Commonwealth implications in the next section). Gwyer proposed a three-step procedure for abdication. First, Edward would issue a royal message which would indicate his desire to renounce the throne and his willingness to concur in any legislation necessary to accomplish this. Second, Gwyer proposed that enabling legislation should be passed on foot of Edward's message.[17] The legislation would include the message

[15] National Archives of Ireland (hereafter NAI): DFA/s.57.
[16] TNA: PRO PREM 1/449.
[17] This advice was bolstered by Maitland's analysis:

> There is, I think, no way in which a reigning king can cease to reign save by his death, by holding communion with the Church of Rome, professing the Popish religion or marrying a Papist, and possibly by abdication. I cannot regard the events of 1327,

in a recital. Third, the legislation would provide the form for an instrument of abdication. If Edward executed the instrument of abdication then the throne would pass to the duke of York. Gwyer indicated that it would be 'preferable' that a formal renunciation of the throne be put on the record, and that the abdication should take place by virtue of this renunciation rather than a statute. His reasons may have been influenced in this regard by Commonwealth considerations. Gwyer later noted that an instrument of abdication would show that the king acted on his own initiative and not on the advice of the government of the United Kingdom. There would be no need to consider, under this procedure, whether the king should act on the advice of each of his dominion governments separately.

Gwyer advocated three legislative amendments. The first was to the Act of Settlement. As we have seen, this was necessary in order to change the line of succession. The second was the Civil List Act 1936.[18] This Act provided for the expenditure of the royal family. Section 1 provided for the payment of certain moneys 'during the present reign and a period of six months afterwards'. Gwyer maintained this was 'altogether inappropriate in the circumstances under consideration'. As we shall see, this aspect of the advice was not acted upon. The final Act which required amendment was the Royal Marriages Act 1792.[19] Section 1 provided that no descendant of George II could marry without the consent of the king. Section 2 provided for an exception whereby a member of the royal family could marry provided that they gave 12 months' notice to the privy council and, during this 12-month period, both houses of parliament did not expressly disapprove of the marriage. Gwyer pointed out that once Edward abdicated he would have to ask the permission of his brother, 'which it might be thought in the circumstances that He should not be under an obligation to do', or comply with the 12-month period. Accordingly, Gwyer

> 1399 or 1688 as legal precedents. I can deduce no rule of law from them: they seem to me precedents for a revolution, not for legal action. If we had a very bad king, we should very probably depose him; but unless he consented to an act of parliament depriving him of the crown, the deposition would be a revolution, not a legal process. Even the king's power to abdicate, except by giving his assent to a statute declaring his abdication may, it seems to me, be doubted.

See Maitland, *The Constitutional History of England*, 344. For a contrary view, see Kenneth Hamilton Bailey, "The Abdication Legislation in the United Kingdom and in the dominions," *Politica* 3 (1937–38): 1–7.

[18] 26 Geo V & 1 Edw VIII c 15.

[19] 12 Geo III c 11.

recommended amendment of the Royal Marriages Act to exempt Edward and his heirs from the operation of the Act.

Some early drafts of the Bill exist.[20] One of 4 December 1936, which proposed an Act to be known as 'His Majesty's Abdication Act, 1936' contained a draft Section 1(1) which provided for the succession of 'that member of the Royal Family … who would have succeeded if His Majesty had died'. By 8 December this rather macabre phrasing had given way, apparently due to an Australian request, to the more elegant 'there shall be a demise of the crown', which would appear in the final Act. The most difficult part of the drafting process was the second preamble, which extended the Act to the dominions.[21] The dominions had different constitutional structures and not all had adopted the Statute of Westminster 1931. This made agreeing a formula agreeable to all dominions difficult. We shall deal with this difficulty later.

On 11 December 1936, His Majesty's Declaration of Abdication Act 1936 was passed. It included the instrument of abdication signed by Edward on 10 December in a schedule to the Act. The Act provided in section 1(1) that Edward would, upon royal assent to the Act by Edward, cease to be king and 'accordingly the member of the Royal Family then next in succession to the Throne shall succeed thereto'. Section 1(2) eliminated any progeny of Edward from the line of succession and amended the Act of Settlement accordingly. Section 1(3) removed Edward and his heirs from the ambit of the Royal Marriages Act 1772. The internal British response, however, was complicated by the necessity to secure Commonwealth agreement.

Abdication and the Commonwealth

The abdication crisis highlighted a conflict between two theoretical views of Commonwealth relations. These were the *inter se* doctrine and the doctrine of the divisible crown. The conflict was complicated by the provisions of the Statute of Westminster 1931. This statute was the legal culmination of the Balfour declaration of 1926, which acknowledged the 'equal status' of the dominions with the United Kingdom. The Balfour declaration also provided that the Commonwealth was 'united by a com-

[20] TNA: PRO CAB 21/4100/2.

[21] The only other change was in the first Preamble where the phrase 'has signified His desire that effect should be given thereto' was replaced with 'has signified His desire that effect thereto should be given immediately'.

mon allegiance to the Crown'. As we shall see, both 'equal status' and 'common allegiance to the Crown' underpinned the Statute of Westminster, which created a legal difficulty for the United Kingdom.

The inter se *Doctrine and the Divisibility of the Crown*

In the 1930s the British government adhered to the *inter se* doctrine of Commonwealth relations. This doctrine held that relations between the Commonwealth countries were of an imperial constitutional rather than international nature. J.E.S. Fawcett stated there were three elements to the *inter se* doctrine:

1. It only applied to the self-governing members of the Commonwealth, and not colonies.
2. It was based upon the traditional constitutional principles of the unity and indivisibility of the crown and the common allegiance owed to it by its subjects in the Commonwealth, though it was directed outwards to secure the unity of the Commonwealth in its international relations.
3. It was developed to standardise treaty practice and no general form of the doctrine was accepted.[22]

The most important element for our purposes is (2), which is based upon the indivisibility of the crown. The indivisible crown meant the king was king of all of the Commonwealth countries at the same time, rather than king of each separately. This theoretical point had a number of practical applications. If the king was a single king then it axiomatically followed that treaties, which were concluded in the name of heads of state, could not be concluded between Commonwealth members as the head of state in both instances was the same person performing the same function. Therefore, Commonwealth relations were, under the *inter se* doctrine, constitutional rather than international.

The alternative view was most commonly associated with General James Hertzog, the prime minister of South Africa.[23] Hertzog claimed that the

[22] James Edmund Sandford Fawcett, *The Inter Se Doctrine of Commonwealth Relations* (London: The Athlone Press, 1958), 6–7; the second element is a direct quotation.

[23] See, for example, TNA: PRO DO 35/2167. The view was also held by the government of the Irish Free State through the 1920s and by civil servants in other dominion governments, such as O.D. Skelton, undersecretary of state at the department of external affairs in Ottawa.

king held all of his titles separately. The king was king of the United Kingdom, king of South Africa, king of the Irish Free State, etc. On this view of multiple crowns, it was theoretically possible for the king to be replaced in one of the Commonwealth countries and yet remain king in the others; for example, the king could cease to be king of South Africa but remain king of the other Commonwealth countries.

A historical parallel was drawn between the Commonwealth position and the fact that Kings George III, George IV and William had been kings of Hanover and, at the same time, kings of Great Britain and Ireland. The same person was king in both jurisdictions but the person did not hold the title of king of Hanover by virtue of holding the title of king of Great Britain and Ireland. Hanover was governed by agnatic succession. This meant that a female could not succeed to the crown. When Victoria became queen of the United Kingdom, her uncle became King Ernest Augustus I of Hanover. This historical parallel therefore indicated the possibility of having separate monarchs in Great Britain and the dominions.[24]

This view was incompatible with the British *inter se* doctrine. This conceptual distinction must be borne in mind when considering the abdication crisis. It was important, from the British point of view, to ensure a co-ordinated response to the crisis in order to preserve their concept of the indivisible crown and thus of the *inter se* doctrine.

The Statute of Westminster 1931

There were two issues that arose as a result of the Statute of Westminster 1931 in the abdication crisis. First, why was Commonwealth input necessary at all? Second, how were the various Commonwealth countries to implement the abdication?

The preamble to the Statute of Westminster 1931, which referred to 'common allegiance to the Crown', provided that any change in the law of royal succession would require the assent of the parliaments of all of the dominions:[25]

> [I]nasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of nations, and as they are united by

[24] This is not the only historical parallel that may be drawn. The concept was based on the idea of personal union, which has a strong historical pedigree.

[25] 22 & 23 Geo 5.

> common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne … shall hereafter require the assent as well of the parliaments of all the dominions as of the parliament of the United Kingdom.

The noted constitutional scholar Professor E.C.S. Wade remarked in the aftermath of the abdication 'that no reliance was placed upon the technical plea that the contents of the preamble are outside the operative parts of the Statute'.[26] In the debates on the Statute of Westminster, Winston Churchill had stated that '[t]he Preamble is nothing. It has no legal force.'[27] Why was the 'technical plea' not advanced, thereby implicitly conceding that the preamble to the Statute of Westminster was legally binding?

Two answers may be identified. First, the preamble was inserted as recognition of a Commonwealth conventional rule. In 1929, the conference on the operation of dominion legislation recommended the adoption of such a constitutional convention on the basis that the royal succession was a '[matter] of equal concern to all'.[28] This proposal had been adopted in the 1930 Commonwealth conference and was, as a result, incorporated in the Statute of Westminster.[29] The preamble was a Commonwealth constitutional convention even in the absence of implementing legislation. James Thomas, the secretary of state for dominion affairs, referred to the preamble as a 'constitutional convention' in the debates which led to the enactment of the Statute of Westminster.[30] Second, if the preamble had been ignored then the British government would have broken with the principle of the indivisible crown, which, as we have seen, was a component of the *inter se* doctrine. If the British government had legislated unilaterally on the matter then it would have meant that the other Commonwealth governments would have had to legislate unilaterally as well. As a result of this constitutional convention, the Commonwealth had to be consulted before the line of succession could be changed.

[26] E.C.S. Wade, "Declaration of Abdication Act 1936," *Modern Law Review* 1 (1937): 64.

[27] 259 *Parliamentary Debates* col. 1195 (20 November 1936).

[28] *Report of the Conference on the Operation of dominion Legislation and Merchant Shipping Legislation 1929*, Cmd. 3479, [59]–[61].

[29] *Summary of the Proceedings of the Imperial Conference of 1930* Cmd. 3717, 21.

[30] 259 *Parliamentary Debates* col. 1180. See also M. Hudson, "Notes on the Statute of Westminster 1931," *Harvard Law Review* 46 (1932): 269–270.

The second question that we must address is the different procedures which each Commonwealth country had to adopt to implement any proposed change. The Statute of Westminster did not extend to all of the dominions. Section 10 of the statute provided that certain sections of it did not apply to New Zealand or Australia unless the parliament of the respective country adopted the sections.[31] These parliaments had not adopted the Statute of Westminster by 1936.[32] New Zealand and Australia were governed by a declaration, also contained in the preamble to the Statute of Westminster, which provided that no British legislation could affect a dominion save at the request of that dominion:

> And whereas it is in accord with the established constitutional position that no law hereafter made by the parliament of the United Kingdom shall extend to any of the said dominions as part of the law of that dominion otherwise than at the request and with the consent of that dominion.

The legislative alteration in the identity of the king affected those dominions of which he was head of state. This requirement to 'request and […] consent' to the legislative change applied to Australia and New Zealand and was described as 'the established constitutional position'.

South Africa, the Irish Free State and Canada were governed by Section 4 of the Statute of Westminster, which stated:

> No Act of parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a dominion as part of the law of that dominion, unless it is expressly declared in that Act that that dominion has requested, and consented to, the enactment thereof.

This section simply entrenched 'the established constitutional position' contained in the preamble for those dominions to which it had not applied. Section 4 did not stipulate any particular procedure for a dominion to 'request and […] consent' to legislation. It would appear that this could be done by an order-in-council, by legislative resolution or by some other measure. Under the preamble to the Statute of Westminster, however, it was declared that a change to the royal succession would require the assent of the parliaments of the dominions. South Africa clarified this point in the

[31] Section 10 also applied to the dominion of Newfoundland but this was under direct British rule in 1936.

[32] New Zealand and Australia subsequently adopted the Statute in the 1940s.

Status of the Union Act 1934. Section 2 of the Act provided 'no Act of the parliament of the United Kingdom […] passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the parliament of the Union'. This meant that a legislative resolution would not suffice; only South African legislation could provide for the extension of a British Act to South African.

In summary, the preamble to the Statute of Westminster required that any alteration in the law of royal succession required 'the assent […] of the parliaments of all the dominions'. In addition, Canada, the Irish Free State and South Africa were protected by Section 4 of the Statute of Westminster, which also required 'request and […] consent' to imperial legislation. Since legislation affecting royal succession was imperial legislation, the process of 'request and […] consent' was required. Section 4 did not apply to Australia and New Zealand, but this was of little consequence since the British parliament was bound by the preamble to the Statute of Westminster, which required 'request and […] consent' of the dominion parliament to imperial legislation. Thus, imperial legislation providing for a change in royal succession required a request by all of the dominions and assent by their parliaments. It was not clear whether 'assent by parliament' in the preamble meant legislative consent or consent by resolution. The position in South Africa was, however, clear: no imperial act could extend to that dominion unless it was confirmed by an Act of the Union parliament. The proposal for morganatic marriage or a change to the Act of Settlement 1701 required internal legislative change.

The Preamble to His Majesty's Declaration of Abdication Act 1936

Gwyer's memorandum of 23 November dealt with the issue of compliance with the Statute of Westminster.[33] Gwyer, first, noted that non-compliance with the constitutional convention laid down in the Statute of Westminster would not necessarily invalidate any British Act. In other words, an amendment of the Act of Settlement would be effective in English law, notwithstanding any failure to obtain the 'request and […] consent' of the dominions. Gwyer pointed out that if a dominion did not request and consent to the British legislation, it could not extend to that dominion by reason of the Statute of Westminster and, therefore, the statutory amend-

[33] TNA: PRO PREM 1/449.

ments contained in the British legislation would not apply to that dominion. So, if the British Act amended the Act of Settlement but Canada did not request and consent to it then the Act of Settlement would remain unamended in Canada. If a dominion refused to request and consent to the British Act, that dominion would have to pass an Act in its own parliament altering the succession. Gwyer presumed this would follow the British example but the line of succession would be set in dominion by dominion, rather than British, legislation. Gwyer concluded if such events were to take place, 'the doctrine of the indivisibility of the Crown will have received a shock from which it will not easily recover'. The abdication crisis could therefore undermine the *inter se* doctrine.

On 3 December 1936, Baldwin telegrammed the dominion prime ministers and pointed out the necessity for the introduction of British legislation to alter the line of succession.[34] He proposed that 'in the circumstances of the case the less legislation, and therefore the less opportunity for public discussion and debate, the better, and accordingly that if possible legislation should be confined to the UK Act'. This statement had, as we have seen, an ulterior motive: the preservation of the *inter se* doctrine. Baldwin stated that the most desirable method was, therefore, to extend the British Act to the dominions by Section 4 of the Statute of Westminster. This could be done in a recital to the British Act. Baldwin invited the dominions to consider whether a resolution passed by the respective dominion parliaments when they next sat would be sufficient to satisfy the requirements of the preamble to the Statute of Westminster.

As we have seen, one interpretation of the preamble to the Statute of Westminster was that it required consent by legislation. A rival view was that a parliamentary resolution (rather than legislation) would suffice. The British prime minister was uncomfortable with the former interpretation: Baldwin was particularly anxious that the process should not involve dominion legislation. In his view, legislation was not necessary. The change in succession, Baldwin argued, was automatically re-incorporated in local law. He pointed out that Section 2 of the Commonwealth of Australia Constitution Act provided that references to the queen 'shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom'.[35] Thus, the crown in Australia followed, according to this theory, the British crown. Section 3 of the South African Constitution fol-

[34] TNA: PRO DO 121/37.
[35] 63 & 64 Vict c. 12.

lowed the Australian model and Baldwin pointed out this had been supplemented by the definition in Section 5 of the Status of the Union Act 1934, which stated that '"heirs and successors" shall be taken to mean His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland as determined by the laws relating to the succession of the Crown of the United Kingdom of Great Britain and Ireland'. According to Baldwin, 'what is made explicit in these two Acts may also be regarded as implicit in the Constitution of the other dominions'.[36] According to Baldwin, the internal law of the dominions already fixed the line of succession to follow the British line. Therefore, any change in the British line of succession would be automatically incorporated in the respective dominions. As a result, there was no necessity for any further dominion legislation. This was a theory of the 'implied incorporation' of the British legislation.

On 5 December 1936, the Canadian government responded and rejected Baldwin's theory of implied incorporation, 'in view of [the] recognised position of dominions in regard to the Crown' and on the basis that the preamble to the Statute of Westminster explicitly provided a role for the dominion parliaments when the line of succession was changed.[37] They indicated that they would be unable to convene the Canadian parliament given the vastness of the country. They were 'considering the feasibility' of Baldwin's proposals. If they adopted Baldwin's suggested course, they proposed that the Canadian government would consent to the British legislation. This would receive the assent of the Canadian parliament at its next sitting. They admitted that '[t]his course might be held not to be in strict accord with constitutional convention' but added that 'it conforms to it in substance'.[38]

[36] Baldwin did not stipulate what provision of the Irish Free State Constitution provided for this but the British attorney-general subsequently indicated it was his view that Article 51 did so; see further below. Article 51 stated: 'The Executive Authority of the Irish Free State … is hereby declared to be vested in the king, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the dominion of Canada.'

[37] TNA: PRO DO 121/37.

[38] The position of the Canadian government in 1936 proceeds from a fundamentally different position than that which was adopted by the 2013 Harper Government in relation to a subsequent change to the line of succession. In the case of the Harper Government, Baldwin's proposal of implicit amendment was essentially adopted.

The New Zealand government replied on 5 December but made no mention of Baldwin's implied line of succession theory.[39] They indicated that British legislation was sufficient, thus implicitly agreeing with Baldwin's argument, and that the preamble to the British Act should contain a recital of the request and consent of New Zealand. On 5 December the Australian government indicated that they felt that an Act of the Australian parliament was necessary; this would incorporate the British legislation.[40] Baldwin suggested that a parliamentary resolution, rather than legislation, might suffice to satisfy the Statute of Westminster and indicated that Australian legislation might lead to the conclusion that legislation was necessary in all the dominions. He pointed out that New Zealand and Canada were considering this course of action. On 6 December, the Australian government indicated they would consider whether a parliamentary resolution or legislation was necessary. On 6 December, the South African government stated that, as they had adopted the Statute of Westminster, they were required to introduce legislation to extend the British Act.[41] This response implicitly rejected Baldwin's 'implied incorporation' theory. Both the South African and Canadian governments in their telegrams indicated they wished to make it clear that the dominions had responded to the king's request and had not demanded the course of action. On 6 December the Canadian government also advised Baldwin that, contrary to his advice to the Australian government on 5 December, they had not decided whether to assent to the legislation by means of an Act of the Canadian parliament or by parliamentary resolution.[42] They indicated that, at that time, they were inclined to do so by statute. As we shall see, this is the course they eventually adopted.

On 6 December, Baldwin proposed the inclusion of the following recital in the British legislation: '[a]nd whereas following upon the communication to His Dominions of His Majesty's said declaration and desire the (here insert the names of Dominions) have requested and consented to the enactment of this Act'.[43] On 7 December, the South African gov-

[39] TNA: PRO DO 121/37.
[40] TNA: PRO DO 121/37.
[41] TNA: PRO DO 121/37.
[42] TNA: PRO DO 121/37.
[43] It should be pointed out the Malcolm MacDonald, the dominions secretary, later claimed that he had drafted the telegrams with the help of Neville Chamberlain and John Simon in Baldwin's name; see Malcolm MacDonald, *Titans and Others* (Glasgow: Collins, 1972), 66.

ernment responded and noted that this form of words would bring the British statute within the terms of Section 4 of the Statute of Westminster. The South African situation was governed by Section 2 of the Status of the Union Act, which required an Act of the South African parliament to extend the British Act to South Africa. The South African government therefore proposed that the preamble should simply declare that South Africa 'assents' to the British legislation, which was all that was necessary in order to comply with the preamble to the Statute of Westminster governing the royal succession.

As a result, the British government proposed to state that the dominions of Canada, New Zealand and Australia had 'requested and […] consented' to the British legislation, while the Union of South Africa had 'assented' to the legislation.[44] Canada, Australia and New Zealand objected to this wording as it seemed to imply that they had sought the abdication of the king more forcefully than the South Africans. New Zealand proposed that all dominions should be listed as 'assent[ing]'.[45] The Canadian government proposed separate preambles for each of the dominions.[46] Baldwin again proposed that the United Kingdom legislation was by implication incorporated in South Africa, but this view was not accepted by the South African government. The Canadian government further indicated that they were not prepared to allow the word 'assent' to be used in isolation. They pointed to the word 'request' used in Section 4 of the Statute of Westminster and stated that it did 'not appear desirable to set precedent for a lesser procedure or phraseology so far as Canada is concerned'.[47] At this point, 10 December, time was pressing and it was necessary to reach immediate agreement. It will be recalled that Edward had signed the instrument of abdication on 10 December. Baldwin therefore proposed the following preamble:

> And whereas following upon the communication to His Dominions of His Majesty's said declaration and desire, the dominion of Canada, pursuant to the provisions of the Statute of Westminster 1931 has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa have assented thereto.

[44] 7 December 1936 (TNA: PRO DO 121/37).
[45] 9 December 1936 (TNA: PRO DO 121/37).
[46] 9 December 1936 (TNA: PRO DO 121/37.).
[47] 10 December 1936 (TNA: PRO DO 121/37.).

Canada requested the inclusion of the phrase 'section four' before 'of the Statute of Westminster' and this phrasing was eventually adopted.

However, the compliance with the preamble to the Statute of Westminster 1931 was extremely casual. The preamble stated:

> [I]nasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne […] shall hereafter require the assent as well of the parliaments of all the dominions as of the parliament of the United Kingdom.

But the assent of all the dominion parliaments had not been secured before the passage of the British Act. The Australian parliament sat contemporaneously in order to ratify the actions of the British parliament but it was alone in doing so. Furthermore, neither the Free State parliament (as required by the preamble) nor the government (as required by Section 4) had assented in advance to the British Act that changed the line of succession. Accordingly, the Irish Free State was not mentioned in the preamble to the His Majesty's Declaration of Abdication Act 1936. Non-compliance with the 1931 Act did not, of course, affect the legality of the change of succession. The constitutional doctrine under which parliament was not bound by earlier parliaments meant that His Majesty's Declaration of Abdication Act 1936 could legally declare George VI king, notwithstanding non-compliance with the Statute of Westminster.[48]

Dominion Legislation

As we have seen, the preamble to the Statute of Westminster provided that 'any alteration in the law touching the Succession to the Throne […] shall hereafter require the assent as well of the parliaments of all the dominions as of the parliament of the United Kingdom'. It was unclear whether this preamble had full legislative force. Two dominions, Canada and South Africa, implemented the change in succession by legislation, while two

[48] See Albert Venn Dicey, *Introduction to the study of the law of the constitution* (London: Macmillan, 1915), 62–65.

others, Australia and New Zealand, proceeded by resolution.[49] The Canadians resisted Baldwin's invitation to proceed by resolution alone and insisted on legislation. This position was embodied in the Succession to the Throne Act 1937. Of more interest for our purposes is the opportunistic stance taken by the South African government.

South Africa had a strong republican lobby, which demanded the right to secede from the Commonwealth.[50] This demand may have been purely theoretical but it formed a part of South Africa's insistence that the crown was divisible. During the abdication crisis, Hertzog came to form a view that was to subvert the doctrine of the indivisibility of the crown. This view was that the abdication of Edward had taken place on 10 December, when Edward signed the instrument of abdication, and not on 11 December, when the British legislation came into force. This point of view was based upon a number of historical precedents cases involving Edward II, Richard II and James II.[51] It is sufficient for our purposes to consider the case of James II. The relevant statute here is the Bill of Rights 1689, which declared in the preamble that 'whereas the late king James II had abdicated the government […] the Throne was thereby vacant'.[52] On this view, a king was able to abdicate unilaterally. According to Hertzog, abdication was 'nothing else than a unilateral act which is free to any man who has undertaken services to a master or to anybody else'.[53]

Hertzog's argument overlooked two crucial points. First, it could be argued that any right of unilateral abdication had been repealed by virtue of the Act of Settlement 1701, which had fixed the line of succession by statue. A Canadian commentator noted:

> It seems obvious that a voluntary declaration of abdication by His Majesty would have had no effect whatever on his position as heir of the body of the most excellent Princess Sophia. In the absence, therefore, of a statutory exception permitting a voluntary abdication, or of a well-recognized com-

[49] 1 EDW VIII *Commonwealth of Australia Parliamentary Debates* (Vol. 152), cols. 2893–2894 for the Senate and col. 2901 for the House of Representatives (11 December 1936); and 25 *New Zealand Parliamentary Debates* cols. 5, 7 (9 September 1937).

[50] Edgar H. Brookes, "The Secession Movement in South Africa," *Foreign Affairs* 11 (1933): 347; W. Hancock *Survey of British Commonwealth Affairs: Volume I Problems of Nationality* (Oxford: Oxford University Press, 1937), 527–535.

[51] See 28 *Union of South Africa: Debates of the House of Assembly* col. 635 (25 January 1937).

[52] 1 Will & Mary c 2.

[53] 28 *Union of South Africa: Debates of the House of Assembly*, col. 636.

> mon law principle that could, with some plausibility, be read into the Act of Settlement, it is submitted that the courts would have continued to regard His Majesty as the reigning sovereign until parliament had declared to the contrary.[54]

Second, it was arguable that the instrument of abdication itself was not intended to apply *ex proprio vigore*. The instrument declared: 'I, Edward the Eighth … do hereby declare My irrevocable determination to renounce the Thrones for Myself and for My descendants, and My desire that effect should be given to this Instrument of Abdication immediately.' It is arguable that this wording simply declared the king's intention and that further action was necessary for it to take place.[55]

South Africa did not raise this issue when it could possibly have been incorporated into the British legislation. The South African insistence on the argument after the passage of the British Act infuriated the British. On 6 January 1937, the dominions secretary, Malcolm MacDonald, noted:

> The Union never raised this point when they saw our proposed legislation, had plenty of time to think about it, and assented to its enactment. Had they raised it, we could have considered legislating so that the late king's abdication took effect as from the moment of his signing the Instrument. Not having raised the point, and having assented to our proposal, surely the Union are now morally bound to make their legislation conform in this respect with ours.[56]

Hertzog presented his case in person to the governor-general, George Villiers, at Groote Schuur, the prime minister's Cape Town residence, on 10 January 1937.[57] Villiers asked Hertzog why any British legislation was necessary under the theory which Hertzog held. Hertzog replied that the heirs of Edward had to be excluded from the line of succession. Hertzog asked why the British government had included the word 'immediately' in the instrument of abdication, which made it automatically effective, according to Hertzog. Villiers tartly responded 'that the British govern-

[54] F. Cronkite, "Canada and the Abdication," *The Canadian Journal of Economics and Political Science* 4 (1938): 181.

[55] See Kenneth Hamilton Bailey, "The Abdication Legislation in the United Kingdom and in the dominions," *Politica* 3 (1937–38): 8–9.

[56] TNA: PRO DO 35/531/2/5.

[57] TNA: PRO DO 35/231/2/27.

ment could hardly be expect to provide for a contingency which according to their view of the law could not arise'.

Section 1(1) of His Majesty King Edward the Eighth's Abdication Act 1937, as passed by the South African parliament, stated: 'It is hereby declared that the Instrument of Abdication […] has, and has had, effect from the date thereof.' This Act was very important from a legal point of view. Edward VIII abdicated one day earlier in South Africa than in Britain. It was impossible, in light of this development, to maintain that the crown was indivisible. This undermined the *inter se* doctrine which had hitherto been the British approach to Commonwealth relations. Malcolm MacDonald's later commentary in his autobiography about the effect of the South African position was remarkably laconic—he indicated that he welcomed the demise of the theory of the indivisible crown.[58] This may be contrasted with his telegram at the time. While MacDonald was never the most fervent believer in the indivisible crown, there was a note of pique in this response to the South African approach to the abdication. Moreover, the South African approach limited how the British government could approach the Irish response to the abdication.[59]

The Irish Free State and the Abdication Crisis

The Irish Free State was the only member of the British Commonwealth of nations which was not mentioned in the preamble to the His Majesty's Declaration of Abdication Act 1936. The Irish Free State government perceived that the abdication crisis could be used to further advance their claims to internal sovereignty.

The Internal Situation

As we have seen, Fianna Fáil came to power in 1932 with the intention to pursue a republican constitutional agenda. The party aimed to eliminate all traces of British influence from the Constitution of the Irish Free State. In 1936, however, the process was far from complete. The crown, through its representative, the governor-general, continued to perform prominent, if only symbolic, functions in the Constitution. From the time of his elec-

[58] MacDonald, *Titans and others*, 71–72.

[59] On the Irish response, see Deirdre McMahon, *Republicans and Imperialists: Anglo-Irish Relations in the 1930s* (Yale: Yale University Press, 1984), 198–202.

tion as president of the executive council, de Valera had pressed to have the institution excised from the Constitution. In 1932, James MacNeill retired as governor-general and de Valera attempted to have the functions of the office exercised by either the chief justice or the president of the executive council.[60] In 1934, draft amendments to the Constitution were prepared which would have curtailed further the influence of the governor-general.[61] On both occasions, the institution of the governor-general survived. In April and May 1935 de Valera instructed John Hearne, legal advisor to the department of external affairs, to begin drafting a new Constitution.[62] In his oral instructions, de Valera indicated that the new Constitution was:

> To provide for the establishment of the office of President of Saorstát Eireann, the holder of which would fulfil all the functions now exercised by the king and the Governor General in internal affairs; and
>
> To contain provision for the retention of the king as a constitutional officer of Saorstát Eireann in the domain of international relations.[63]

On 10 June 1936, John Dulanty, Irish high commissioner to the United Kingdom, submitted a memorandum drafted by the Irish government to Clive Wigram, private secretary to the king, which outlined the Irish government's intention to introduce a new Constitution which would inter alia create the office of a directly elected president and abolish the office of governor-general.[64] In subsequent meetings between Dulanty and Malcolm MacDonald from June to October 1936, a number of difficulties emerged.[65] The British government wished to ascertain whether the king would be retained in the internal affairs of the country.[66] This was necessary in order for the British government to be satisfied that the Free State remained within the Commonwealth. The British government therefore recommended consultation between officials on both sides to clarify the

[60] See further Deirdre McMahon, "The Chief Justice and the Governor General Controversy in 1932," *Irish Jurist* 17 (1982): 145; and Brendan Sexton, *Ireland and the Crown 1922–1936: The Governor-Generalship of the Irish Free State* (Dublin: Irish Academic Press, 1989), 125–151.

[61] NAI: Taois s. 2793, 2794, 2795, and 2796.

[62] UCDA: P150/2370.

[63] UCDA: P150/2370.

[64] UCDA: P150/2368.

[65] NAI: DFA/2003/17/181.

[66] NAI: DFA/2003/17/181, see, for example, meetings of 24 June and 8 September.

legal position envisaged under the new Constitution.[67] De Valera viewed the matter as purely internal and made clear that no consultations about the new Constitution could take place. On 3 November, Joseph Walshe, secretary of the department of external affairs, composed a note on a meeting which had taken place that day between Dulanty and Horace Wilson.[68] In this meeting, Wilson said that '[e]ven if the king did not participate at all in internal affairs something might be done provided there was not a complete eviction'. Walshe did not attach any importance to statements by civil servants but noted that the statement illustrated 'how far the [British] have been obliged to move towards us by the system of the "fait accompli"'. The abdication of the king was to provide the opportunity for a greater *fait accompli*.

The first recorded message on the Irish side mentioning the abdication was a letter dated 19 November 1936 from Dulanty in which he mentioned the rumours circulating about the king.[69] On 29 November 1936, Sir Harry Batterbee held a meeting with Eamon de Valera, Joseph Walshe, John Dulanty and John Hearne.[70] Batterbee communicated the three choices which Baldwin had discussed with the king. De Valera emphasised that the king was viewed differently in the Free State than in the United Kingdom as the former's 'interest in the king was purely from the point of view of function and not from any personal point of view'. De Valera also noted he had indicated his intent to remove the king from the internal constitutional position of the Free State and de Valera's wish that the king's position had been clarified before the abdication crisis.[71]

De Valera indicated he did not intend to acquiesce to the British suggestion that the Free State request and consent to the British legislation as he believed this would '[e]xpos[e] himself to the charge that he had not preserved for the Irish Free State the position of complete equality in constitutional matters which had been attained under the Statute of

[67] NAI: DFA/2003/17/181, see, for example, meeting of 19 October. At this meeting were Dulanty, Harry Batterbee, assistant under-secretary at the dominions office, and Horace Wilson, head of the British civil service.

[68] UCDA: P150/2173. The note refers to a meeting between Dulanty and British civil servants but does not identify the others present.

[69] NAI: DFA 2003/17/181.

[70] TNA: PRO DO 121/37.

[71] TNA: PRO DO 121/37.

Westminster'.[72] The point indicates de Valera's extreme view of 'equality' under the Statute of Westminster as it will be recalled that the procedure the British wished to use was also set up under the same Statute. Therefore, the use of the procedure could hardly infringe on the principle enshrined in the same Act. De Valera's view of 'equality' under the Statute of Westminster was closer to a guarantee of national sovereignty.

In the course of his discussion, de Valera indicated he would prefer the morganatic alternative, perhaps for mischevious reasons. Both Dulanty and Walshe agreed with this point. De Valera pointed out 'every avenue ought to be explored before [Edward] was excluded from the throne'. Batterbee interjected that the British approach to the throne was different to that of the Free State:

> [M]ost of us regarded it with an almost religious veneration and all our information went to show that public opinion in this country […] would not tolerate the king marrying a woman of the nature of Mrs. Simpson—Caesar's wife must be above suspicion.[73]

At this stage de Valera indicated his preference, given Batterbee's representation, for the third option—abdication. Significantly, Batterbee noted de Valera intended to 'impress upon me, for better or worse, we had reached a parting of the ways'.

In an interesting development, later that day Batterbee met Walshe and Hearne without de Valera.[74] In the course of that discussion the Irish officials broached the possibility of a constitutional settlement between the two countries. They suggested privately the only way the Free State could retain the king's internal influence was 'for the principle of a United Ireland and for that alone'. The Irish officials suggested inter alia a federative body drawn from the representatives of the parliaments of Northern Ireland and of the Free State, a financial settlement and some form of Commonwealth citizenship.

De Valera decided to proceed slowly with the implementation of the abdication procedure. On 5 December, de Valera telegrammed Baldwin, noting:

[72] TNA: PRO DO 121/37. Batterbee had indicated the preferred British approach. De Valera's words were a response to this approach.

[73] De Valera apparently based his preference for the morganatic option on the basis of the legality of divorce as a recognised institution in England.

[74] TNA: PRO DO 121/37.

> [T]he news of intended sudden action on Monday next within a week of the receipt of the first information concerning the position gives me serious cause for anxiety. Apart from other reasons legislation in our parliament would be necessary in order to regularize the situation […] Such legislation at this moment would cause grave difficulty. Is there no alternative to immediate abdication?[75]

One further source of difficulty was that the Dáil had adjourned on 27 November 1936 and did not plan to sit until 3 February 1937.[76]

On 10 December 1936, the cabinet resolved to pass two pieces of legislation to deal with the abdication.[77] It was unsurprising that the Free State would choose to legislate separately from the rest of the Commonwealth given the independent position which had been staked out by Fianna Fáil in relation to constitutional affairs since 1932. This legislation was introduced:

1. to give effect to the abdication as far as the Saorstát was concerned;
2. to delete from the Constitution all mention of the king and of the Representative of the Crown whether under that title or under the title of Governor General;
3. to make provision by ordinary law for the exercise by the king of certain functions;
4. in external matters as and when so advised by the Executive Council.[78]

Also on 10 December, Walshe had a telephone conversation with Batterbee in which Batterbee attempted to convince Walshe that a resolution would suffice for the purposes of the preamble to the Statute of Westminster—in effect, that no legislation was necessary and that the change in succession was automatically incorporated by Article 51 in the Irish Free State:

> The Attorney-General would at least have to say that, as a lawyer, he had to look at the law and interpret the Constitution, especially Article 51, as implying 'that the king of the United Kingdom was the king in the Irish Free State within the meaning of the Irish Free State Constitution until the

[75] NAI: DFA s57.
[76] 64 *Dáil Debates* col. 1228 (27 November 1936).
[77] NAI: Taois CAB 7/377.
[78] NAI: Taois CAB 7/377.

> dáil otherwise provided.' The Attorney-General would enunciate this doctrine as mere theory if that would help.[79]

Walshe indicated such an account would be intolerable and commented in a memorandum prepared on the day of Batterbee's suggestion:

> Such an answer made on such authority would cause serious detriment to our position as established in the Statute of Westminster. Indeed, if it were accepted as a Constitutional convention it would destroy the effect of the renunciation in the Statute of Westminster that the British have no right to legislate for the other Members of the Commonwealth without their request and consent.[80]

It is unclear whether the memorandum was delivered sufficiently quickly to influence the cabinet discussion or whether the cabinet reached its conclusion as to the merits of a swift legislative response independently of this advice. What is clear is that by 1.30 p.m. on 10 December de Valera had instructed Walshe to contact Batterbee and let him know that he (de Valera) was attempting to convene the Dáil the following day. The agreed text to be delivered to a question asked in the House of Commons about the legislative situation in the Free State stated: 'I have received a message from Mr de Valera that the government of the Irish Free State are summoning their parliament, if possible, tomorrow to make provision for the situation which has arisen in the Irish Free State.'[81]

De Valera viewed the possibilities raised by the abdication crisis with some excitement. Included in his papers is the following handwritten note:

> No barrier
> 32 Counties Repub.
> New Constit. foreshadowed[82]

[79] NAI: DFA 2003/17/181.
[80] NAI: DFA 2003/17/181.
[81] NAI: DFA 2003/17/181.
[82] UCDA: P150/2345. The note contains references to the numbers voting for and against the Bills in the Dáil sessions. We can date this part of the note as, at the latest, 10 December 1936, however, as it makes reference to 'Exec.—Functions'. The Bill, which was to become the Executive Authority (External Relations) Act 1936, was first called the Executive Functions (Foreign Relations) Bill 1936 when it was drafted by the parliamentary draftsman. The Bill had been redrafted by 11 December with the title it was eventually to bear.

The fact that the Dáil was to reconvene the next day meant the Bills were drafted with some haste. The parliamentary draftsman, Arthur Matheson, drafted the Bills on 10 December, handed three copies to John Hearne, received revisions, redrafted the Bills and sent them to the printers on the same day.[83] Matheson's diary from the period indicates that he met with Hearne and George Gavan Duffy, then a senior counsel, to discuss the legislation.[84] It seems clear that one copy was for Hearne and one for de Valera; the third copy may have been either for Walshe, who was present at the Batterbee meeting, or for Gavan Duffy, who was informally providing the government with constitutional advice.

Legislation

Of the two pieces of legislation introduced, only part of the Executive Authority (External Relations) Act was necessary to deal with the abdication crisis itself. Section 3(2) of the Act stated:

> Immediately upon the passing of this Act, the instrument of abdication executed by His Majesty King Edward the Eighth on the 10th day of December, 1936 […] shall have effect according to the tenor thereof and His said Majesty shall, for the purposes of the foregoing sub-section of this section and all other (if any) purposes, cease to be king, and the king for those purposes shall henceforth be the person who, if His said Majesty had died on the 10th day of December, 1936, unmarried would for the time being be his successor under the law of Saorstát Eirean.[85]

This phrasing was inserted only at the committee stage of the Bill on 12 December 1936.[86] At 1.38 a.m. on 11 December the Free State received a telegram containing the text of the British Act and, given the resemblance in wording, it seems clear that this final version of the text was substantially influenced by the final British version. This was a precautionary measure, as explained by de Valera when introducing the amendment:

> I indicated that there were certain words raised last night in which there might be some nook or corner which Edward VIII or his disembodied spirit

[83] NAI: AGO/2000/22/738 and AGO/2000/22/739.

[84] Gavan Duffy was appointed to the High Court on 21 December 1936. A schedule to the Act contained the instrument of abdication. NAI: AGO/2001/49/81.

[85] A schedule to the Act contained the instrument of abdication.

[86] 64 *Dáil Debates* col. 1500 (12 December 1936).

> might be hovering around to get possession of. It was to make quite certain that, if there was any such nook or corner, it would be taken possession of, if I might put it that way, not by Edward VIII, but by his successor.[87]

Sections 1 and 2 of the Act provided that consular and diplomatic representatives would be appointed on the advice of the government of the Free State and that all international agreements would require the assent of the parliament of the Free State. Section 3(1) stated that the Irish Free State was:

> associated with the following [Commonwealth] nations and so long as the king recognized by those nations as a symbol of their co-operation continues to act on behalf of each of those nations […] the king so recognized may, and is hereby authorized to, act on behalf of Saorstát Eireann for the like purposes as and when advised by the Executive Council to do so.[88]

In the Irish Free State, however, the king was retained only as a 'symbol' and then only insofar as he was a symbol of co-operation with an international body.

The Executive Authority (External Relations) Act 1936 came into force on 12 December 1936. Section 3(2) of the Act provided that the abdication was operative within the Free State from the date that the Act came into force—12 December 1936. It will be recalled that the South African government maintained that the abdication operated from 10 December 1936 but that the British government claimed Edward VIII abdicated on 11 December. The South African claim undermined the *inter se* doctrine of Commonwealth relations. The Free State legislation undermined the doctrine for the same reason.

The Constitution (Amendment No 27) Act contained a schedule which amended ten Articles of the Free State Constitution, essentially deleting the internal functions of the king in the State.[89] From a purely legal stand-

[87] 64 *Dáil Debates* col. 1500.

[88] The earlier draft had made reference to the 'British Commonwealth' and the 'monarch' rather than the more passé statements contained in the final draft; see above note 33. John A. Costello attempted to insert a reference to the 'British Commonwealth of nations' at the Committee Stage; see 64 *Dáil Debates* col. 1485 (12 December 1936).

[89] The amended Articles were 2A, 12, 24, 41, 42, 51, 53, 55, 60 and 68. Some Articles were deleted, for example Article 60, while others transferred duties requiring the king's assent to the Chairman of the Dáil, for example Article 42.

point, this piece of legislation was completely unnecessary to resolve the abdication crisis successfully. The result of these two Acts was that the link between the Free State and the crown was relegated from a constitutional to a statutory basis.

In the Dáil, deputy John A. Costello pointed out that he 'failed to see any possible connection between the abdication of the king and the provisions of [the Constitution (Amendment No 27) Act] purporting to take out the references to the king in the Constitution'.[90] De Valera's speech explained the Irish response to the abdication crisis:

> In these two Bills we are giving expression to the position as it is to-day, in reality and in practice, and, if we are to take responsibility for Bill No. 2, we are not prepared to do so unless we have Bill No. 1, which makes quite clear what the functions of the king are for whom succession is provided. We think this is the proper time. In the time of King Edward VIII I had indicated quite clearly that we proposed in the new Constitution to make the position of the king roughly as it was in the old Constitution, with these deletions.[91]

What is clear from the speeches of deputies Costello, Frank MacDermott and Desmond Fitzgerald[92] is that their primary concern was whether the proposed constitutional amendment would result in the Free State being excluded from the Commonwealth. Malcolm MacDonald, secretary of state for dominion affairs, had indicated in private to de Valera that exclusion might be a possibility.[93] The issue was raised in the Dáil by the leader of the opposition, William Cosgrave, who put three questions to de Valera:

> One: is it the intention of the Executive Council, in these Bills, to sever the connection of this State with the Commonwealth of Nations? The second question is: has consideration been given by the government as to whether the Bill severs or jeopardizes our membership of the Commonwealth? And,

[90] 64 *Dáil Debates* col. 1293 (11 December 1936).

[91] 64 *Dáil Debates* col. 1279 (11 December 1936). Strictly speaking, of course, the 'time of King Edward VIII' continued in Ireland until the Bills were passed; the use of the past tense would only have been appropriate under the Westminster approach rejected by the Free State on 10 December.

[92] 64 *Dáil Debates* cols. 1310–1311 (MacDermott). 64 *Dáil Debates* cols. 1315–1318 (Fitzgerald).

[93] Malcolm MacDonald, *Titans and Others*, 70.

> three, in connection with the second question, has there been consultation with all or any of the other States, members of the Commonwealth of Nations, as to the effect of the proposed legislation on our relations with them?[94]

De Valera answered that there had been no change in Commonwealth status as Article 1 of the 1922 Constitution was not affected by the legislation.[95] He stated there had been no need to consult the other dominions on the matter as the matter was one which 'affects ourselves alone'.[96] The concern of the deputies expressed subsequent to de Valera's answer was as a result of the fact that they were not sure whether his answer would be accepted by the other relevant parties.

Anglo-Irish Relations

On 14 January 1937, a meeting was held between MacDonald and de Valera in London.[97] MacDonald questioned de Valera about the Executive Authority (External Affairs) Act 1936 but made an important concession when dealing with the constitutional legislation:

> The Constitution (Amendment No 27) Act 1936 dealing as it did with the internal affairs of An Saorstát was clearly the concern only of the people of An Saorstát. Absolute freedom in internal affairs was of course one of the bedrock principles of the Commonwealth.[98]

In a memorandum to his cabinet colleagues circulated on 18 January 1937, MacDonald outlined the reasons for accepting or rejecting the Irish

[94] 64 *Dáil Debates* cols. 1232.

[95] Article 1 stated: 'The Irish Free State is a co-equal member of the Community of Nations forming the British Commonwealth of nations.'

[96] 64 *Dáil Debates* col. 1233.

[97] See generally David Harkness, "Mr. de Valera's dominion: Irish relations with Britain and the Commonwealth, 1932–1938," *Journal of Commonwealth Political Studies* 8 (1970): 220–221. MacDonald's importance to the development of Anglo-Irish relations in the 1930s may be discerned from the fact that in Deirdre MacMahon's consideration of the time period, he is given his own chapter: *Republicans and Imperialists, Anglo-Irish Relations in the 1930s* (New Haven: Yale University Press, 1984), Chap. 9.

[98] NAI: DFA 2003/17/181.

legislation.[99] The reasons for rejection were, first, that the legislation was a breach of the treaty. Second, if the Free State was allowed to remain a member of the Commonwealth under such circumstances then other countries might also attempt to join under like conditions. Third, the legislation might not signal 'the beginning of Mr. de Valera's permanent acceptance of the king'. MacDonald, however, did not believe this was correct as he placed weight on de Valera's desire for a united Ireland and the only possibility for attaining this was within the Commonwealth. Fourth, and most importantly, rejection could serve as a bad example to other dominions. MacDonald pointed to Herzog's difficulties with a republican movement in South Africa and the Indian unrest which was occurring at that time. MacDonald discounted this risk as 'the other dominions are already rather inclined to regard the Irish as curious people who must do things differently from everybody else'.

The reasons for accepting the legislation were as follows. First, if they attempted to force the Irish out of the Commonwealth, they would be doing so to a country which had voluntarily accepted the king as king of Ireland. Second, it would exacerbate the ongoing political difficulties. Third, it would strengthen the British defensive position if they could come to some sort of arrangement regarding defence. Fourth, the Commonwealth was not a static organisation and there was no reason to accept the internal functions of the crown in dominions as the final resting place of the organisation. Finally, the Irish position was a matter of common concern for all members of the Commonwealth.

On 2 February 1937, the dominions were telegrammed by the British government on the Irish legislation.[100] The telegram laid out the basic structure of the Acts and pointed out de Valera did not intend to include Article 1 of the 1922 Constitution, which provided that the state was 'a co-equal member of the Community of Nations forming the British Commonwealth of nations', in the new Constitution. The British government stressed the need for consultation with the other members of the dominion but was prepared to accept that the legislation did not effect 'a fundamental alteration in the position of the Irish Free State as a Member of the Commonwealth'.

The British government attached three further points to be brought to de Valera's attention. First, they 'attach[ed] particular importance' to the

[99] TNA: PRO CAB 24/267.
[100] TNA: PRO CAB 24/268 C.P. 52 (37).

proposition that Article 1 be included in the new Constitution or else in an amendment to the Executive Authority (External Affairs) Act to include this. Second, they wanted it made clear that the Free State recognized the king as a symbol of *their* co-operation with the Commonwealth, not just as a symbol of another's co-operation. Third, they wanted the king to be referred to specifically and not as an 'organ'. Despite these objections, the British did not advocate the expulsion of the Free State from the Commonwealth.

The Bodenstein Memorandum

As a result of the developments in Commonwealth relations, including the British telegram, in February 1937 Dr. H.D.J. Bodenstein, secretary of the department of external affairs of South Africa, authored a memorandum on the Irish response to the abdication crisis.[101] This memorandum examined the question of whether the Free State legislation placed the country outside the Commonwealth. Bodenstein stated that, according to the 1926 Balfour declaration, there were two essential factors in the Commonwealth:

1. Members were united by a common allegiance to the crown, and
2. Members were freely associated.

Bodenstein pointed out that allegiance is a 'relationship between the person of the Sovereign and his subject as a natural person'. Allegiance could not describe the relationship between bodies politic, namely the dominions and the crown.[102] Bodenstein concluded, therefore, that allegiance was not used in a legal sense but must have been used to describe some identical relationship between the dominions and the crown. He stated that in 1926 the king was the head of the executive and formed a part of the legislature, and that justice was dispensed in his name in each of the dominions. Bodenstein did not thereafter establish which of the three elements, or perhaps a combination thereof, best described the relationship between the dominions and the crown. Instead, he asked 'how much of his royal powers the king may be deprived of without the rela-

[101] NASA: BTS/1/31/1 memorandum entitled 'Memorandum on recent changes in the Irish Free State Constitution and its effect on the membership of the Irish Free State of the British Commonwealth.'

[102] He relied on *Calvin's Case* (1608) 77 ER 377, where it was held '[a] body politic (being invisible) can neither make nor take homage', 389.

tionship existing between the equal autonomous communities ceasing to exist'. Bodenstein left a considerable gap in his analysis. Unless one could ascertain what the elements were of the relationship between the dominions and the crown, it would seem impossible to determine subsequently whether that relationship had ceased to exist.

Bodenstein pointed out the king could be deprived of powers by either (1) assigning them to another body but allowing them to be exercised in the name of the king, or (2) assigning them to another body *simpliciter*. The first procedure did not impair the position of the king as the powers were still nominally exercised by the king. If, under the second procedure, the king were deprived of all legal power then he would 'be merely an ornament in the community, useful perhaps for social purposes, and wield only such influence as he may command in virtue of his own personality'. Bodenstein pointed out that it would be difficult to exclude a dominion even under these circumstances 'merely because it has […] brought legal theory into line with actual practice'. However, theoretically, the crown was a part of the executive, legislature and judiciary; as a matter of practice, the power was vested in the government, the popular representatives and the judiciary. Bodenstein concluded that the Free State had not even gone so far as to completely eliminate the king as they had retained the crown in relation to external affairs. Therefore, Bodenstein concluded the Free State had not violated the common allegiance to the crown.

Bodenstein then turned to the matter of free association He concluded that the question of how States associated within the Commonwealth was entirely in the field of politics:

> It is possible for the Members of the British Commonwealth of nations to continue to co-operate and to remain associated even if the king plays no role whatsoever in their constitutional law. It is also possible for such co-operation to cease completely without altering the relationship between the Members of the British Commonwealth of nations provided the king be maintained.

This memorandum shows that legal thinking, within South Africa at least, was conciliatory in regard to the Irish position. As will be recalled, the Irish Free State fulfilled the first of the two criteria outlined above: the king was to play no role in its constitutional law. This memorandum illustrates the difficulties which Britain faced if it attempted to expel the Free State from the Commonwealth. In fact, the South African government was prepared to consider the possibility that even in the absence of the External Relations (Executive Authority) Act 1936, the Free State would remain within the Commonwealth.

The dominions accepted the position outlined by the British government in the telegram of 2 February 1937 and it was in those terms that the position of the Commonwealth was outlined to de Valera in April 1937. The Free State was not to be expelled from the Commonwealth. Nonetheless, the position staked out by de Valera had, as is clear from the Bodenstein memorandum, altered the conception of the Commonwealth in the eyes of the South African government. The Free State had always been somewhat of a cuckoo in the Commonwealth nest, a position reflected in the scholarship—David Harkness' volume on the Cumann na nGaedheal government's relationship is entitled *The Restless Dominion*. In 1936, the Irish Free State managed not only to displace the crown from the internal affairs of the State, but also to re-fashion the Commonwealth itself by doing so from within the nest.

Conclusion

The abdication of King Edward VIII tested the foundations of the Commonwealth. The United Kingdom was forced to consult with the dominions in order to pass legislation altering the line of succession. Canada and South Africa used the situation to pass legislation which bolstered their claims that the crown was divisible. This was a blow to the British theory of *inter se* relations between Commonwealth countries. The South African violation of the indivisibility of the crown meant that the Irish Free State government found itself negotiating with a British government whose confidence had been weakened.

The British administration of December 1936 was a less muscular one than that which had confronted de Valera in June 1932. This was partly due to the drawn-out trade war between the Free State and the United Kingdom, but also to a change of personnel, particularly Malcolm MacDonald for James Thomas in the dominions office. The new personnel were more amenable to strengthening Anglo-Irish ties. Moreover, the opinion of the British cabinet had shifted, with previous advocates of a hard stance, such as Neville Chamberlain, now adopting a more conciliatory tone.[103] This meant that hardliners such as Lord Hailsham were isolated and, ultimately, lost their influence over the dispute. One potential problem which faced de Valera in the enactment of

[103] See further Donal K. Coffey, "The Commonwealth and the Oath of Allegiance Crisis: A Study in Inter-War Commonwealth Relations," *Journal of Imperial and Commonwealth History* 44, no. 3 (2016): 492–512.

a new Constitution which excluded the crown from the internal affairs of the State, a recalcitrant British government and Commonwealth, had been removed.

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CHAPTER 4

Constitutional Drafting and Contemporary Debates

The drafting of the Constitution in 1937 was a complicated process, and is the subject of *Drafting the Irish Constitution 1935–1937*. Until now, accounts of the drafting process have suffered from the lack of a clear drafting timeline. This drafting timeline is remedied by the use of a sequential method of draft dating, which is then deployed to analyse the history behind articles that have changed during the drafting process. It is not possible to give more than a brief commentary in this volume; interested readers are advised to consult *Drafting the Irish Constitution 1935–1937* for a more in-depth analysis of the process. Nonetheless, there are certain trends in Irish historiography that can be addressed briefly here. These relate to a number of discrete topics, but demonstrate, as a whole, that the drafting process was transnational, one influenced by contemporary theories of constitutionalism in Europe and the wider world. It is useful, however, to draw attention to some discrete elements of the drafting project in 1937 to give some indication of important trends. There are three topics that will be dealt with here: historiography and the Constitution; the religious dimension of John Hearne's thought; and the establishment of judicial review in the Constitution itself. These three topics disclose a complex picture of the drafting process, one that was characterised by outward-looking drafters but also tempered by Catholicism in certain key dimensions. In order to

D. K. Coffey, *Constitutionalism in Ireland, 1932–1938*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76237-1_4

consider these topics in detail, however, we need to have some understanding of the context surrounding the drafting of the 1937 Constitution, specifically the general trends in constitutionalism and the individuals involved in the drafting process.[1]

Constitutional Drafting in the Inter-War Period

Inter-war constitutions are an endangered breed. In Europe, the last remaining constitution from the time is that of Ireland, which was drafted and ratified in 1937. Certain features were characteristic of the European trend at the time: popular sovereignty, a head of state wielding a suspensive veto, extensive liberal rights provisions, and provisions relating to economic rights and the organisation of the state were all new features that appeared in liberal democracies after the end of the First World War. The archetype of this new constitutional structure was the 1919 Constitution of the Weimar Republic, although individual features could be seen in the 1918 Constitution of the Russian Socialist Federal Soviet Republic and the 1917 Constitution of the United States of Mexico. They were conspicuous by their absence from, for example, the 1915 Constitution of Denmark and the Constitutional and Organic Laws of France between 1875 and 1919.

The inter-war years were a time of constitutional experimentation, which was to fail tragically in most instances. Nonetheless, in the early 1920s liberal democracies were ascendant in Europe and it was only as the decade progressed that the precarious nature of these democracies emerged—first in Italy in 1922, then in Poland and Portugal in 1926, and finally the Kingdom of the Serbs, Croats and Slovenes in 1929 (which became, in the process, Yugoslavia). The tendency as the 1920s waned and the 1930s dawned was towards greater authoritarian rule, and the constitutions formed in the wake of the change in the political atmosphere reflected this. When Austria introduced a constitution in 1934, for example, the country moved from having a liberal constitution (written by Hans Kelsen in 1920) to becoming a corporatist dictatorship. This was, in part, influenced by the teachings of the Catholic Church in the 1930s, which emphasised corporatism as a 'third way' between communism and laissez-faire economics. The one pre-1937 European exception to the

[1] This material overlaps with *Drafting the Irish Constitution 1935–1937*, but is necessary here in order to give clarity on the historiographical points considered later.

trend was the admirable but doomed 1931 Constitution of the Second Spanish Republic.

In 1937, the Irish Free State was a member of the British Commonwealth of Nations, and the drafting of the 1922 Constitution bore the traces of this influence. The institutions of state were broadly comparable to those of the other dominions—the Crown was present in all three branches of government. In 1922, the head of the executive council was the governor-general, legislation had to be signed by him, and appeal to the Judicial Committee of the Privy Council still existed. These provisions were gradually removed, until in 1936 all traces of the crown had been excised from the Free State Constitution. The Irish Free State's time as a constitutional monarchy had drawn to a close. This Commonwealth constitutionalism was in tension with the other element underpinning the 1922 Constitution: popular constitutionalism.[2] The tension between these concepts mirrored the division between the Irish and British negotiators of the 1922 Constitution: the Irish preferred the popular constitutional model, while the British preferred the monarchical elements.[3] The position in 1936 was a confused one: the monarchical elements of the Constitution had been removed, but the provisions of the Constitution remained, according to the Irish courts, subject to the Articles of Agreement for a Treaty between the United Kingdom and Ireland.[4]

It was in this maelstrom of constitutionalism that the Irish Constitution was drafted in 1937. It bears the traces of these constitutional debates, and is situated within the cross-currents of European constitutionalism at the time. The institutions of state that were established were those of a broadly liberal democracy, although with the possibility of corporatism if that was, ultimately, what the people wanted. In 1922, the Irish Free State Constitution ensured a series of liberal rights. These were expanded in 1937 to include provisions relating to social and economic rights. The drafting of these new articles again reflected the tensions to which the 1937 Constitution was subject: the expansion of rights proceeded along the lines of the liberal constitutions, but the examples drawn upon for the articulation of those rights were derived primarily, at least in the first

[2] See Laura Cahillane, *Drafting the Irish Free State Constitution* (Manchester: Manchester University Press, 2016), 87–88; Leo Kohn, *The Constitution of the Irish Free State* (London: George Allen & Unwin, 1932), 112–116.

[3] Cahillane, 47–65.

[4] *The State (Ryan) v Lennon* [1935] 1 IR 170. On this case, see Donal K. Coffey, "The Judiciary of the Irish Free State," *Dublin University Law Journal* 33, no. 2 (2011): 70–73.

instance, from illiberal regimes—from Portugal and Poland in particular. Constitutional courts, corporative chambers, territorial questions—all were of this time, and all were wrestled with in the drafting process. The success of the Irish Constitution may be said to derive from its institutional resilience; it is notable that the provisions establishing the organs of state were not predominantly derived from the authoritarian tradition. This was to prove important in terms of the viability of the Constitution in the longer term. It is notable, for instance, that the constitutions of Portugal and Spain, which survived the inter-war period, both collapsed in the 1970s as a result of their reliance on authoritarianism. Both these constitutions, as well as the Irish, were influenced substantively by Roman Catholicism—one difference between them was the resilience that a democratic framework provided. Another difference that should not be forgotten was the colonial nature of many of the European constitutions of the time. Article 1 of the Portuguese Constitution of 1933 included references to 'West Africa', 'East Africa', 'Asia' and 'Oceania', and continued in subsection 2 that the only territory that could be acquired by a foreign country was for diplomatic purposes. The decolonisation movement of the post-war period was to place considerable pressure on the constitutional structures of those countries with colonies. In Ireland, there were obviously no overseas territories. It is notable, however, that the territorial claim that Ireland did make through Articles 2 and 3, to Northern Ireland, was removed as part of the Good Friday Agreement in the 1990s.

The institutional resilience of the Irish Constitution is significant in the sense that the institutions were framed by the earlier liberal democratic constitutions of this period. The suspensive veto and judicial review of legislation are the best examples of this trend. The Irish Constitution was, ultimately, a mixture of four broad trends: Commonwealth constitutionalism; popular constitutionalism; the liberal democratic constitutionalism of the immediate aftermath of the First World War; and Catholic corporate thought. The first, Commonwealth constitutionalism, is a shadow of its importance in the Irish Free State Constitution. As already outlined, this was primarily as a result of changes that occurred in 1936. Traces can, however, be seen in different elements of the Constitution, including, for example, the provision in relation to the prerogative. Popular constitutionalism was present in the 1922 Constitution, but this is even clearer in the preamble and opening articles of the 1937 Constitution. The liberal democratic trend can be seen in various institutional structures, predominantly in the presidency and courts. Catholic corporate thought can be

detected in the Senate. The fundamental rights provisions are a blend between the liberal democratic and the Catholic trends, with the former more prominent in Article 40 and the latter in Articles 41, 42, 43 and 45.

These trends can only be examined through a fine-grained analysis of the drafting of the various articles of the Constitution. Certain influences can be pinpointed more clearly early in the process, but become less apparent by the final draft due to alterations made during drafting, for example the influence of European constitutionalism on the fundamental rights articles.

The Drafters

The most useful way to track the input of the parties is chronological. It may be useful first, therefore, to set out a skeleton timeline when considering the influence of the various actors:[5]

15 May 1935—John Hearne produces a prospective first draft of a new Constitution.

August 1936—Plan of Fundamental Constitutional Law.

4 September 1936—Edward Cahill makes his first submission.

19 October 1936—First full draft of the Constitution.[6]

20–28 October 1936—Cabinet discussions the draft Constitution.

21 October 1936—Jesuit submission on the Constitution.

November 1936—John Charles McQuaid receives a letter from de Valera on the Constitution.

1 December 1936—Second full draft.

January 1937—Department of finance provides commentary on financial articles in 1922 Constitution.

11 January 1937—Third draft.

13 February 1937—Fourth draft.

15 February 1937—George Gavan Duffy is consulted on the Constitution.

16 February 1937—Arthur Matheson reviews drafts of the Constitution.

28 February 1937—Fifth draft.

15 March 1937—Drafts distributed to government departments and individuals for comment.

[5] For a fuller exposition of the drafting chronology, see *Drafting the Irish Constitution 1935–1937*.

[6] Michéal Ó Gríobhtha was seconded from the department of education to the department of the president of the executive council on 19 October 1936 to translate the English draft into Irish. He worked on it until the Dáil approved it on 14 June 1937; see UCDA: P122/103.

John Hearne

A recent biography of John Hearne by Eugene Broderick traces his life as a supporter of the Irish Parliamentary Party through his career—assistant parliamentary draftsman in 1923, legal adviser to the department of external affairs in 1929 and the primary draftsman of the Irish Constitution in 1937.[7] Hearne's memoranda on the foundations of the Irish Free State were important for the constitutional changes made in the 1930s, and in 1934 he was a member of the Constitution Review Committee. Hearne's drafting background and legal training made him the natural candidate to be entrusted with the drafting of the 1937 Constitution.

The role of John Hearne was first given detailed treatment by Dermot Keogh in 1986.[8] In 1987, Brian Kennedy devoted two articles exclusively to the influence of Hearne, published in the *Irish Times* and in *Éire-Ireland*.[9] These works are, however, not as extensive a treatment of Hearne's life as Broderick's recent volume.

The usefulness of the method pioneered in *Drafting the Irish Constitution* is that it forces us to limit our analysis of the Constitution to a more clearly linear structure. To give an example of where this approach helps with recent scholarship, consider the following passage from Eugene Broderick's book:

> On 30 April and 2 May, de Valera had meetings with John Hearne. A record of these conversations has been preserved in a document which has come to be known as 'the squared paper draft'. This was written in de Valera's own handwriting on thirteen pages of a mathematics copy. It was his contemporaneous personal record of the conversations between the two men. It was not a draft of a constitution; rather it was a record of discussions regarding a proposed draft, an unofficial memorandum of dialogue

[7] Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* (Dublin: Irish Academic Press, 2017).

[8] Dermot Keogh, *The Vatican, the Bishops and Irish Politics, 1919–1939* (Cambridge: Cambridge University Press, 1986), 208: 'But who was most responsible for contributing to the formulation of the new document over the two-year period? The central figure in the process was unquestionably John Hearne—an able and knowledgeable civil servant who had once been a student for the priesthood.'

[9] Brian Kennedy, "The Special Position of John Hearne," *The Irish Times*, 8 April 1987. Brian Kennedy, "John Hearne and the Irish Constitution," (1937)', *Éire-Ireland* 24, no. 2 (1989): 121. See also Dermot Keogh, "The Irish Constitutional Revolution," 8–11.

> and instructions. While, unsurprisingly, de Valera dominated the deliberations, Hearne made a significant contribution, as is apparent from an examination of the document.[10]

Broderick then goes to analyse the relationship between de Valera and Hearne on the basis of this document.[11] The difficulty with this analysis is that there is no evidence to support the contention that the squared paper draft was a contemporaneous note of the discussions. In fact, it appears unlikely that it was, because the draft produced by Hearne after the meetings differs substantially from the squared paper version. To take one simple example, Article 1 of the draft produced by Hearne on 18 May states: 'Saorstát Eireann is an independent sovereign State.'[12] In contrast, the first two bullet points of the squared paper draft are: 'The name of the State shall be Eire',[13] and 'Éire is a sov[ereign] Indep[endent] Democ[ratic] State.' There are numerous other variations between the two documents. It is implausible that de Valera and Hearne had a meeting and agreed that the name of the state would be 'Éire' and Hearne then simply inserted the name 'Saorstát Eireann' in its stead. There are a number of other plausible explanations for the squared paper draft: they may be notes that de Valera made of alterations he wished to be made on the 18 May draft, the skeleton of a new Constitution which he wished to replace it with, or even a series of scattered elements that he thought in no particular order. We cannot be sure of when exactly the square paper draft was composed—it could be as late as 1936. It does not support, however, the analysis that Broderick subsequently engages in as the basic proposition cannot stand. Broderick's analysis of the relationship between the two men is rich and multi-textured, but his view of the importance of this source colours his subsequent views to a certain extent, particularly in relation to Hearne's importance on the constitutional court question. The method used in this *Drafting the Irish Constitution*, however, avoids this problem.

The extent to which Hearne simply reflected the views of de Valera in his work cannot be clearly gauged. As Hearne himself stated:

> As regards the English version, I kept no records of my conversations with the President or others in the course of the drafting, and made none after-

[10] Broderick, *John Hearne*, 88 (endnotes omitted).
[11] Broderick, 88–91.
[12] UCDA: P150/2370.
[13] UCDA: P150/2370; 'Eire' is struck through.

> wards. On one occasion, during the drafting, the President asked me whether I was making notes of our conversations, and I said that I was not doing so.[14]

In the absence of a clear documentary record, any account of the relative influence of de Valera or Hearne must necessarily be speculative. Kathleen O'Connell acted as de Valera's private secretary and her diaries dealing with de Valera's appointments from the time survive. These diaries provide an incomplete record of his dealings with Hearne.[15] They indicate that de Valera had a single meeting on 19 August 1936 with Hearne, but do not disclose whether the meeting was about the Constitution.[16] In October 1936, Hearne began to meet frequently with de Valera, and O'Connell would sometimes note 're Constitution'.[17] The first such meeting that O'Connell recorded was on 13 October 1936. The entry for this meeting did not note whether it related to the Constitution, but that for the meeting on the following day, 14 October, did. Thereafter, O'Connell recorded meetings between Hearne and de Valera twice on 15 October, once on 17 October, twice on 19 October, once on 21 and once on 22 October. Hearne's meetings with de Valera in November 1936 were generally in the company of officials from the department of external affairs, which may suggest that they did not relate to the Constitution. One exception was 16 November, when de Valera met Hearne alone. In December 1936 Hearne was involved in the legal response to the abdication crisis. Meetings between Hearne and de Valera were held on 21, 29 and 31 December, after the abdication crisis had been resolved. A meeting between Hearne, de Valera and Maurice Moynihan was held on 16 December which may have related to the drafting of the Constitution. Hearne met de Valera on 1 and 2 January 1937.[18] On 5 January, de Valera travelled to Zurich to consult his eye specialist.[19] He returned on 15 January.[20] O'Connell's diary records only two meetings with Hearne in

[14] Hearne to Moynihan, 7 November 1963 (UCDA: P122/105).

[15] UCDA: P150/300. The notes of these meetings were not exhaustive. O'Connell's 1936 diary extended to the first week in January and she made a note of a meeting with Hearne at 4.30 p.m. on 1 January 1937. In her diary for 1937, however, O'Connell noted two meetings with Hearne on 1 January, at 4.30 p.m. and 11.30 a.m. (UCDA: P150/302).

[16] UCDA: P150/300.

[17] UCDA: P150/300.

[18] UCDA: P150/302.

[19] *Irish Independent*, 6 January 1937.

[20] *Irish Independent*, 16 January 1937.

February 1937, on 3 and 20 February. She noted four meetings between Hearne and de Valera before 15 March, each in the presence of a representative of the printing company Cahill's. Thereafter, de Valera met with Hearne only when he was in the presence of Maurice Moynihan, Michael McDunphy and Philip O'Donoghue.

This record, partial though it is, provides an insight into the drafting process. First, the diaries reveal the singular importance of Hearne to the drafting process. De Valera met Hearne frequently. The fact that many of these meetings were private meetings suggests the intimacy of Hearne's role in the process. The only other person who was involved at such an early stage and with such frequency was Micheál Ó Gríobhtha, who was responsible for the Irish text. Second, O'Connell's diaries reveal that the drafting of the Constitution proceeded sporadically. There was very little work done, for example, on the drafts in November 1936 and few drafts can be dated to this time.

The diaries do not reveal how much Hearne contributed to the substance of the drafts; this can be more clearly measured by considering the drafting of individual articles. The draft of 18 May 1935 may be attributed to Hearne as it is clear that de Valera's oral instructions granted him a large degree of autonomy in the compilation of the first draft.[21] It is also clear that the relationship between de Valera and Hearne was the single most important dynamic in the drafting of the Constitution.

The Editorial Committee

In mid-1936 an ad hoc editorial committee was set up to oversee the drafting of the Constitution.[22] Keogh states that it was composed of Maurice Moynihan, Michael McDunphy and Philip O'Donoghue, in addition to John Hearne. It may be useful to provide a brief synopsis of what positions these individuals occupied in 1937.[23]

Maurice Moynihan was appointed to the civil service in 1926. He briefly became private secretary to de Valera in 1932 but had returned to work in the department of finance by the end of the year. He was recalled to the department of the president of the executive council in 1936 to assist in the drafting of the Constitution. Moynihan was appointed secre-

[21] UCDA: P150/2370.
[22] Keogh, *The Vatican, the Bishops and Irish Politics, 1919–1939*, 207.
[23] Details are taken from the *Dictionary of Irish Biography*.

tary of the department of the president of the executive council in April 1937. Moynihan served as de Valera's secretary for 15 years and his particular closeness to de Valera has been noted by historians.

Michael McDunphy was dismissed from the British civil service in 1918 for refusing to take the oath of allegiance and subsequently joined the IRA. He returned to the civil service on the formation of the Irish Free State and served as assistant secretary to the department of the president of the executive council.

Philip O'Donoghue was called to the bar in 1919 and was appointed a justice of the district court in 1924. He became legal assistant to the attorney-general upon the creation of the post in 1929. This post was the equivalent of a secretary of a government department.

The informal nature of this committee means that any comments on its influence in 1936 must be speculative. It is notable, however, that de Valera's meetings with Hearne did not involve the other members of the committee. Comparatively speaking, therefore, they wielded less influence than either of the principal drafters, Hearne and de Valera. Keogh states that the group 'was instructed by the President not to make amendments of substance or principles but simply to polish the language, cut out duplication and avoid ambiguity. The draft was to avoid the use of stilted English and read easily.'[24] The proximity of government departments in 1937 would have facilitated informal discussions on any inter-departmental work. In 1937, the department of the president of the executive council, the department of external affairs and the office of the attorney-general were all located in the same government buildings in Merrion Street.[25] In 1937, the department of the president of the executive council and the office of the attorney-general actually used the same switchboard.[26] Comments by members of the editorial committee could have been solicited on various discrete topics informally.

John-Paul McCarthy has written about the influence of Maurice Moynihan on the drafting process in *Portrait of a Mind*.[27] McCarthy's account focuses primarily on the drafting process from 1937 onward. There are two pieces of historical evidence which show Moynihan's influence in 1936. First, there was a meeting between Hearne, de Valera and

[24] Keogh, *The Vatican, the Bishops and Irish Politics, 1919–1939*, 207.

[25] Iveagh House was donated to the State in 1939 and the department of external affairs moved there afterwards.

[26] The extension number was 62321.

[27] Sean-Pól MacCárthaigh, *Portrait of a Mind: Maurice Moynihan and the Irish State, 1925–60* (MPhil thesis, University College Cork, 2004), 34–52.

Moynihan on 16 December.[28] It is possible that this meeting was to discuss the Constitution. It may also, however, have been to deal with the aftermath of the abdication crisis. Second, Moynihan had a copy of a draft Constitution from October 1936.[29]

This committee was established on a formal basis on receipt of the departmental commentaries on the Constitution in March 1937.[30] The committee was responsible for the compilation of the criticisms that were received from the civil service departments and the revision of the draft Constitution in response.

De Valera

De Valera remained the leadership figure in the process. Maurice Moynihan provided a description of de Valera's 'almost invariable practice' of producing the final draft of documents in the preface to *Speeches and Statements by Eamon de Valera 1917–73*.[31] His account is worth quoting extensively:

> He did not ignore the efforts of his assistants, but he rarely accepted them in their entirety or contented himself with few or only minor amendments. He was scarcely less critical of his own first drafts, and he encouraged his assistants to criticise these also and to suggest alterations. Every important document was subject to revision again and again, with scrupulous attention to exact shades of meaning and great care to foresee and avoid any possible dangers of future misunderstandings or misrepresentations … Whatever use he might make of other people's drafts as material, the final version was essentially the work of Mr de Valera himself.[32]

The existing drafts of the Constitution indicate that this method was also employed in the drafting of the Constitution.

The Cabinet

The influence of the cabinet on the drafting of the 1937 Constitution has been overlooked. Professor Ronan Fanning highlights the influence of de Valera on the drafting process to the exclusion of the cabinet:

[28] UCDA: P150/300.
[29] National Archives of Ireland (hereafter 'NAI'): Taois s.9715.
[30] NAI: Taois s.9748.
[31] Maurice Moynihan, ed. *Speeches and Statements by Eamon de Valera 1917–73* (Dublin: Gill & Macmillan, 1980).
[32] Moynihan, xxvii–xxviii.

> Acting on his own initiative, often in advance of informing or consulting cabinet colleagues in respect of matters he adjudged especially sensitive, Éamon de Valera personally controlled every detail of the process of drafting a new Constitution. His two most important assistants in that process were civil servants.[33]

Fanning also notes that the March committee was set up to revise the draft:

> in the light of observations that might be received from ministers or from their departments. Few ministers bothered. Even so energetic and independent-minded a cabinet colleague as Seán Lemass contented himself with some minor and anodyne comments relating to social policy. Indeed, it well illustrated the extraordinary reluctance of Fianna Fáil ministers to question de Valera's authority that the only trenchant criticism of his draft constitution came, not from a cabinet colleague but from a civil servant: J. J. McElligott, the Secretary of the department of Finance.[34]

With the new drafting chronology, we have a clearer view of the importance of the importance of actors in the early drafting process. Cabinet input on the Constitution was considerable, but it occurred before the drafts were circulated to the departments. In particular, the cabinet meetings in October 1936 on the Constitution were crucially important in shaping the early drafts. The first full drafts of the Constitution were put together in advance of these meetings, and the December draft which appeared after the cabinet meetings differed significantly, primarily in terms of governmental structure, from those that preceded the meetings. The de Valera papers disclose that the cabinet met on 20, 21 and 22 October to discuss the Constitution.[35] O'Connell's diary entries show that the cabinet also met on 23, 26 and 28 October to discuss the Constitution.[36] Her diaries note a number of meetings with the executive council in April

[33] Ronan Fanning, "Mr. de Valera drafts a Constitution," in *De Valera's Constitution and Ours*, ed. Brian Farrell (Dublin: Gill & Macmillan, 1988), 36.

[34] Fanning, 37 (endnotes omitted).

[35] UCDA: P150/2374.

[36] UCDA: P150/300. The diary also shows an executive council meeting on 27 October but does not expressly link it with the Constitution. It seems possible that this meeting also discussed the Constitution but, in the absence of clear evidence for this, I have not included it in the main text.

1937 on the Constitution 'until late'.[37] Maurice Moynihan's diary from the period notes a meeting of the executive council held to discuss the second chamber on 5 February 1937.[38] De Valera's notebooks contain successive drafts dealing with possible Senate composition. The first is headed 5 February 1937 and the final notes 'App[rove]d 5.3.37'.[39] This approval must have come from the executive council.

The executive council held repeated meetings on the Constitution. The fact that the executive council was involved at an early stage reveals two reasons why the 'only trenchant criticism' of the draft in March was from the secretary of the department of finance. First, the cabinet had already agreed to the vast majority of the provisions of the Constitution by March 1937. Second, any criticisms which they had would have been brought up at cabinet discussions on the draft Constitution rather than in the departmental memoranda on the draft.

The difficulty in ascertaining the degree of influence of the cabinet is, as Professor Joseph Lee noted, that '[t]he cabinet minutes of early 1937 are nothing if not discreet, even by their normal standards of reticence'.[40] This was apparently because of Maurice Moynihan's belief 'that [the] collective responsibility [of the cabinet] was incompatible with record [*sic*] of any discussion at Cabinet other than those that tended towards the decision actually taken'.[41] There are two points which we can use to measure the influence of the cabinet on the drafting process. First, the number of meetings indicates that the cabinet had a considerable degree of input. Second, there are substantive differences between the drafts which de Valera brought to cabinet and those that emerged afterwards. This can be seen most clearly in relation to the provisions relating to the institutions of state—in particular, the presidency.

On 5 November 1936, the Fianna Fáil parliamentary party discussed the draft Constitution.[42] *The Irish Press* contains the fullest account of this meeting. It records that the meeting lasted from shortly after 11 a.m. until 7 p.m., with a break for lunch. The paper notes:

[37] 2 April, 3 April, 4 April (UCDA: P150/300).
[38] UCDA: P122/76.
[39] UCDA: P150/2379.
[40] J.J. Lee, *Ireland 1912–1985: Politics and Society* (Cambridge: Cambridge University Press, 1998), 202.
[41] MacCárthaigh, *Portrait of a Mind*, 149.
[42] *The Irish Press*, 6 November 1936; *Irish Independent*, 6 November 1936.

> There was a frank and free expression of opinion at the invitation of Mr. de Valera, who was anxious to have the suggestions of the Deputies particularly on the method of constituting the new Second Chamber on the lines proposed by the Minority Report of the Second Chamber Commission, which advocated a House on vocational lines.[43]

It is not clear whether any constructive proposals were put forward at this meeting, but the drafting of the Senate provisions again changed substantially over the period in question.

The Jesuits

The leading article on the influence of the Jesuits on the drafting of the 1937 Constitution remains Seán Faughnan's 'The Jesuits and the Drafting of the Irish Constitution of 1937'.[44] On 4 September 1936, Edward Cahill SJ sent a memorandum to de Valera entitled 'Suggestions Regarding the General or Fundamental Principles of the Constitution'. This document was insufficiently precise for de Valera's purposes. He asked for concrete suggestions—as opposed to general principles—which could be included in the Constitution. Cahill was regarded with a degree of suspicion by the Society of Jesus and it was therefore determined to establish a committee which would help draft the next submission to de Valera. This committee was composed of Frs. Patrick Bartley, John MacEarlan, Joseph Canavan, Edward Coyne and, of course, Cahill himself. This committee compiled the submission, which was entitled 'Suggestions for a Catholic Constitution'.[45] Cahill sent the submission to de Valera on 21 October 1936. The official biography of de Valera indicates that the October submission was compiled by Cahill, but, as Keogh points out,[46] this was due

[43] *The Irish Press*, 6 November 1936.

[44] Seán Faughnan, "The Jesuits and the Drafting of the Irish Constitution of 1937," *Irish Historical Studies* 26, no. 101 (1988): 79. See also Keogh, "The Irish Constitutional Revolution," 11–19; Keogh and McCarthy, *The Making of the Irish Constitution 1937* (Cork: Mercier Press, 2007), 94–105; and Finola Kennedy, "Two Priests, the Family and the Irish Constitution," *Studies* 87 (1998): 353. The following account draws on Faughnan's analysis. The author has examined the Jesuit archives and the de Valera papers and concurs with Faughnan.

[45] UCDA: P150/2393.

[46] Keogh, "The Irish Constitutional Revolution," 17.

to the covering letter in which Cahill intimated as much.[47] In fact, the submission was the work of the entire committee. The memorandum contained a draft preamble, as well as draft articles on religion, marriage, the family, education, private property and freedom of speech. This memorandum was supplemented by Cahill by a personal memorandum of November 1936. This memorandum was censored by Patrick Bartley to ensure it did not conflict with the committee's submission.

Historians disagree as to the relative influence of the Jesuit submission. Dermot Keogh argues that the view that Cahill 'exercise[ed] some influence' over the drafting process is 'largely mistaken'.[48] Keogh also states that de Valera 'knew ecclesiastical politics so well that there was little danger of his confusing mainstream Catholic thought with [Cahill's] views from the periphery'.[49] Keogh concludes that the Jesuit submission may have had some influence on the preamble, but that it was not as influential as the suggestions made by John Charles McQuaid.[50] In a later work Keogh states that 'there was really only one clergyman directly involved in the process and that was McQuaid'.[51]

By contrast, Finola Kennedy argues that Keogh underestimates the role of Cahill. First, Kennedy believes that Cahill's thought was not outside the mainstream of Catholic thinking in the 1930s.[52] Second, she claims that some provisions in the final drafts correspond closely to Cahill's original proposals: 'A straightforward comparison between the writings of Cahill and the text of the Constitution in the areas of marriage, the family and the role of women indicates a close relationship.'[53]

Kennedy's argument is stronger on the first point. It is doubtful that Cahill was outside the mainstream of 1930s Catholic thinking.[54] Three

[47] 'I have, in drawing up the drafts which I am sending you, availed myself of the advice and assistance of three or four others, some of whom have made a special study of these matters; others, although not specialists, are pretty well informed on them, and are men on whose judgment I have confidence.'

[48] Keogh, "The Irish Constitutional Revolution," 11.

[49] Keogh, 11.

[50] Keogh, 18–19.

[51] Dermot Keogh, "The Role of the Catholic Church in the Republic of Ireland 1922–1995," in *Building Trust in Ireland* (Belfast: Blackstaff Press, 1996), 122.

[52] Kennedy, "Two Priests, the Family and the Irish Constitution," 355–356.

[53] Kennedy, 348.

[54] It is clear, however, that he was regarded as being 'singular' by members of the Jesuit order; see Dermot Keogh, "The Jesuits and the 1937 Constitution," *Studies* 78 (1989), 86–88.

pieces of evidence support this view. First, de Valera solicited the contribution from Cahill in September 1936. It seems doubtful he would have done so if he believed that Cahill's views were not orthodox. Second, de Valera's official biography, which had a lot of input from de Valera himself, states Cahill was 'in the forefront of Irish Catholic social writers at the time'.[55] Third, de Valera intended to introduce the Constitution in the Dáil in November 1936.[56] There is no record that he took any clerical advice, with the exception of Cahill's before this date. When de Valera began to draft the Constitution, therefore, there was no indication that he intended to consult any other clerical source aside from Cahill. This does not tally with Keogh's dismissal of Cahill's views.

Kennedy's success on the first point, however, undermines her claims on the second. If Cahill was an orthodox thinker on Catholic issues then it makes it more, not less, difficult to attribute any personal influence to him. In a footnote, Kennedy extensively quotes from Cahill's *The Framework of a Christian State* and compares it to the text of the Constitution.[57] Cahill's work was based on papal encyclicals. McQuaid's submissions to de Valera were based on the same documents. The fact that the Constitution incorporated concepts from the encyclicals, therefore, does not mean that one can attribute them to Cahill. The documentary evidence, moreover, indicates repeated submissions by McQuaid, which were revised and eventually became part of the text of the Constitution. The Cahill submissions, in contrast, were limited to two submissions, to which de Valera does not appear to have responded. This is Keogh's view of the drafting process and it seems correct.[58]

In an early work, Keogh queries whether 'the Jesuit submission had the advantage of being the all important first draft on which both Hearne and de Valera worked'.[59] He advances an argument which attributes more importance to the Jesuit submission than his later writings on the topic

[55] Earl of Longford and T. O'Neill, *Eamon de Valera* (Dublin: Gill & Macmillan, 1970), 295.

[56] At the Fianna Fáil ard-fheis, de Valera said he had hoped 'that we would have a draft ready so that we might have it introduced in the Dáil and published generally to-morrow, but I am afraid I have to admit that my anticipation was some weeks in advance; however, one does not make a Constitution every day.' *The Irish Press*, 4 November 1936. This intention had been generally known; see *The Irish Times*, 31 October 1936.

[57] Edward Cahill, *The Framework of a Christian State: An Introduction to Social Science* (Dublin: M.H. Gill & Son, 1932). See Kennedy, "Two Priests, the Family and the Irish Constitution," 362–364.

[58] Keogh, "The Jesuits and the 1937 Constitution," 122.

[59] Keogh, 91–92.

suggest: 'They produced the first draft in the areas where the 1922 Constitution was not particularly expansive. Having set the context and the topics for discussion, the Jesuits were thus quietly influential in the drafting process.'[60] On this issue, the answer is unequivocal: the Jesuits did not produce the first extensive draft, nor did they produce the first draft which dealt with fundamental rights. As Keogh notes, Cahill's letter to de Valera enclosing the Jesuit submission was on 21 October, but there are extant drafts, including drafts of fundamental rights, from earlier in October. Therefore, the Jesuit submission appears to have been of less importance, both in terms of being the progenitor of the fundamental rights provisions and in shaping the final drafts. In the case of the latter, the most important clerical drafter was John Charles McQuaid.

What accounts for Cahill's replacement by McQuaid? One possibility is that the substance of the Jesuit submission was insufficient for de Valera's purpose. This was the argument put forward by the official biographers of de Valera and also by Faughnan.[61] Another possibility was Cahill's indiscretion. On 14 October, Cahill addressed a meeting of An Ríoghacht, an organisation formed by Jesuits for the purpose of establishing 'the social reign of Christ in modern society',[62] in Jury's Hotel, at which he put forward, at length, his views on constitutional drafting.[63] Cahill believed that '[a]ny new Constitution for the Free State must be a framework of a Christian State' (coincidentally the title of the book he had written in 1932). He stated, 'there could be no more fruitful work […] than that of doing one's share in helping to organise their own country after the Catholic model'. When engaged in this work the framers should:

> [D]o their best to make Catholic principles felt in public life; to do their best for the proper protection of the family; to instil proper ideas of property and wealth; to remind those who own property of their duty to the poor; to get people to understand the exact functions of the State, and the duties everyone had to it.

This indiscreet comment revealed, to all but the most obtuse listener, that Cahill was himself engaged in the drafting of the new Constitution.

[60] Keogh, 94.

[61] Longford and O'Neill, *Eamon de Valera*, 295–296, and Faughnan, "The Jesuits and the Drafting of the Irish Constitution of 1937," 90.

[62] *Dictionary of Irish Biography Volume 2* (Cambridge: Cambridge University Press, 2009), 241.

[63] *The Irish Press*, 15 October 1936.

The drafting process promised to be arduous and delicate; Cahill's suitability for this process must have been questioned in the aftermath of this speech. On 19 September, de Valera had asked for Cahill's submissions to take a more concrete form.[64] The speech was given on 14 October. On 21 October, Cahill sent the Jesuit submission to de Valera. There is no record of correspondence between de Valera and Cahill thereafter. This may be contrasted with de Valera's correspondence with McQuaid, with McQuaid re-drafting and re-visiting articles a number of times. It is possible that de Valera opted to exclude Cahill from the drafting process as a result of this ill-timed speech. Dermot Keogh points out that de Valera looked for two qualities in the civil servants he consulted: 'efficiency, and strict secrecy'.[65] De Valera would have sought similar characteristics in other contributors. McQuaid possessed both characteristics; Cahill violated the second when he gave his speech to An Ríoghacht. As we have seen, the Jesuit submission was sent on 21 October. In November 1936, de Valera contacted McQuaid, the religious figure who was to have the greatest influence on the drafting of the Constitution.[66]

John Charles McQuaid

McQuaid's influence was confined to those articles of the Constitution on which the Church had issued moral teaching. The Catholic Church had expressed its agnosticism as to which form of government was the best. The concerns of the Church were narrower: as long as the state adhered to Catholic teaching on those matters on which it had pronounced its teaching then there would be no conflict between Church and state. As a result, the vast majority of constitutional articles were of no concern to McQuaid. This point has been missed in some commentary on the Constitution. Don O'Leary seems to suggest that de Valera looked for advice on the political structure of the state from those religious figures involved in the drafting process. O'Leary quotes a statement of political neutrality under Catholicism by Cornelius Lucey, later bishop of Cork:

[64] UCDA: P150/2393.

[65] Dermot Keogh, "Church, State and Society," in *De Valera's Constitution and Ours*, ed. Brian Farrell (Dublin: Gill & Macmillan, 1988), 107.

[66] Keogh and McCarthy, *The Making of the Irish Constitution 1937*, 106–122; Cathal Condon, *An Analysis of the Contribution Made by Archbishop John Charles McQuaid to the Drafting of the 1937 Constitution* (MA thesis, UCC, 1995); Diarmaid Ferriter, *Judging Dev* (Dublin: Royal Irish Academy, 2007), 198–200.

'Just as there is no Divine Right of Kings, there is no Divine Right of Democracy.' O'Leary states:

> De Valera was hardly impressed by the wide range of political options which this assertion seemed to offer. He realized that Catholic social teaching demanded a more complex approach to the formation of political structures than Lucey's exposition indicated.[67]

There is no indication that de Valera sought any advice from any religious figure about the institutions of the state. McQuaid, the religious figure who was most influential in constitutional drafting, sent missives on political authority but not on the internal mechanics of the state.

Dermot Keogh and Andrew McCarthy have considered the difficulty of analysing the influence of McQuaid on the drafting process:

> Although it is clear that McQuaid had a not insignificant role in the drafting process, any definitive assessment as to the nature and degree of his influence is problematic. Very few of the draft documents have dates. Drafts have cryptic titles such as X, Y and Q. Although Q was de Valera's occasional shorthand for McQuaid, it does not necessarily mean that any document with Q on it was written by McQuaid.[68]

These difficulties are considerably vitiated when we use the methodology outlined at the beginning of this chapter. This method allows us to produce of a chronology of the various titled drafts, such as X and Y.[69] Using this method, we can construct a much fuller and more accurate view of McQuaid's role in the drafting process.

His role was that of a specialist advisor. He gave expert advice on how to ensure that a limited number of articles adhered to Catholic social teaching. It seems likely that a decision was made in late 1936 that the new articles based on a moral vision of the state should be made to cohere with Catholic social teaching, and it is against this backdrop that one must gauge the impact of McQuaid. It is noteworthy that the first dated correspondence between McQuaid and de Valera is from 11 November

[67] Don O'Leary, *Vocationalism and Social Catholicism in Twentieth-Century Ireland: The Search for a Christian Social Order* (Dublin: Irish Academic Press, 2000), 58.

[68] Keogh and McCarthy, *The Making of the Irish Constitution 1937*, 109.

[69] The Q drafts seem to have been appended by de Valera to indicate which drafts were to be sent to McQuaid.

1936.[70] The McQuaid papers contain a partial draft which matches a draft in the de Valera papers which I have dated 20 October.[71] This was most likely the draft which was sent to McQuaid in November 1936. The fact that McQuaid's involvement was limited and did not extend to the structural elements of the Constitution is evident from the fact that the partial draft encompasses only the fundamental rights sections.

McQuaid's influence was mainly in relation to the nation, Article 6, on the duties of citizenship, and the fundamental rights provisions. The 15 March 1937 draft that exists in the McQuaid papers is almost untouched between the article dealing with citizenship and the beginning of the section entitled 'Personal Rights and Social Policy'.[72] His influence, particularly on the fundamental rights provisions, was considerable. The early drafts of these provisions are substantially different from the final versions. This does not mean that McQuaid was solely responsible for the rights sections. McQuaid provided copious notes on the principles which underlay fundamental rights and commented on the successive drafts of the Constitution. He also provided suggestions for the inclusion and deletion of certain phrases in the drafts. More rarely, he drafted entire sections or articles for submission to de Valera.

Cathal Condon contends that McQuaid 'was the author of Articles 1–3, the Preamble and Articles 40–45'.[73] This claim rests on a detailed analysis of the McQuaid archives. First, Condon states that McQuaid drafted the first version of Article 2 as follows: 'The National territory consists of the whole of Ireland and its territorial seas.'[74] This overlooks the fact that an earlier draft of the Constitution stated: 'The national territory is the whole of Ireland and the territorial seas of Ireland.'[75] This earlier draft was from October 1936, before McQuaid was involved in the drafting process. Second, Condon attributes any material which is in McQuaid's handwriting to McQuaid. If a document is written entirely in pencil and there is a blue typed version of it then it seems likely that the author of this document was McQuaid, but this assumption is not as useful when considering amendments that are noted on pre-existing drafts.

[70] See Keogh and McCarthy, *The Making of the Irish Constitution 1937*, 107.

[71] Dublin Diocesan Archives (hereafter 'DDA'): AB8/A/V/48. The de Valera equivalent is contained in UCDA: P150/2385.

[72] 15 March 1937 (DDA: AB8/A/V/53).

[73] See, for example, Cathal Condon, *Contribution by McQuaid*, 16.

[74] Condon, 40.

[75] UCDA: P150/2373.

These handwritten notes may have been dictated to McQuaid by de Valera in phone conversations to indicate de Valera's preferred wording. Condon's analysis overstates the importance of McQuaid as a result of these two difficulties.

What then was McQuaid's role? An example from the drafting process may illustrate it clearly. In the course of the drafting of the equality clause of Article 40.1, McQuaid expressed his belief that 'it is a fact of evident experience that inequalities do and must exist in organized Society'. This led him to a broader thesis. A state:

> in making its laws—which are enactments of reason with a view to the common good—cannot duly provide for and safeguard its citizens, unless it takes account of the unequal capacity of its citizens […] A judge has a higher function in Society than a bank-clerk and for that reason merits a higher recompense, and in virtue of the good of Society that recompense must be accorded to him. Social inequalities are just, not only because they represent higher grades of service to Society, but also because they are required for the attainment of the public good.[76]

Now, consider de Valera's formulation of equality in the Dáil. He began by noting:

> in fact, the only basis on which you can take it, the only respect in which people can be taken as completely equal is in the fact that they are human persons, having a certain same nature, certain destinies and so on. That is the only really true, philosophical way in which you can speak of equality, so that 'as human persons' is put in here deliberately to make the statement a true one and not a false one [….] The next part of [Article 40.1] is designed to prevent a straining of what was a narrow expression into another sphere, and to prevent its being used to suggest that we should not have regard in our enactments to differences of capacity, social functions and so on. Of course, we must. As a matter of fact, we are bound to […] If you want to distinguish between the various functions—I can scarcely get a better word—or activities of various kinds of classes, you can hardly, in our civic life, describe them by a better phrase than 'social functions'. A judge has one social function. A bank clerk has another social function.[77]

[76] UCDA: P150/2406. Although this memorandum is undated it must have post-dated 30 April 1937 as it was only at this point that the article became Article 40.

[77] 67 *Dáil Debates* (2 June 1937) cols. 1591–1592.

Note how even the examples given in de Valera's Dáil speech are the same as those suggested by McQuaid. The closest comparison one can think of in contemporary terms is the practice of civil servants of providing briefing notes for their minister when they are answering questions in the Dáil.

The Department of Finance

In January 1937, the department of finance provided an analysis of Articles 35, 36, 37, 54 and 61 of the 1922 Constitutions.[78] These were the financial provisions of the Free State Constitution. The department of finance dealt with inter alia the preparation of estimates and appropriation. This commentary proved useful in the preparation of the financial articles of the 1937 Constitution. In this case, the department of finance was the most obvious source of specialist advice on the operation of the financial articles of the 1922 Constitution.

George Gavan Duffy

George Gavan Duffy also provided some influential material on the Constitution.[79] We have encountered Gavan Duffy in Chaps. 1 and 3; he provided legal advice on constitutional questions such as the oath of allegiance, the constitutional basis of the state and the abdication crisis. He was involved in the drafting process before March 1937. A memorandum entitled 'Notes on Miscellaneous Points Arising on Constitution of 1922, as Amended' in the de Valera papers from February 1937 was probably composed by Gavan Duffy.[80] He also provided a critique of the direct English translation of the Irish draft of the Constitution.[81] Both of these memoranda were provided in advance of the circulation of the draft Constitution to the various departments in March 1937. Kathleen O'Connell's diaries record a meeting between de Valera and Gavan Duffy on 15 February 1937. This was most likely the date on which Gavan Duffy

[78] 2 January 1937 (NAI: Taois s.9481). The memorandum was forwarded to Hearne on 5 January 1937.

[79] Golding had speculated that Gavan Duffy was part of the drafting process; G.M. Golding, *George Gavan Duffy 1882–1951* (Dublin: Irish Academic Press, 1982), 50–51.

[80] 22 February 1937 (UCDA: P150/2396). The other likely author, Matheson, made his comments in the first person while the author of the memorandum did not.

[81] UCDA: P150/2397.

became involved in the drafting process—one day before the parliamentary draftsman became involved in the drafting process.

Arthur Matheson

Arthur Matheson was appointed parliamentary draftsman in 1923.[82] De Valera's official autobiography states that the preparation of the original draft was done by Hearne 'in consultation with the parliamentary draftsman'.[83] Dermot Keogh dates Matheson's involvement from 1936.[84] Matheson's own diaries do not disclose any meetings on the Constitution in 1936. Matheson's diary from 1937 contains an entry for 8 February which reads: 'Conference with Mr. Hearne re drafting of new Constitution + allied legislation.'[85] His first meeting with de Valera relating to the Constitution was on 16 February. Matheson had six meetings with de Valera between 16 February and 10 March which dealt with the Constitution.[86] During the same period he met Hearne four times.[87] Matheson's diary provides an insight into the relative importance of the various drafters. Although he met Hearne and de Valera numerous times in those two weeks, he did not record any meetings about the Constitution during that time with anyone other than Hearne and de Valera. He first recorded a meeting with Philip O'Donoghue on 18 March, after the Constitution had been circulated for general comment and the drafting committee had been officially established. Matheson gave advice on the literal translation of the Irish text and subsequent English versions of the text.[88] The de Valera papers contain submissions by Matheson on the revised draft, received by him on 2 March 1937.[89]

[82] On Matheson, see Brian Hunt, "The Origins of the Office of the Parliamentary Draftsman in Ireland," *Statute Law Review* 26, no. 3 (2005): 175, 177–181.

[83] Longford and O'Neill, *De Valera*, 290.

[84] Keogh, *The Vatican, the Bishops and Irish Politics*, 9.

[85] NAI: AGO/2001/49/82.

[86] 20 February, 24 February, 27 February, 1 March, 3 March, 10 March 1937.

[87] 2 March, 3 March, 4 March, 6 March 1937.

[88] A memorandum on miscellaneous points raised by the literal translation is headed 'Handed one carbon to the President 24/2/37' (NAI: AGO/2000/22/796). Matheson met de Valera on 16 and 20 February so it was likely at one of these meetings that de Valera sought his help and provided a copy of the literal translation of the Irish text (which may be found in the same folio).

[89] UCDA: P150/2397.

The department of the Taoiseach file on the drafting of the Constitution notes: 'The preparation of the original draft was done mainly by Mr. John Hearne, B.L., Legal Adviser of the department of external affairs, in consultation with the parliamentary draftsman, Mr. Matheson, B.L., under the personal direction of the President.'[90] This appears to be the basis for Dermot Keogh's belief that Matheson was involved in the drafting process from 1936. However, the same memorandum makes it clear that the 'original draft' is the draft of 15 March 1937. Matheson appears not to have been involved in the drafting process until relatively late.

Other Influences

The draft of 15 March 1937 was submitted for departmental consideration. The most voluminous submissions were supplied by the department of finance. The 15 March draft was also sent for comments to others, such as Conor Maguire, who had just been appointed to the High Court. In addition, the draft Constitution was the subject of amendment in the Dáil itself.[91]

Historiography and the Constitution

The analysis of the drafting and historical importance of the Constitution may be divided into two schools of thought. The first centres on academics outside the field of history and focuses on the legal innovations in the Constitution. The first person to address this element of the Constitution was John Maurice Kelly. The second school of thought is the historical one; this has predominantly considered the extent to which the Constitution was influenced by Roman Catholic thought. In more recent times, Gerard Hogan has questioned the second school by emphasising the legal importance of the Constitution. Both approaches address key elements of the Constitution and the drafting process. However, both schools also suffer from the fact that, until now, the chronology of events was not clear. Therefore, it was not possible to track influences across the entire drafting process, which meant that either isolated drafts were considered, undermining a more holistic approach to the process, or later drafts were considered, as they were easier to date.

[90] NAI: Taois s.9748.

[91] On these, see Gerard Hogan, *The Origins of the Irish Constitution, 1928–1941* (Dublin: Royal Irish Academy, 2012), Chaps. 9–11.

The legal analysis of the Constitution and its impact has been heavily influenced by the pronouncements of the doyen of Irish constitutional lawyers, John Maurice Kelly. Kelly drew attention to the large fields in which the 1937 Constitution simply copied the text of the 1922 document: 'the basic law of 1937 can be fairly presented as a stabilising and reforming continuation of that of 1922; indeed […] it would be misleading to present it any other way.'[92] Kelly's masterful analysis of fundamental rights in the Irish Constitution claimed that only two articles were 'original and unusual': Articles 41 and 42.[93] These areas of fundamental rights alone were, according to Kelly, 'unusual […] amongst Constitutions'.[94]

Bill Kissane has recently drawn attention to the fact that the fundamental rights provisions of the 1937 Constitution were wider than classical liberal rights, which prevented the state from acting:

> The constitution departed from the classical view of rights as principles which must be protected from the state, and conceives of a state where the individual sometimes needs the state to realise the freedom they want to enjoy. The constitution specifically enjoined the state to 'vindicate' the rights of its citizens. The 'protective function' of the state was transformed, anticipating West European legal developments in this area.[95]

This marked a key difference between the 1922 and 1937 legal orders.

The works of Kelly and Kissane, however, fail to consider contemporary continental constitutionalism in 1937. While Kissane notices the introduction of specific elements of the 1937 Constitution which imposed a positive duty on the state, his view of contemporary constitutionalism is not strictly accurate. In fact, as Kohn points out, the 1922 Constitution was idiosyncratic in inter-war constitutions in not providing a programme of social rights.[96] In 1937, therefore, the Irish Free State was behind, not

[92] J.M. Kelly, *The Irish Constitution*, 2nd ed. (Dublin: Jurist Publishing, 1980), xxvii.

[93] J.M. Kelly, *Fundamental Rights in the Irish Law and Constitution* (Dublin: Allen Figgis & Co, 1961), 33.

[94] Kelly, *Fundamental Rights in the Irish Law and Constitution*, 33, footnote 2. See also Kelly, *The Irish Constitution*, xxx.

[95] Bill Kissane, *New Beginnings: Constitutionalism and Democracy in Modern Ireland* (Dublin: University College Dublin Press, 2011), 88.

[96] See Leo Kohn, *The Constitution of the Irish Free State* (London, 1932), 172: 'Of the declarations embodying a programme of social, economic or educational reform, which are so characteristic of modern Continental constitutions, the Irish Constitution contains only two.'

ahead of, developments. The Constitution of the German Reich of 1919, for example, contained a number of 'protective elements' (to be found in Part II, Sections II–V). This key element in understanding the drafting of the 1937 Constitution, its reliance on foreign sources, has been overlooked in Kissane's recent work. Kissane contends that the 1937 Constitution 'reflected the values of a peripheral European society falling back on its own cultural resources during an era of crisis'.[97] In fact, the constitutional drafting documents disclose an early reliance on continental constitutions.

More recent scholarship has begun to address this element of the Constitution. Gerard Hogan, for example, has drawn attention to the similarities between the 1919 Constitution of the German Reich and the 1937 Constitution of Ireland.[98] Eugene Broderick has also noted the link between the 1919 German Constitution and the 1937 Constitution, as well as between the 1920 Czechoslovak Constitution and the 1921 Polish Constitution.[99]

Hogan draws attention to a deficiency in historical treatments of the 1937 Constitution: 'historical analysis has examined the Constitution in the abstract, divorced from contemporary practice as it existed in other European countries in 1937.'[100] This deficiency suggests the need for a comparative method to consider how innovative the 1937 Constitution was. The documentary evidence demonstrates that Hogan is correct about the influence of continental constitutions and refutes Kelly's argument about the originality of the provisions; both Article 41 and 42 of the 1937 Constitution had strong textual links, particularly in their first iteration, with other continental constitutions. Moreover, links also occur throughout the fundamental rights provisions. Each provision has a corresponding continental progenitor to a lesser or greater degree. Far from the drafters in 1936 'falling back on [their] own cultural resources', they strove to engage with continental constitutional thought. Granted, as the drafting process wore on and the articles became more complex and influenced by

[97] Kissane, *New Beginnings*, 59.

[98] See Gerard Hogan, "Some Thoughts on the 1937 Constitution," in *Lawyers, the Law and History*, ed. Felix Larkin and Norma Dawson (Dublin: Four Courts Press, 2013); Gerard Hogan, "De Valera, the Constitution and the Historians," *Irish Jurist* 40 (2005): 303–306.

[99] Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* (Newbridge: Irish Academic Press, 2017), 176–181.

[100] Hogan, "De Valera, the Constitution and the Historians," 317.

Roman Catholicism, these links became less obvious, yet this does not detract from the fundamental point.

A second issue in the historiography in relation to the Constitution has focused on how Catholic the provisions of the 1937 Constitution were. The narrative that is sometimes presented in relation to the drafting process is that the fundamental rights provisions of the Constitution were infused with Catholic theory. John Whyte notes that, in contrast to the 1922 Constitution, the fundamental rights provisions of the 1937 Constitution were 'obviously marked by Catholic thought'.[101] In a similar vein, Kieren Mullarkey comments: 'A Catholic social philosophy was indeed very evident especially in the constitution's attitude towards the family, divorce, education and the role of women.'[102]

On the other hand, commentators such as Dermot Keogh have adopted a subtler view:

> De Valera, Moynihan and Hearne were all people of wide culture. They were wholly free of the stridency associated with certain vociferous elements in the Catholic Church in the 1930s. All three had broad intellectual horizons. None were the victims of then fashionable ideological phobias.[103]

An examination of the continental constitutions which inspired the 1937 Constitution disclose that they were mainly inspired, even in the early drafts, by Catholic continental provisions. It is necessary to establish this point by reference to specific examples.

In Article 41, the first draft of the 1937 Constitution ran: 'The State guarantees the constitution and protection of the family as the source of the preservation and increase of the race, the basis of moral education and of social discipline and harmony, and the sure foundation of ordered society.'[104] The inspiration for this was the Portuguese Constitution of 1933, which stipulated:

[101] J.H. Whyte, *Church and State in Modern Ireland*, 51.

[102] Kieran Mullarkey, "Ireland, the pope and vocationalism: the impact of the encyclical *Quadragesimo* Anno," in *Ireland in the 1930s: New Perspectives*, ed. Joost Augusteijn (Dublin: Four Courts Press, 1999), 106.

[103] Dermot Keogh, "Church, State and Society," 106.

[104] 12[?] October 1936 (UCDA: P150/2373). The use of a question mark in square brackets here is based on the sequential model of draft dating outlined in *Drafting the Irish Constitution 1935–1937*. This provides a speculative date assigned in a chronological order so that the drafting process can be more clearly mapped.

> The State shall ensure the constitution and protection of the family as the source of the maintenance and development of the race, the primary basis of education, discipline and social harmony, and the fundamental requirement of political and administrative order, by its association and representation in the parish and the municipality.

The textual links here are striking, for example 'preservation and increase of the race'; the slight difference in phrasing is attributable to the Irish drafters working from a French translation of the Portuguese Constitution. The 1933 Portuguese Constitution established special provisions in relation to family elections of parish councillors which the Irish Constitution did not copy, but the convergence between the initial lines of the Portuguese Constitution and the early Irish draft is revealing.

The forerunner of Article 41.2 in the early drafts was 'maternity shall be protected by special laws'. A similar provision was to be found in the interwar constitutions of Europe.[105] The direct textual forebear, however, appears to be the 1919 Constitution of the Polish Republic, which declared in Article 103: 'Maternity is protected by special laws.' The next iteration of Article 41.2 was inspired by Article 12(1)2 of the 1920 Constitution of Austria. Similar provisions underpin other fundamental rights provisions. For example, an early draft of Article 42 stated: 'Primary instruction is obligatory and may be given in the home or private schools or in official schools established or recognised by the State.'[106] This may be compared with a similar provision in the Portuguese Constitution: 'Elementary primary education is obligatory and may be provided in the home, in private schools or in official schools.' Similarly, the earliest drafts of Article 43 were based on the Polish Constitution. The Irish draft provided:

> The State guarantees the right to private ownership of property whether by individual citizens, by bodies corporate or unincorporated, or by the State itself as one of the fundamental principles of ordered society.
>
> The protection of their private property is guaranteed to all citizens, institutions and communities within the State and no such property shall be limited or acquired by the State save for general utility purposes, upon payment of adequate compensation, and in accordance with the law.
>
> The ownership and cultivation of the land being one of the principal features of the national life, the exercise by the State of its right to the compul-

[105] See, for example, Article 199 of the 1919 Constitution of the German Reich: 'Motherhood has a claim upon the protection and care of the State.'

[106] 13[?] October 1936 (ibid.).

> sory purchase of rural property for general utility purposes shall be subordinated to the principle that the agrarian structure of E[ire] ought to be based on agricultural holdings capable of normal productivity and privately owned.[107]

Article 99 of the Polish Constitution of 1921 stated:

> The Polish Republic guarantees the right to property, whether the individual property of citizens or the corporate property of associations of citizens, autonomous bodies, or the State itself, as one of the fundamental principles of society, and of law and order; the Republic guarantees to all its inhabitants, institutions and communities, the protection of their property, and allows limitations or abolition of individual or collective property only in cases provided by law for reasons of general utility and with compensation.
>
> […]
>
> Land, being one of the principal factors of the life of the nation and of the State, must not be the subject of unlimited alienation. The laws shall prescribe the degree in which the State has the right of compulsory purchase of rural property, and of controlling the transfer of such property in conformity with the principle that the agrarian structure of the Polish Republic ought to be based on agricultural holdings capable of normal productivity and privately owned.

Attention to the initial drafts of the fundamental rights provisions demonstrates, therefore, that they were not initially based on papal encyclicals. Instead, they were based on fundamental rights provisions in contemporaneous European constitutions. These initial drafts were then amended to make the final versions a more faithful interpretation of Catholic teaching, but a failure to attend to the early drafts gives an inchoate picture of the drafters' influences and risks portraying them as parochial figures. In fact, both Hearne and de Valera were, by 1936, familiar with diplomacy at an international level and attempts to seek out the best international examples would have been natural for such individuals. Granted, the most influential continental constitutions for the initial drafts were Catholic, but there was a genuine effort to take international practice into account.

The most accurate conclusion on this aspect seems to remain Anthony Coughlan's:

> The incorporation of Christian social principles in the Constitution was important in gaining political support for the document in the 1937 refer-

[107] 12[?] October 1936 (UCDA: P150/2373).

> endum, but how far he allowed these principles to take him was described by de Valera's own ideological outlook, his deep personal religious faith and his sense of what was politically practicable.[108]

This thesis should not, however, be overstated. The drafters of the 1937 Constitution were Catholic, and even those early drafts of the Constitution which drew on continental traditions were in line with Catholic thought. The gradual integration of papal encyclicals must be seen in light of this gradual development—the Constitution was always intended to comply with Catholic thought. It is in light of this general trend that we can consider a recent thesis in relation to the main draftsman of the 1937 Constitution, John Hearne.

Was John Hearne a Secular Drafter?

The importance of Hearne to the drafting process cannot be overstated; in combination with de Valera, he was of singular importance to the drafting of the Constitution, particularly in the early stages. It is therefore only fitting that Hearne's importance has come to be more celebrated as historians investigate the drafting process. However, recent attempts to lionise Hearne have perhaps ventured further than the documentary evidence warrants. Gerard Hogan has recently argued that the drafting process progressed from a secular draft in May 1935 to a more Catholic finished version in 1937: 'it ought to be noted that Hearne's draft was a largely secular one, in that it displayed none of the specifically Catholic influences to be found in the final version of the Constitution.'[109] Hogan extrapolates from this point:

> The largely secular nature of Hearne's first drafts is important, since the working papers show that the provisions which were influenced by Catholic teaching were largely added on towards the end of the drafting process, either because they corresponded with de Valera's own personal wishes and political agenda, or following representations from clerical or political sources. The basic point nevertheless remains true: the sub-structure of the Constitution was fundamentally liberal-democratic and secular in nature,

[108] Anthony Coughlan, "The Constitution and Social Policy," in *The Constitution of Ireland 1937–1987*, ed. Frank Litton (Dublin: Institute of Public Administration, 1988), 146–147.

[109] Hogan, *Origins*, 155.

> with the religiously-inspired provisions subsequently superimposed upon this secular sub-structure.[110]

More recently, Eugene Broderick has argued that John Hearne would have been comfortable with a Constitution that drew on a Roman Catholic heritage. Hearne had studied for the priesthood and was a daily communicant. As Broderick notes, Hearne was 'proud of its Christian basis' and referred approvingly to this basis in public speeches.[111] Which is the more persuasive view of Hearne: Hogan's or Broderick's?

Hogan's analysis overlooks one important point in relation to Hearne's draft. Hearne constructed his first draft on the basis of implementing de Valera's oral instructions 'into the text of the existing Constitution rather than [attempting] to construct—at this stage—a completely new Constitution'.[112] Thus, the fact that the 1922 Constitution was largely secular meant that Hearne's draft too was largely secular. The first limb of Hogan's argument, that Hearne's drafts were largely secular, does not prove that Hearne was a secular drafter.

Second, it is not in fact the case that all of the early drafts of the Constitution were secular. There is evidence of an early draft which included articles which would have profoundly influenced the Irish State if it had been enacted.[113] This draft declared that the state was governed by a parliamentary democracy 'on the basis of principles of the Christian religion'. It also stated:

> Any law or any provision of any law enacted by the Oireachtas which is contrary to natural justice, or otherwise contrary to the Natural law or which is in conflict with the fundamental doctrines of the Christian Faith is hereby declared to be void and inoperative.

This draft provided that the Catholic Church was to be governed by its own laws and that relations between the Church and state were to be determined by agreement with the Holy See, as approved by the Dáil. This early draft indicates that the fusion of Roman Catholicism and liberal democracy was a concern of the drafters from an early stage. It is not clear

[110] Hogan, *Origins*, 156.
[111] Broderick, *John Hearne*, 192.
[112] 17 May 1935 (UCDA: P150/2370).
[113] 12[?] October 1936 (UCDA: P150/2373).

whether this early draft was a result of de Valera's interventions or the product of Hearne's own initiative.

The drafting process does disclose material which we can use to consider whether Hearne was a secular drafter. It is useful in this regard to compare the 1935 draft preamble which Hogan quotes with a later version, which Hearne drafted in 1936. Hearne's 1935 draft was as follows:

> In the Name of Almighty God, We, the Sovereign Irish People through our elected representatives assembled in this Dáil Éireann sitting as a Constituent Assembly, in order to declare and confirm our constitutional rights and liberties, consolidate our national life, establish and maintain domestic peace on a basis of freedom, equality and justice, ensure harmonious relations with neighbouring peoples, and promote the ultimate unity of Ireland do hereby, as of undoubted right, ordain and enact this Constitution.[114]

Hogan describes this draft, including its preamble, as 'noble', 'fair-minded' and 'secular'.[115] However, Hearne appears to have re-drafted the preamble in August 1936 as follows:

> Affirming our belief in the Most Holy and Undivided Trinity, the Author of all life and the source of all lawful authority:
>
> Gratefully recalling the heroic sacrifices of past generations of our race in the cause of Irish national independence:
>
> Resolved to declare and confirm our constitutional rights and liberties, establish domestic tranquility [*sic*] on the basis of freedom, equality and justice, maintain and foster the sanctity and welfare of the family as the basis of moral education and social harmony, ensure the growth of the spiritual and cultural ideals of the Nation and the development of the material resources of our country:
>
> Confident of thus restoring our national life, securing the blessings of peace and freedom for coming generations and promoting the ultimate unity of Ireland:
>
> We, the Sovereign Irish People as of undoubted right and, under the Providence of Almighty God, of our own absolute authority do hereby give ourselves this Constitution to be the Constitution of E[ire].[116]

[114] 18 May 1935 (UCDA: P150/2370).

[115] Hogan, *Origins*, 156.

[116] UCDA: P150/2425. The provenance may be gleaned from the fact that it is marked 'Hearne', and shares many phrases in common with the May 1935 preamble and almost no phrases with subsequent drafts of the preamble, indicating common authorship with the May preamble.

It is clear from this draft that Hearne was not a secular drafter. It could be argued that this draft preamble was, in fact, more religiously inspired than the version which was ultimately enacted. Brian Kennedy drew attention to Hearne's deep Catholicism, in particular the fact that he had studied for the priesthood, in his profile of him:

> As for the 'dash of Maritian,' the 'glimpse of corporatism' and the Papal Encyclical of 1931, Hearne may well have contributed to their influence. Both he and de Valéra were Roman Catholic daily communicants but, unlike de Valéra, Hearne had a personal interest in philosophy and theology, nurtured during his years at Maynooth.[117]

The inclusion of religiously inspired articles in the final draft of the Constitution indicates that de Valera must have approved of the idea. However, this does not mean that Hearne did not also approve of their inclusion. It is a mistake to conclude that the early drafts were secular and that the religious elements were inserted late in the drafting process, particularly after the interventions of McQuaid. The early draft which would have made law contrary to the 'fundamental doctrines of the Christian faith' void would actually have resulted in a considerably more Catholic document than the one ultimately enacted. This draft dates from a period where the only people working on the Constitution, as far as can be ascertained, were de Valera and Hearne. It might seem, in light of the later development of the theory of unenumerated rights based on the 'Christian and democratic' nature of the state or the natural law, that the courts ultimately incorporated this idea *sotto voce*. Nonetheless, the reference to 'the fundamental doctrines of the Christian Faith' in the draft would have more deeply enmeshed the courts in the determination of points of Catholic doctrine and provided for judicial review of legislation on this basis. The final drafts, which included references to other Churches, were comparatively more tolerant than this early version. It was always intended that the Constitution would be inspired by a Catholic ethos; the progression of the drafting process merely made the latent elements more explicit.

This Catholic ethos was politically important. Dermot Keogh has described how the drafts of the religious sections were disclosed to the leaders of the religious denominations in the Free State in April 1937.[118] Cardinal Joseph

[117] Kennedy, "John Hearne and the Irish Constitution," 125.

[118] Keogh, "The Irish Constitutional Revolution," 29–59. The analysis that follows draws on Keogh's account.

MacRory, Primate of All Ireland, had indicated that he had difficulties with the early drafts of the clause relating to religion.[119] In his correspondence with the papal nuncio, MacRory made his difficulties with the original drafts known, in particular the fact that it listed the different congregations of faith that existed in the Free State: 'Though very unworthy, I am the head of the Irish Church; and as such I think I couldn't do less than insist that not only the Preamble but the Constitution itself should show some special recognition of our religion. As it is, the Constitution makes us no better than the Quakers!'[120]

De Valera attempted to overcome this difficulty by sending Joseph Walshe, secretary of the department of external affairs, to Rome with drafts of the relevant material on 16 April 1937. Walshe consulted with the secretary of state for the Vatican, Cardinal Pacelli. The Pope indicated that the Vatican would not approve, but would remain silent.[121] This blunted any difficulties MacRory might have had with the draft.[122]

This episode demonstrates the political need for a Constitution which would satisfy the inquiries of the clergy. If de Valera had been faced with the opposition of Cardinal MacRory, it is doubtful the draft Constitution would have been accepted. Ultimately, it was de Valera's 'own ideological outlook' which was the more important.

A Constitutional Court? De Valera and Judicial Review

In his recent work, Gerard Hogan has advanced a thesis that the idea for a constitutional court was the work of John Hearne.[123] Eugene Broderick, in his recent volume, concurs: 'The idea came from Hearne.'[124] Although the direct evidence on this point is slight, it is possible to advance a thesis which attributes it to de Valera rather than Hearne. In order to ascertain whether Hogan's view is correct, we must first consider the various strands

[119] Keogh, 30, 36.

[120] Vatican Secret Archives: Arch. Nunt. Irlanda Box 16, fasc 8 'Costituzione Irlandese (de Valera)', MacRory to Robinson, 9 April 1937.

[121] Keogh, 51.

[122] Keogh, 53.

[123] See Gerard Hogan, "John Hearne and the Plan for a Constitutional Court," *Dublin University Law Journal* 33 (2011): 76; Hogan, *Origins*, 152.

[124] Eugene Broderick, *John Hearne*, 165.

to it. First, Hogan advances an argument that the notes written in de Valera's hand may have, at least in part, reflected Hearne's influence:

> The 'squared paper draft' makes reference both to a Constitutional Court and 'organic laws,' *ie*, laws which the Oireachtas would be empowered to make to give effect to basic constitutional principles. However, the idea of a Constitutional Court was then practically unknown in the English speaking world and no one but a constitutional specialist would have used the term 'organic laws' (itself a term used by constitutional lawyers versed in the continental legal tradition). This might tend to suggest that these ideas were imparted by Hearne to de Valera rather than the other way around.[125]

It is not clear when exactly the 'squared paper draft' was written, but it must have been before October 1936. Hogan's view overlooks the fact that organic laws had been explained in the 1922 volume, *Select Constitutions of the World*, which the documentary record and de Valera's official biography demonstrate that de Valera had recourse to in the drafting process.[126] The volume explained 'organic laws' as follows:

> It is sufficient to repeat that [the Organic Law's] purposes was to implement the Constitutional Laws … These Organic Laws rank higher than ordinary legislation and lower than the Constitutional Laws. They differ from the Constitutional Laws inasmuch as they may be amended or repealed in the ordinary course of legislation, whereas the Constitutional Laws … require a special procedure.[127]

Thus, while it is possible that Hearne may have made reference to organic laws, it is also plausible that de Valera came across the term in his studies of contemporaneous constitutions. Moreover, the same volume contained provisions establishing constitutional courts. In that case, de Valera's notes may reflect his own thinking, rather than Hearne's.

Second, Hogan points out that Hearne composed a memorandum on the operation of judicial review in comparative constitutions which drew attention to constitutional courts.[128] On 12 December 1935, Hearne composed a note on the provisions relating to constitutional review in

[125] Hogan, "John Hearne and the Plan for a Constitutional Court," 77.

[126] See Tomás Ó Néill and Pádraig Ó Fiannachta, De Valera (Dublin: Cló Morainn, 1968), 322.

[127] *Select Constitutions of the World* (Dublin: The Stationery Office, 1922), 393.

[128] Hogan, "John Hearne and the Plan for a Constitutional Court," 78.

Czechoslovakia, Austria, Spain, Poland, the United States and France.[129] Hearne included one interesting editorial note: 'It will be observed that in only three of those Constitutions is there a provision for a Constitutional Court so called.' The interesting thing about this is that only six countries were canvassed and in fully half of these countries there was a provision for a constitutional court.[130] The use of the word 'only', as in '*only* three of those Constitutions', might be thought to suggest that Hearne's feeling were opposed to a constitutional court.[131] A note on the memorandum from the assistant secretary of the department of external affairs, Sean Murphy, indicates that de Valera had asked for a 'memorandum on Constitutional Courts in other countries' that morning, 12 December. Thus, the idea for the memorandum seems to have originated with de Valera. The documentary material, therefore, provides a very slight indication that Hearne was ambivalent about the introduction of a constitutional court, but the Murphy memorandum does provide some direct textual evidence that de Valera was interested in how this institution worked in other countries. This conforms to the 'squared paper' notes that de Valera made, and is consistent with his speeches in the Dáil about constitutional courts.

Finally, Hogan points out that an early Hearne draft contains provisions to establish a constitutional court.[132] Broderick has noted that the idea was drawn from the Czechoslovak example.[133] This is certainly an argument in favour of Hearne's authorship, but it overlooks the complicated interaction between de Valera and Hearne in relation to the drafting process. It is difficult to attribute a particular idea to Hearne on the basis of a draft—such an idea may also have come from de Valera. Once we concede that the authorship of such provisions is open to question, however, it is difficult to proffer a convincing reason for attributing authorship of certain elements to Hearne and not de Valera. The draft, therefore, does not establish that Hearne preferred a constitutional court.

In the Dáil debates on the Constitution, de Valera continued to talk about his preference for a constitutional court:

> This matter of the Constitution is going to be interpreted, ultimately, by the Courts. The Supreme Court is going to be the body to decide on its inter-

[129] 12 December 1935 (UCDA: P150/2370).

[130] These were Austria, Spain, and Czechoslovakia.

[131] Broderick argues on the same lines as Hogan that Hearne was in favour of the idea; see Broderick, *John Hearne*, 166.

[132] Hogan, "John Hearne and the Plan for a Constitutional Court," 78–79.

[133] Broderick, *John Hearne*, 166.

> pretation. I know that a number of people would prefer to get some other body to be the judge in such matters, and I do not want to say, for one moment, that, if I could get another body to deal with the interpretation of the Constitution, and which could decide such matters just as well as the Supreme Court, I would not be in favour of having some body other than the ordinary courts. I know that in other countries, courts are set up, known, roughly, as constitutional courts, to deal with such matters, which take a broader view … or not so narrow a view, as the ordinary courts which, strictly interpreting the ordinary law from day to day, have to take. If I could get from anybody any suggestion of some court to deal with such matters, other than the Supreme Court, then I would be willing to consider it, and, if it were feasible, to adopt the suggestion. … However, if it were possible to find a better body to deal with these matters, and if the lawyers would help me to put into this an indication whereby it could be suggested to the court that, in constitutional matters, the court should not take a narrow, or, what might be called, a strictly legalistic view, then I would do that; but again that is a course that I found too difficult to put down here and to reduce to practice.[134]

This public record shows that de Valera held himself out as being prepared to accept a workable proposal for a constitutional court even in the Dáil. Moreover, the second solution which de Valera proposed, to put in place an interpretive principle which would guide the operation of the courts, also appears in de Valera's own handwritten notes on the draft Constitutions:

> Arrange Canon of Interpretation
>
> 1. Principles not for judicial determination—Legislature only the judge
> 2. Liberal (Marshall) interpret[atio]n of judiciable [*sic*] parts.[135]

This is a reference to the celebrated judgment of the Chief Justice of the USA in *McCullough v Maryland* which would judge means consistent 'with the letter and spirit of the constitution' as constitutional provided that the ends were legitimate.[136]

Both elements, the idea of a body other than the Supreme Court to be vested with the power of constitutional review and the interpretive prin-

[134] 67 *Dáil Debates* (11 May 1937) cols. 53–54.

[135] UCDA: P150/2392. The need for a canon of interpretation was also noted in UCDA: P150/2379.

[136] (1819) 17 US 316, 421.

ciple, appear again in de Valera's speech of 13 May 1937.[137] In the course of a response to Patrick McGilligan, de Valera again indicated his misgivings about vesting the power of judicial review of legislation in the Supreme Court:

> Deputy McGilligan tells us that, in order to administer any of these, we would need to have a court of Archbishops. It is possible that, by their special training in matters of this particular sort, they might be a better court for that purpose than the Supreme Court. Yet it is very interesting that, when I said that I was looking around for something better than the Supreme Court, I immediately was scoffed at. Of course we are told a Constitution must be interpreted by the courts, and why should I look for any other body? And we have somebody who has studied all the Constitutions of the world, as far as they could be got, and he pooh-poohs the idea that any court other than the Supreme Court should be thought of for the purpose of interpreting the Constitution. He knows perfectly well that in other countries, special courts—in some cases, even the Legislature itself—have been taken as the interpreters of the Constitution.[138]

There is a note of personal pique in de Valera's response here, providing slender support to the argument that the idea of a constitutional court was de Valera's own. Furthermore, de Valera went on to refer to the Supreme Court of the USA:

> [E]ven where there is a Supreme Court, as there is in the United States of America, some of the best judges of those courts, when asked to decide as a constitutional court, have said, and put it as the foreground of their work and interpretation, that, ordinarily, the view of the Legislature in interpreting their Constitution should be their guide: that there is a presumption, and should be a presumption, that they are doing their work reasonably and fairly, and that it is only in cases where there is clearly and definitely a departure, *not merely from the letter of the Constitution, but from the spirit of the Constitution*, that they should hold differently.[139]

The portions of the de Valera's speech italicised here refer to Marshall CJ's judgment in *McCulloch v. Maryland*. It was an argument which de

[137] See 67 *Dáil Debates* (13 May 1937) cols. 426–428.
[138] 67 *Dáil Debates* cols. 426–427.
[139] 67 *Dáil Debates* col. 427.

Valera continued to press over 20 years later.[140] This canon of interpretation also appears to have formed part of de Valera's thinking in 1943 when a Council of State was convened to consider whether an Article 26 reference should be made in the School Attendance Bill to the Supreme Court in order to determine its constitutionality.[141]

De Valera's thinking seems to have proceeded in the following way: there was a real danger that the superior courts in the state would adopt an overly formalistic view of the Constitution. This view may be seen in cases such as *Lynham v Butler (No. 2)*, where Fitzgibbon J appeared willing to accede to the proposition that the Constitution of the Free State could be implicitly amended by ordinary legislation during the transitional period provided under Article 50.[142] The 1937 Constitution would not provide such powers to the Legislature, but the danger that de Valera apprehended lay in a crabbed reading of the provisions of the Constitution itself. His apprehension may have been based on de Valera's notorious ambivalence towards lawyers.[143] In future, this would be likely to tell against the Oireachtas. Therefore, it would be preferable to establish a new body who would hear only constitutional cases and would not confine themselves to a formalistic legal analysis—in other words, a constitutional court. When this proved difficult to establish, he jettisoned the proposal and instead considered inserting a rule of interpretation which would guide the superior courts. This rule would have prevented an overly technical analysis of the Constitution by providing a presumption in favour of the constitutionality of legislation passed by the Oireachtas. This alternative was discarded due to drafting difficulties. If the analysis provided here is correct, it is quite easy to see what that difficulty was: any proposal designed to eschew the technical legal analysis of the higher judiciary would itself be subject to that analysis and could therefore not be relied upon. Both of these proposals, constitutional court and interpretative rule, were of a piece and were designed to shield the constitution from the

[140] See *The Irish Press*, 14 October 1982: 'In the early 1960s [de Valera] privately expressed the view that the courts should use the constitution in the same way as United States courts did the constitution of 1789.'

[141] Donal K. Coffey. "'The union makes us strong:' *National Union of Railwaymen v. Sullivan* and the demise of vocationalism in Ireland," in *Judges, Politics and the Irish Constitution*, ed. Laura Cahillane, James Gallen and Tom Hickey (Manchester: Manchester University Press, 2017), 191.

[142] [1933] IR 74, 112. See also *R (Cooney) v Clinton* [1935] IR 245.

[143] See, e.g., James Comyn, *Their Friends at Court* (Chichester: Barry Rose, 1973), 81.

vagaries of the upper echelons of the judiciary. Drafting difficulties, however, stymied both proposals.

If this analysis is correct then it seems unlikely that Hearne was the main impetus behind the push for a constitutional court. Although the evidence is scarce on either side, what there is seems to indicate that de Valera was the prime mover behind the proposal to invest judicial review in a new constitutional court: the notes in his own hand, his request for a memorandum in December 1935 and his personal pique at the treatment of his proposals in the Dáil all point towards his personal interest.

John Maurice Kelly famously argued that the speeches made by de Valera in the Dáil betrayed an ambivalence towards, if not an antipathy to, the possibility of judicial review of legislation. This was most famously captured by the line that the fundamental rights provisions of the Constitution were 'merely … headlines for the Oireachtas'.[144] This interpretation was based on the Dáil debates in which de Valera appeared equivocal about judicial review of legislation.[145] As we have seen in relation to the question of the constitutional court, this does not do justice to de Valera's views on judicial review. Moreover, it appears to have gone unnoticed until now that the phrase itself derives from an article written by Cornelius Lucey in the *Irish Ecclesiastical Record* in early 1937. As we have noted earlier, de Valera's official biography makes specific reference to Lucey as an inspiration for constitutional drafting. In the course of his exposition of what a constitution is, Lucey noted: 'And [a constitution] is a headline to which all new legislation must positively conform.'[146]

The remainder of the article also considered the position of judicial review and drew a distinction between continental and American practices. The former, Lucey noted, are generally protected against violation merely by 'a promissory note to be taken by members of each government, plus … political responsibility'.[147] In contrast, Lucey noted that in the USA the Supreme Court could declare measures invalid on the basis of their failure to comply with the Constitution, 'and the President and Congress are legally bound to defer to such decisions'.[148] So, what of Ireland? Lucey argued: 'On the whole, it would seem that for a young

[144] Kelly, *Fundamental Rights in the Irish Law and Constitution*, 17.
[145] Kelly, 17–21.
[146] Cornelius Lucey, "The Principles of Constitution-Making," 18.
[147] Lucey, 21.
[148] Lucey, 21.

nation a written constitution safeguarded from wanton revision and enforceable by the courts is theoretically the most desirable, and has been productive of the best results in practice.'[149] It is notable that the Constitution which was produced in 1937 accorded with these arguments.

What, then, accounts for the quotations which Kelly drew on? It seems likely that de Valera was attempting to draw a distinction between the legal and political operations of the Constitution. Let us take the remarks of de Valera which Kelly quoted:

> Unfortunately—and the Deputy knows it quite well—we cannot provide by any Constitution against the possible abuse of its powers by the Legislature in future. It is vain to attempt to do it. All we can do is to set headlines for the Legislature, as we are doing here—headlines with regard to the things the Legislature should aim at.[150]

These words refer not to the impossibility of judicial review of legislation, but to the importance of ensuring that the institutions of public life were staffed with people who governed with regard to civic virtue, a point which recurs in Lucey's article.[151] Moreover, the preceding element of the debate clearly demonstrates that de Valera did envisage a role for the courts in judicial review:

> The right to assemble peaceably and without arms is the general guaranteed constitutional right, but I do not think it would be possible for the State to continue without having some method in the public interest … of controlling or preventing meetings that might, in certain conditions, lead to a breach of the peace. That power must be safeguarded somehow, and the object of this section is to safeguard the power of the Legislature to pass laws which will be proper for the maintenance of public peace and to prevent the abuse or the misuse of the right of public meetings. *Again, if there were a situation in which there was an obvious abuse of its power, I take it that the courts would interfere and say that it was an abuse.*[152]

[149] Lucey, 21.

[150] 68 *Dáil Debates* (9 June 1937) col. 217; Kelly, *Fundamental Rights in the Irish Law and Constitution*, 17.

[151] See Lucey, "The Principles of Constitution-Making," 34.

[152] 68 *Dáil Debates* (9 June 1937) cols. 215–216 (emphasis added). I attended a talk by Gerard Hogan at 'The Evolution of the Irish Constitution 1937–2007' conference in which he made a sustained attack on Kelly along these lines. This paper has, I believe, never been published.

It seems clear then that de Valera knew that judicial review as enacted in the Constitution would have teeth and, in consequence, that Kelly's argument is unsustainable. Moreover, the inclusion of the power of judicial review of legislation in the text of the Constitution itself must provide the strongest evidence that it was intended. The manner in which subsequent courts were to use that power was, however, unforeseen: the 1939 case of *The State (Burke) v Lennon* which held section 55 of the Offences Against the State Act 1939 repugnant to the Constitution appears to have been a surprise.[153]

Conclusion

The drafting of the 1937 Constitution, as stated at the outset, was an incredibly complicated process which it is not possible to unravel in a single chapter. Nonetheless, there are certain features that are worth bearing in mind. First, despite the plebiscite, the drafting process was a largely elite affair. It was mostly driven by key individuals who we have seen operating at the highest levels of government in the years immediately preceding 1937, chief amongst them de Valera and Hearne. Second, the interaction between these individuals is difficult to navigate accurately, but certain elements do suggest themselves. These were individuals with an interest in constitutionalism outside the narrow confines of Ireland—or even of the English-speaking world. They preserved the British Commonwealth parliamentary tradition, but introduced new measures, and considered others which they did not implement. These was reflective of the international world they found themselves in; officials such as Hearne had been exposed to international diplomacy in the 1920s through the imperial conferences, while the Free State had been engaged with the League of Nations in Geneva through the 1920s and 1930s. Third, the drafters were religious men living in a religious society, and this channelled their international inquisitiveness: they drew on contemporary models of Catholic constitutionalism to construct early drafts in relation to fundamental rights. Notwithstanding this fact, there were important elements of the constitution that were based on the liberal democratic constitutions that were put in place immediately after the First World War, in particular the 1919 German Constitution. Finally, while it has been appreciated that drafting was done in a closed group, it is less well appreciated that there were important junctures at which popular groups had an influence, particularly in relation to parliament and the president. These

[153] Hogan, *Origins*, 668–695.

were drawn from within the Fianna Fáil party, but they were involved in the drafting process from 1936.

The drafting process was long and complicated. This, however, did not guarantee that the Constitution would be accepted when presented to the public. In fact, certain features of the drafting process all but ensured that there would be difficulties. The tight circle of drafters, drawn from broadly similar nationalist backgrounds, meant that certain presuppositions might turn out to be problematic. As we shall see, the provisions relating to the role of women provoked a backlash when the draft Constitution was released to the public.

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CHAPTER 5

The Reception of the Irish Constitution: May–July 1937

De Valera indicated from the outset his preference for consensus on the content of the Constitution.[1] This wish may have appeared briefly to be possible. The *Irish Independent* argued that the Constitution 'is no more, and in many respects much less' than the 1922 Constitution. Its editorial did draw attention to the debt owed by the drafters to the 1922 Constitution, which it described as 'one of his finest tributes to his predecessors'. It concluded that 'there will be no serious division of opinion'.[2] This conclusion was over-optimistic. W.T. Cosgrave immediately attacked the Constitution as unnecessary given the existence of the 1922 Constitution, displaying a mistrust of the new president which was to linger throughout the Dáil debates and plebiscite campaign.[3] A subsequent *Irish Independent* editorial on 3 May 1937 focused on the flaws in the document in relation to the president and Senate. It was this critical tenor which pervaded the newspaper's coverage thereafter.

As *The Leader* pointed out, it was inevitable that the Constitution would attract criticism as arguments in favour of the 1937 document would necessarily focus on shortcomings in the 1922 Constitution, 'which

[1] See, e.g., 67 Dáil Debates cols. 73–74 (11 May 1937).

[2] *Irish Independent*, 1 May 1937. The overview of the Constitution was titled 'Old Constitution little changed'.

[3] *Irish Independent*, 3 May 1937.

D. K. Coffey, *Constitutionalism in Ireland, 1932–1938*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76237-1_5

was the work of [Fianna Fáil's] political opponents'.[4] The only possible way, if indeed any existed at all, to make the Constitution apolitical would have been to separate it from electoral considerations. De Valera instead chose to hold the plebiscite on the same date as the general election: 1 July 1937. *The Leader* claimed that de Valera was running a campaign with the implicit message, 'hit me now and the Constitution in my arms'.[5] Partisanship was present on both sides. *The Irish Press* editorial on 1 May claimed that 'from the first clause to the last [the Constitution] is inspired by the desire to promote the well-being of the nation, to remove grievances and to elevate the people morally and spiritually'.[6] *The Irish Times* called it a 'long and rather dreary document' which had been drafted with no reference to the Commonwealth.[7]

The most important contribution to the public debate surrounding the Constitution was an article written by John A. Costello for the *Irish Independent* on 6 May 1937.[8] Its headline was 'New Constitution curtails women's rights'. De Valera was subsequently to accuse Costello of 'starting a hare' on women's rights under the Constitution.[9] As we shall see, however, the question of women's rights was to prove contentious and led to a popular movement made up of women's groups campaigning against the Constitution.

The partisan nature of the debate was also evident in the Dáil. While opposition deputies performed creditably in relation to the various significant deficiencies in drafting, it was clear that the substance of the Constitution was essentially a party matter. Amendments were largely rejected, particularly on substantive matters. There were notable exceptions during the Dáil debates; for example, the initial forum for judicial review of legislation was changed from the Supreme Court to the High Court. This was influenced by John A. Costello's analysis in the *Irish Independent*. A more detailed examination of Dáil contributions can be found in the *Drafting the Irish Constitution*. The vast majority of substantive amendments that were tabled were not adopted.

[4] *The Leader*, 15 May 1937.
[5] Ibid.
[6] *The Irish Press*, 1 May 1937.
[7] *The Irish Times*, 1 May 1937.
[8] *Irish Independent*, 6 May 1937.
[9] See 67 Dáil Debates cols. 63–65 (11 May 1937).

The Dáil debates were long and poorly attended. *The Leader* commented damningly on the lack of interest by deputies in June 1937, shortly before the draft was finalised:

> The Draft Constitution was in Committee, and the right of public speech and public assembly were the matters under discussion. There were about a half-a-dozen members present on the Government and Opposition Benches, and two or three Labour and Independent T.D.s were in their places. Amendments were being moved and points made, some of them worth making, some of them not. But the question of free public assembly is an important one and not an easy one. A few of the amendments were put to a vote. The division bells rang, and in trooped our statesmen, looking very wise, and solemnly cast their votes for or against the amendment, but they cast their votes on Party lines, looking very wise and important the while. We were amused. What a farce.[10]

On 14 June 1937, Dáil Éireann voted to approve the draft Constitution. The vote proceeded along party lines: Fianna Fáil were in favour and the opposition parties were against. De Valera dissolved the Dáil and called a general election. The election was to be held on the same day as a plebiscite which would give force of law to the Constitution. The plebiscite campaign was interesting for a number of reasons. First, a plebiscite was a risky means of enacting a Constitution. De Valera's constitutional ideals had reached their zenith in the Constitution but it was by no means certain that the Constitution would attract sufficient popular support to pass. Why, then, was a plebiscite chosen as the method of its enactment? Second, the plebiscite campaign disclosed a number of fault lines in Irish politics. Third, the Constitution was commented upon extensively in the international press but was not officially commented upon by the British government, an institution which certainly had an interest in the draft Constitution.

The Mechanics of the Plebiscite

The most exceptional feature of the 1937 Constitution was its method of enactment. None of the inter-war constitutions of Europe were enacted in this fashion. The majority of such constitutions were enacted by constituent assemblies (for instance, the 1919 Constitution of the German Reich, the

[10] *The Leader* 12 June 1937.

1920 Constitutional Charter of the Czechoslovak Republic, the 1920 Constitution of the Esthonian Republic, the 1920 Austrian Federal Constitutional law, the 1921 Constitution of the Polish Republic, the 1921 Constitution of the Kingdom of the Serbs, Croats and Slovenes, and the 1931 Constitution of the Spanish Republic).[11] The 1931 Constitution of the Kingdom of Yugoslavia was enacted by royal decree. The 1937 Irish Constitution was unique in that it was to be enacted by popular vote, a method which left the Fianna Fáil government prone to the vagaries of an electorate which had suffered the hardships a trade war under the government's tenure. Discounting the possibility of enacting the new Constitution by royal decree, as Yugoslavia had done, there were at least two other possible means by which the Constitution could be enacted: ratification by the Oireachtas, or ratification by a constituent assembly.

Article 50 of the Irish Free State Constitution provided for statutory constitutional amendment for eight years. This had been extended in 1929 for a further eight years, that is until 1938.[12] The Oireachtas could have used this power to pass the 1937 Constitution by means of the power given by Article 50. There was considerable juridical opinion in favour of this method of enactment. Conor Maguire, a former attorney-general and then-president of the high court, believed the Constitution would be enacted in such a fashion.[13] Both John A. Costello, attorney-general from 1926 to 1932, and Diarmaid Ó Cruadhlaoich, a former justice of the Dáil courts and a practicing barrister, noted the difficulties with the enactment of the measure by the Oireachtas.[14] Costello commented on the draft Constitution publicly but more interesting was a private note of his. Costello wrote: 'The present proposals if passed into law may be repealed, altered, or amended without necessity for referendum during the remaining of the period of sixteen years specified in Article 50' of the 1922

[11] B. Shiva Rao, *Select Constitutions of the World* (Madras: The Madras Law Journal Press, 1934), 204–206 (Germany); 167–168 (Czechoslovakia); 150–151 (Esthonia); 109–110 (Austria); 81–83 (Poland); 43–44 (Kingdom of the Serbs, Croats and Slovenes). For Spain, Rhea Marsh Smith, *The Day of the Liberals in Spain* (Philadelphia: University of Pennsylvania Press, 1938), 152–321.

[12] Constitution (Amendment No. 16) Act 1929. See further on the amendment procedure under the 1922 Constitution, John Maurice Kelly, *Fundamental rights in Irish law and the Constitution* (Dublin: Allen Figgis, 1961), 4–6.

[13] Conor Maguire to Eamon de Valera, 14 April 1937 (University College Dublin Archives (hereafter UCDA): P150/2416).

[14] *Irish Independent*, 10 May 1937.

Constitution.[15] If the 1937 Constitution were passed by statutory amendment then it could be repealed in a like manner.

We have noted the difficulties with ratification by statutory amendment that were exposed in the case of *The State (Ryan) v Lennon*.[16] In that case, a majority of the members of the Supreme Court held that the powers of the Oireachtas were inferior to those of the constituent assembly which had passed the Constitution of the Irish Free State (Saorstát Eireann) Act 1922. This Act gave legal force to the 1922 Constitution. It followed that only a constituent assembly, or a body of equal or greater power, could repeal the 1922 Act. This presented some difficulties for de Valera. It meant that any amendment to the 1922 Constitution, including constitutional ratification under Article 50, could not derogate from the treaty; this was stipulated in Section 2 of the 1922 Act. Indeed, the implication of the ruling of the Supreme Court was that the abolition of the oath was *ultra vires* as it derogated from the treaty, although as the Constitution (Removal of Oath) Act was not directly challenged in *The State (Ryan) v Lennon*, the Act still stood. If de Valera sought to ratify the Constitution by means of a constitutional amendment under Article 50 then this new Constitution would have to be in conformity with the treaty. This was a political impossibility—de Valera had spent the previous five years undermining the treaty.

In the early years of his tenure as president of the executive council, de Valera seemed to prefer the approach of convening a new constituent assembly. In May 1934, he explained the 'natural way' of passing a new Constitution: 'If, for instance, we wanted in a short period to get this Constitution revised and a new Constitution secured, the natural way of doing it would be to get an Assembly for that purpose elected directly by the people.'[17]

Exactly a year later, John Hearne asked 'whether the new Constitution should (or could) be enacted by the existing Oireachtas, and, if not, whether a Constituent Assembly should be called and, if so, how?'[18] Hearne's first draft of the 1937 Constitution provided for the enactment of the Constitution by 'the Sovereign Irish People through our elected

[15] UCDA: P160/262 (3).
[16] [1935] IR 170.
[17] 52 Dáil Debates col. 1219 (17 May 1934).
[18] 17 May 1935 (UCDA: P150/2370).

representatives in this Dáil Eireann sitting as a Constituent Assembly'.[19] Neither de Valera nor Hearne dismissed the possibility of a constituent assembly ratifying the Constitution. The difficulty with this method of enactment derived from some vagueness in the judgments in *The State (Ryan) v Lennon*.[20] The problem was that *The State (Ryan) v Lennon* did not indicate clearly how to determine whether a particular institution was a constituent assembly or not. Kennedy CJ, dissenting, had stated:

> It may be also necessary to recall that that [Constituent] Assembly was a single-chamber parliament, membership of which was not restricted by, or conditioned on, any test, oath, or declaration of any kind, and which did not act in combination or association with any other chamber or body or person (Lord Lieutenant or Governor-General), and that it was the Parliament to which the then Executive or administration […] was responsible.[21]

A similar test was put forward by Fitzgibbon J.[22] Both Kennedy CJ and Fitzgibbon J commented on the fact that there was no 'oath' or 'test' placed on members of the 1922 constituent assembly. Fitzgibbon declared that it was 'open to all elected representatives'. Kennedy CJ pointed out the constituent assembly had not acted in combination with any other institution.

The Dáil in 1937 satisfied all of the criteria identified by the Supreme Court in *The State (Ryan) v Lennon*. Membership of it was not dependent on subscribing to an oath, as the oath of allegiance had been abolished. It was open to all elected representatives. It did not act in combination with any other institution as the office of the governor-general and the Senate had been abolished. Therefore, under the criteria of a constituent assembly identified by the Supreme Court it could be said to be a constituent assembly.

However, the Supreme Court had also indicated in *The State (Ryan) v Lennon* that the Oireachtas was not a constituent assembly in 1934. According to the Supreme Court, it did not possess the power to amend the Irish Free State (Saorstát Eireann) Act 1922. Therefore, the Dáil in 1937 could not act as a constituent assembly to pass the Constitution.

[19] UCDA: P150/2370.
[20] [1935] IR 170.
[21] [1935] IR 170, 203–204.
[22] [1935] IR 170, 224.

It would have been possible to convene a new constituent assembly for the express purpose of passing the new Constitution. There were three difficulties with this approach, however. First, what were the criteria by which it could be ascertained whether the new body was a constituent assembly? Second, if the Dáil did not have the power to amend the Irish Free State (Saorstát Eireann) Act 1922, did it possess the power to convene a new constituent assembly? Third, how would the new constituent assembly interact with the Dáil? Would it be answerable to the Dáil or act independently of it? These legal uncertainties made the constituent assembly option unattractive.

The solution which de Valera hit upon was to enact the Constitution by plebiscite. The constituent assembly of 1922 derived its power from the people. Therefore, a plebiscite could repeal any measure passed by the constituent assembly, including the Irish Free State (Saorstát Eireann) Act 1922, and enact another in its place. This procedure did not escape comment. Patrick McGilligan, professor of constitutional law at University College Dublin, asked as late as December 1937:

> in what enactment or series of enactments, were the people given power to legislate in this country and, secondly, whether what has been discussed as the Constitution is not an amendment of the [1922] Constitution that was in being here, and if not, why not?[23]

Nonetheless, the plebiscite promised to avoid the difficulties with ratification either by statutory amendment or by constituent assembly. It was also clear that the plebiscite was an expression of the guarantee contained in Article 1 of the draft Constitution—an affirmation of the sovereign, inalienable and indefeasible right of the Irish nation to choose its own form of government. This point was made in a speech prepared by de Valera (though not delivered): 'When the draft Constitution is submitted to the people for their approval, that approval, if forthcoming, will, I think be the first actual exercise by the people of the sovereign right affirmed in [Article 1] without dictation or interference by any power or authority outside the people themselves.'[24]

Furthermore, it cannot have escaped de Valera's notice that a plebiscite would make the Constitution a thing of the public—a *res publica*. Finally,

[23] 69 Dáil Debates col. 2637 (16 December 1937).
[24] UCDA: P150/2441.

in their programme for action in 1926 Fianna Fáil had pledged to 'replace the Free State Constitution, with its articles dictated by England by a Constitution freely framed by the representatives of the Irish people'.[25] The Constitution could be seen as a fulfilment of this guarantee as it was to be enacted by a two-part process: consideration by the Dáil, followed by a popular plebiscite. The intention was that the Dáil would sit as a deliberative body while the ratification of the Constitution would rest upon the *sua sponte* expression of the will of the people.[26]

The initial published draft of the Constitution was printed in the three major papers, the *Irish Independent*, *The Irish Press*, and *The Irish Times*, on 1 May 1937. *The Cork Examiner*, and its sister publication, the *Cork Evening Echo*, also contained the text of the Constitution on 1 May, although the text stopped in the middle of Article 45, omitting 18 articles.[27] Other newspapers simply summarised the provisions of the draft Constitution.[28] The people were, however, given only limited sight of the Dáil-approved version as newspapers did not carry the text as amended in the aftermath of the 14 June dissolution.

Free copies of the Dáil-approved version were available for perusal. However, these free copies were not available in the post offices until shortly before the plebiscite. This was due to the short time, scarcely over two weeks, between dissolution and vote on 1 July and the logistics of printing copies of a document finalised on the last day of the Dáil. On 21 June, a run of 20,000 copies of the final text was completed; 16,000 were delivered to the department of posts and telegraphs to be delivered to post offices.[29] A further 2000 were made available to booksellers and the remaining 2000 in that run were to be distributed amongst libraries, Garda stations and civic guard superintendents.[30] It is hard to imagine that a close reading of the text, a text so dependent on nuance and syntax, would have been possible in a post office. It is, of course, possible that an unusually conscientious reader could have gleaned the content of the major amendments from the extensive coverage of the Dáil debates, but as a large number of amendments were dealt with in the final stages this would have been very difficult work.

[25] UCDA: P150/2047.
[26] National Archives of Ireland (hereafter NAI): DFA/105/6.
[27] *Cork Examiner*, 1 May 1937, *Cork Evening Echo*, 1 May 1937.
[28] See *Evening Herald*, 1 May 1937, *Dublin Evening Mail*, 1 May 1937.
[29] 21 June 1937 (NAI: Taois/s.10239).
[30] Ibid.

Telephone bureaux opened on 2 July in the post offices in Dublin and Cork.[31] These bureaux opened at 10 a.m. and were open 24 hours a day until the results were finalised. They provided both the results of the general election and the plebiscite. Results were also broadcast on national radio. These were provided between 2 and 6 July.[32] It was accepted at a relatively early stage that the plebiscite would be carried but the composition of the Dáil was not clear until the last ballots were counted. In the event, Fianna Fáil ended up with the same number of seats as the remaining parties and independents combined. The plebiscite passed by 685,105 votes to 526,945. It seems likely that the public would have had more interest in the general election, given the tightness of the contest, than the plebiscite.

Irish Responses to the Plebiscite

Seven principal arguments were advanced against the Constitution on the hustings.[33] These arguments were not the sole preserve of any single party but can be linked to a greater or lesser extent with certain parties or other groups.

First, there was a fear that the presidency would be used to establish a dictatorship. This was a largely contextual fear; the centripetal force of European ideology could not be ignored. The position of president seemed to be an attempt to proceed along the lines of the Fascists or Nazis. This argument was based on the ability of the president to be granted further powers and ignore the advice of the council of state, and his immunity from suit. This was an argument associated with Fine Gael and Labour.[34] William Norton, the leader of the Labour Party, said that although he agreed with many provisions of the draft Constitution:

[31] *Evening Echo*, 1 July 1937. The extensions were 72441 in Dublin and 224 in Cork; see *The Wicklow People*, 3 July 1937.

[32] See *Evening Echo*, 2 July 1937, 3 July 1937, 5 July 1937, 6 July 1937. The radio programme for 7 July 1937 makes no mention of such bulletins.

[33] See generally Mary McGinty, *A Study of the Campaign For and Against the Enactment of the 1937 Constitution* (M.A. thesis, Galway: University College, 1987), and Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution: Bunreacht na hÉireann* (Cork: Mercier Press, 2007), 180–197.

[34] See the comments by James Dillon, Fine Gael deputy, in *Irish Independent*, 29 June 1937.

> [T]here were also dangerous provisions which would enable a future government by a majority of one vote in the Dail to hand over to the new President powers which would invade the rights of Parliament and which might help to establish here a dictatorships [*sic*] of the variety which now existed in Germany, Russia, and Italy.[35]

Frank MacDermot, the independent TD, noted succinctly that the president had less power than the Taoiseach, and that both had less power than the president of the executive council under the Free State Constitution in 1937.[36] MacDermot occupied an interesting position in relation to the Constitution. He had previously been a founder member of the Centre Party and, after its amalgamation, a member of Fine Gael. In 1937, MacDermot decided not to contest the election. This gave him considerable latitude. He was not beholden to popular opinion and could focus on the Constitution rather than constituency issues. He was a consistent advocate for the Constitution, also believing that it was desirable because its acceptance 'would remove any possible excuse for Fianna Fail again becoming an unconstitutional Party'.[37]

The position of the president occupied the majority of de Valera's radio address upon the dissolution of the Dáil.[38] De Valera emphasised the mediating presence of the presidency, noting that '[h]e simply sets in train for definite decision by the appointed authority specified matters about which there is a dispute'.[39] De Valera addressed meetings in O'Connell Street on 16 June and in Gort on 20 June in which he argued the presidency did not amount to a dictatorship.[40] This argument was advanced by de Valera for a simple reason—it was an argument which he could win.

Second, women's equality proved contentious. The Constitution envisaged a situation in which women could be treated differently in a certain social context. This would most obviously impact on the economic sphere. This was the most popular basis of objection across the political spectrum. We shall deal with this objection separately below.

[35] *Irish Independent*, 26 June 1937.

[36] *Irish Independent*, 18 June 1937. The letter appears in *The Irish Times* on 14 June. The Seanad had been abolished in 1936; the Oireachtas was a unicameral legislature in 1937.

[37] MacDermot to Law, 1 July 1937 (MacDermot papers: NAI: 1065/10/2).

[38] *The Irish Press*, 16 June 1937.

[39] *The Irish Press*, 16 June 1937.

[40] For O'Connell Street, *The Irish Times*, 17 June 1937. For Gort, *The Irish Times*, 21 June 1937.

Third, the press was extremely sceptical of the provisions allowing the freedom of the press to be curtailed. The most threatening aspect of this was that it could be curtailed to protect 'the authority of the State'.[41] This phrase could, in the eyes of constitutional detractors, be stretched to stop any meaningful political criticism. This argument was made by Fine Gael and also, naturally, by the press.[42] James Dillon, a Fine Gael deputy, argued that 'under [the Constitution] every newspaper in the country, except the Government organ, could be suppressed'.[43] Fine Gael's advocacy for the freedom of the press was somewhat ironic, given their preference for banning Communist propaganda. In 1936, Frank MacDermot made reference to a speech given by James Burke, Fine Gael's director of organisation, in which Burke stated as follows:

> In May of [1936] in Wexford Dr. Ryan expressed the Government view in the following words: 'If people said that in their opinion the best form of government for this country was the form of government in Russia, they were bound to protect them and allow them to put their views before the people.'
>
> […]
>
> The attitude of Fine Gael had always been, and would always be, directly opposite to that of Fianna Fáil in this matter.[44]

Fourth, the limitations on the right to freedom of association gave rise to concern. Article 40.6.1(iii) provided for the right of citizens to form unions, but this right was subject to 'public order and morality'; the Constitution also provided that laws could be enacted to regulate and control the exercise of the right 'in the public interest'. These limitations were not found in the 1922 Constitution. Those on the left of the political spectrum, in other words those most likely to be in unions, were most concerned with this aspect with the Constitution. It was raised most often by the Labour Party.[45] Richard Corish pointed out:

[41] Article 40.6.1(i).

[42] See editorial in the *Irish Independent*, "The Constitution," 29 June 1937.

[43] *Irish Independent*, 29 June 1937.

[44] 64 Dáil Debates col. 1211. I would like to thank John O'Dowd for bringing this to my attention.

[45] See statements by William Norton at Ballymore Eustace, *Irish Independent*, 19 June 1937.

> Mr. de Valera had refused to give an assurance to Mr. Norton—in fact, he said it would be necessary to curtail the activities of trade unionism—that trade unions would enjoy the same liberties and privileges under the new Constitution.[46]

Fifth, the more general exceptions placed on rights such as personal liberty, property, and so on, led to a conclusion that the new Constitution was a diminution of the liberties of the citizen. This was based on the less encumbered expressions of right in the 1922 Constitution. In a sense, this argument was disingenuous for, as have seen, the 1922 Constitution had proven itself to be inadequate as a defence of personal rights during its brief life. This was due to the fact that the Free State Constitution could be amended by a simple Act of Parliament by virtue of Article 50. This attack was associated with Fine Gael. William T. Cosgrave, the leader of Fine Gael, stated that 'so far as the new Constitution was concerned it did not give the citizens the same fundamental rights as they had under the old Constitution'.[47]

Sixth, the draft provided for the continuation of military tribunals. This legitimised, in a certain way, the manner in which Article 2A of the 1922 Constitution had been used against elements of the population, most notably the Blueshirts and radical Republicans. This argument was most commonly voiced by Republicans, the natural targets of such tribunals, and Labour. Maud Gonne MacBride raised the issue in a letter to the *Irish Independent* in which she argued the provision for special courts was introduced 'either [as] a slur on the ordinary courts, or for the sinister of giving power to a Government which had lost the confidence of the people, to outlaw political opponents by denying them juries and open trial'.[48]

[46] *Irish Independent*, 25 June 1937.

[47] *Irish Independent*, 24 June 1937.

[48] *Irish Independent*, 4 May 1937. *An Phoblacht* was suppressed at the time; this source provides a useful barometer of republican animosity to the draft Constitution. Gonne-MacBride caustically remarked in June:

> Article 2A was written large all over the Draft Constitution […] President de Valera had virtually stated in the Dail that he would not entrust the powers conferred by that Article to anyone but himself. He had also stated that the Constitution was for all time.

What President de Valera seemed to imply by the two statements was that he was going to live forever.

Irish Independent, 7 June 1937.

Seventh, the Constitution was attacked for failure to mention the Commonwealth. This was associated with *The Irish Times*.[49] This criticism attracted less space than the other arguments and was essentially an issue only for those who wished for closer relations with Britain. Membership of the Commonwealth was also sometimes mentioned as the only possible means whereby a United Ireland could be achieved, a point which we have seen raised in the midst of the abdication crisis by Irish officials.[50]

These were the principal substantive arguments advanced against the draft Constitution. We will next consider to what degree political groups commented on the draft Constitution.

Political Groups

The Labour Party

Despite the substantial grounds of disagreement with the Constitution, there was a paucity of argument on the campaign trail. No literature from the Labour Party campaign mentions the Constitution. Instead, the focus of the party was on economics. This is hardly surprising. Labour was substantially in agreement with the policies undertaken by the Fianna Fáil government while in power and their unwillingness to vote for the Constitution stemmed from disagreement with specific articles, for example the position of women, rather than with the document as a whole. The party no doubt aimed to pick up votes at the expense of Fianna Fáil, as they were aligned similarly on the political spectrum, and therefore Labour's focus was on putting forward a platform which emphasised the differences between the parties. Economics were Fianna Fáil's weakest point and therefore the most natural to target. On the eve of the general election vote, Labour produced a 15-point manifesto. None of the 15 points dealt with constitutional issues; they were all economic proposals.[51]

[49] *Irish Times*, 26 June 1937. See also *Dublin Evening Mail*, 1 July 1937.
[50] *Irish Times*, 18 June 1937.
[51] *Evening Herald*, 30 June 1937.

Fine Gael

Fine Gael was similarly generally indifferent to the Constitution.[52] Although party raised the topic on a number of occasions, the arguments were generally superficial.[53] In the Fine Gael election handbook, the topic of the Constitution merits a mere two pages out of 23.[54] These pages criticise the Constitution for being a 'vague issue of entirely secondary importance [upon which] a determined effort is to be made to evade facing up to the real problems'.[55]

The 'real problems' to which the booklet referred were economic. Fine Gael viewed the Constitution as a red herring to distract the attention of the voters from the general election. As a result of their preoccupation with economic issues, Fine Gael's constitutional discourse was weak, unfocused and opportunistic. Significantly, Fine Gael ignored the structural implications of the draft Constitution. Indicative of the Fine Gael approach is a comment by Cecil Lavery, who would subsequently become attorney-general and thereafter be appointed to the Supreme Court, who baldly stated that voters should 'not bother your heads' about the Constitution.[56] This was not an isolated opinion amongst Fine Gael candidates, as Patrick McGilligan, a professor of constitutional law at University College Dublin, demonstrated at Cavendish Row when he claimed, 'people are not concerned with the Constitution but with food, work, strikes, and emigration'.[57]

The most significant speech on the Constitution by a Fine Gael candidate was given by William Cosgrave in Limerick on 23 June.[58] He criticised the diminution of the rights of the people and of the press, the potential for economic discrimination against women, and the cost of presidential referral of Bills to referenda. This addition to the debate was hardly enlightening. His first arguments, the diminution of the rights of the people and of the press, were based on potential problems which would not seem threatening. The cost of presidential referral of referenda was a transitory problem and reflects a fiduciary concern of those straightened times more than a structural argument. The argument about wom-

[52] See generally Michael Laffan, *Judging W.T. Cosgrave* (Dublin: Royal Irish Academy, 2014), 318–320.
[53] See *Irish Times*, 17 June 1937 and 19 June 1937.
[54] *Fine Gael Election Handbook* (UCDA: P80/1123).
[55] *Fine Gael Election Handbook*.
[56] *Irish Times*, 17 June 1937.
[57] *Irish Independent*, 16 June 1937.
[58] *Irish Independent*, 24 June 1937.

en's discrimination was more ably made by the women's groups who campaigned against the Constitution.

On the final day before the election, Fine Gael specifically addressed the Constitution in a campaign advertisement.[59] The advertisement indicated the method of filling out the plebiscite ballot. The advertisement drew attention to the number of groups who opposed the Constitution but did not address the substance of the Constitution itself:

> Who wants it?
> Fine Gael voted against it
> Independents (save one) voted against it
> Labour voted against it
> Women are against it
> They can't all be wrong.

Fine Gael naturally had a sentimental attachment to the Free State Constitution as they had been the drafters of the document. Nonetheless, they did not prioritise the Constitution, preferring to campaign on economic issues. This may be seen in their advertisement in *The Irish Times* of 15 June. The only constitutional issues which Fine Gael raised were a pledge to govern in conformity with the Constitution and 'natural justice', to use Commonwealth membership to its utmost potential and to form a bicameral legislature.[60] The rest of this advertisement focused on economic issues. Mary McGinty sums up the contribution made by Fine Gael as follows:

> Fine Gael deputies, who had so ably demonstrated their oratorical skills during the course of the Dáil debates on the Constitution, seemed to lose those skills completely when it came to voicing their opposition to the Draft at the hustings. They appeared to be almost afraid to dwell on the issue of the Constitution and were always more comfortable when dealing with economic issues.[61]

Left Wing Groups

On the fringes a more substantive engagement was attempted. The left objected strenuously to the provisions dealing with the entrenchment of

[59] *Irish Independent*, 30 June 1937; *Dublin Evening Mail*, 30 June 1937.
[60] *Irish Times*, 15 June 1937.
[61] Mary McGinty, *A Study of the Campaign for and against the Enactment of the 1937 Constitution*, 349.

private property as a natural right in Article 43. *The Irish Democrat*, for example, said de Valera had removed the symbols of imperialism but 'the Conquest is retained'.[62] Hanna Sheehy-Skeffington also derided the provisions dealing with women, commenting that '[w]e come in under Marriage, the Family and Private Property—linked up as a form of chattel'.[63]

The Communist Party of Ireland outlined their opposition to the Constitution in their election manifesto carried in the 19 June edition of *The Irish Democrat*: 'Our alternative to this Constitution of the rich and the possessing is a Constitution for our working men and women, for the poor and dispossessed, the Republic of labour.'[64]

Republican Fringe Groups

Republicans also opposed the Constitution. The ability of Sinn Fein to campaign against the Constitution was curtailed by two major considerations. First, *An Phoblacht* was repressed until the end of June, which resulted in the publication of only a single issue before the plebiscite took place.[65] Second, there was the danger that a vote against the Constitution could be construed as a vote for the Free State Constitution. Therefore, Sinn Fein asked supporters to abstain from the vote. They elicited the help of the mainstream press, in the absence of *An Phoblacht*, to put forward their views.[66] Tom Barry's Bodenstown address in June was unequivocal: 'We want neither the old Constitution or this one. We want the Constitution of the Republic and we are going to get it.'[67]

The Republican Congress presented the most novel proposal, calling for the re-establishment of the 1921 ard-fheis, which had agreed to recog-

[62] *The Irish Democrat*, 8 May 1937.

[63] Ibid.

[64] *The Irish Democrat*, 19 June 1937. The manifesto continued: 'Scott stands for the fullest freedom, civil and religious, for all citizens and for all sections of the working class and Republican movements, the abolition of Coercion, terrorism, repression, and the opening of the jails to the fighters for freedom.' The fact that this was a fringe movement can be deduced from the fact that the Communist Party of Ireland's announcement of Scott as a candidate in the general election on the 19 June was followed on the 26 June by the withdrawal of his candidacy; *The Irish Democrat*, 26 June 1937.

[65] Republicans tried to surmount this problem by getting coverage by other papers; see letter from Maud Gonne MacBride, *Irish Independent*, 4 May 1937.

[66] *Irish Independent*, 16 June 1937.

[67] *An Phoblacht*, 26 June 1937.

nise Dáil Éireann, to discuss the Irish constitutional position.[68] This was, at best, a fringe idea.

Religious Groups

The Catholic press praised the Constitution.[69] *The Irish Catholic* pointed out that not only was the Constitution not in conflict with papal encyclicals, it was based on them:

> It is not merely a question of an absence of conflict between these provisions and that teaching; there is abundant evidence, too, of a sincere desire on the part of the drafter to be guided by the principles laid down in such Encyclicals as the 'Immortale Dei' and 'Rerum Novarum' of Leo XIII, and 'Quadragesimo Anno' of the present Pontiff. Mr. de Valera has proved himself not merely a close student of these monumental documents, but a courageous statesman who is willing to give effect to the recommendations embodied in them.[70]

The lobby group, An Ríogacht (the League for the Kingship of Christ), publicly supported the Constitution as being in line with Catholic doctrine.[71] In a private letter to de Valera, the group noted their opposition to the fact that the Directive Principles of Socio-Economic Policy were not directly enforceable.[72] This concern motivated the League for Social Justice to come out publicly against the Constitution.[73]

In Britain, *The Catholic Herald* praised the articles on fundamental rights, stating: 'Still more should we give thanks for the most Christian preamble to any Constitution of our times.'[74] The *Standard* felt that 'on one point at least we shall all be agreed: due honour has been done to the religious aspect of Irish life'.[75]

[68] *The Irish Democrat*, 22 May 1937.
[69] McGinty, *A Study of the Campaign for and against the Enactment of the 1937 Constitution*, 261–268.
[70] *Irish Catholic*, 6 May 1937.
[71] *Irish Independent*, 3 June 1937.
[72] 27 June 1937 (NAI: Taois/s 9856).
[73] *The Kerryman*, 12 June 1937.
[74] *Catholic Herald*, 14 May 1937.
[75] *The Standard*, 7 May 1937.

Officially, the Church of Ireland was favourable to the Constitution.[76] However, its press was less warm. The leading column, 'The Week', of *The Church of Ireland Gazette* was dismissive:

> This triumph of imaginative literature has little to recommend it to the Opposition, and there is no escaping the fact that by presenting it as a matter to be voted upon at a general election this idealistic document is being made to serve party ends. Despite its absurd reticences and its pretence of a state of things which does not exist, it contains high-flown sentiments which will doubtless commend themselves to many voters, and it is not easy to imagine that those who vote on largely sentimental grounds will vote for it while rejecting Mr. de Valera.[77]

This antipathy towards the Constitution may have been influential in some constituencies that voted against the Constitution.

The moderator of the Presbyterian Church, F.W.S. O'Neill, commented on the Constitution in an address to the Presbyterian General Assembly.[78] He pointed out that the Constitution was 'unusual in modern times' because it did not establish any particular church and 'recognise[d] all religious denominations existing in the country'.[79] He also stated it was 'more remarkable' for the fact that 'it is based upon a definitely Christian attitude to life'. He read out the opening clauses of the Preamble and Article 44 and asked, '[p]utting aside all other opinions about this Constitution […] may we not be thankful to our Father for the high example set by those solemn declarations?' The *Irish Independent* records that this question was met with applause.[80]

Press Opinion

We have seen that the partisan nature of the political debate was mirrored by editorials in the leading newspapers: *The Irish Press* naturally mirrored the opinion of Fianna Fáil, while the *Irish Independent* mirrored Fine Gael.

[76] Dermot Keogh, "The Constitutional Revolution: An Analysis of the Making of the Constitution," in *The Constitution of Ireland 1937–1987*, ed. Litton (Dublin: Institute of Public Administration, 1988), 56.

[77] *Church of Ireland Gazette*, 18 June 1937. See also Robert Fitzroy Foster, *Modern Ireland 1600–1972* (London: Penguin Books, 1988), 544.

[78] *Irish Independent*, 8 June 1937.

[79] *Irish Independent*, 8 June 1937.

[80] *Irish Independent*, 8 June 1937.

The Irish Times argued that the Constitution was unnecessary, dangerous in relation to the press, did not refer to the Commonwealth and was 'based not upon reality but upon humbug'.[81]

Legal Journals

The Irish Law Times and Solicitors' Journal welcomed the introduction of the new Constitution because the number of amendments that had been made to the 1922 Constitution had devalued it:

> Thus it was that the whole fundamental framework of the constitutional system of the Saorstát has been radically changed within a comparatively short period of time and it will hardly be gainsaid that the state of Saorstát fundamental law at the moment inevitably calls for some general revision and in fact would point to the necessity for a new Constitution sooner or later.[82]

This welcome extended only as far as the introduction of a new Constitution—the article was studiously non-committal on the terms of the Constitution being offered. *The Irish Jurist* was more fulsome in its praise:

> [I]t contains all the necessary elements of a complete code of fundamental law, embodying much that is useful in the present Irish Free State Constitution, though also offering every indication that its draughtsmen have profited considerably from the trials and errors of the earlier instrument.[83]

The Women's Campaign

The most popular movement which concerned itself with the text of the Constitution was, perhaps unexpectedly, a non-party initiative organised by various women's groups.[84] In the original unamended form there were

[81] *Irish Times*, 30 June 1937.

[82] "Éire—the new Constitution," *Irish Law Times and Solicitors' Journal* (15 May 1937): 120.

[83] "Current Events" *Irish Jurist* III (1937): 17.

[84] See generally Mary Luddy, "A 'Sinister and Retrogressive' Proposal: Irish Women's Opposition to the 1937 draft Constitution," *Transactions of the Royal Historical Society* 15 (2005): 175; C. Beaumont, "Women and the Politics of Equality: The Irish Women's Movement, 1930–1943," in *Women and Irish History: Essays in Honour of Margaret MacCurtain*, eds. Valiulis and O'Dowd (Dublin: Wolfhound Press, 1997), 181–184; Margaret Ward, *Unmanageable Revolutionaries: Women and Irish Nationalism* (London: Pluto Press, 1995), 237–247; and Brian Girvin, "The Republicanisation of Irish Society 1932–48," in *A New History of Ireland: Volume VII Ireland, 1921–84*, ed. Hill (Oxford: Oxford University Press, 2003), 142–144.

concerns that women could be the victims of discrimination. This discrimination could, it was thought, take political form as the draft Article 9 did not provide for the exercise of the franchise or the ability to seek political office 'without distinction of sex'. The Constitution also allowed, according to these groups, economic discrimination on the grounds of sex. Article 40 provided for equality but also allowed differentiation on the grounds of 'difference of capacity' and of 'social function'. Article 41.2 provided for recognition for the life of women 'within the home'. It also stated that 'mothers' should not be obliged by economic necessity to engage in work outside the home. Article 45 made reference to 'the inadequate strength of women' and also stated that women should not be forced by economic necessity 'to enter avocations unsuited to their sex, age or strength'. These provisions could be taken to mean that women would face economic discrimination, through their elimination from certain industries. Article 41 also suggested that the rightful role of women was in the home.

A number of women's groups had, during the Dáil discussion stages, lobbied the government for change.[85] Deputations from four groups were received on 14 May and 22 May to discuss the Constitution. Their argument was ingenious: they linked their objections to republican doctrine and argued for the inclusion of the words of the 1916 Proclamation and its reference to 'equal opportunities'. They also proposed the retention of the wording of the 1922 Constitution, which guaranteed the privileges and duties of citizenship, irrespective of sex.[86]

The importance that de Valera attached to the question of women's rights is evident: of four requests by women's groups for an audience, all four were granted. In comparison, the solitary request for representation by a media group (the Dublin and Irish Association District of the Institute of Journalists) was denied.[87]

De Valera was prepared to find some middle ground and, after the reception of deputations from various women's groups, changed the text to ensure no political discrimination could take place. He did this by

[85] NAI: Taois s.9880. The Joint Committee of Women's Societies and Social Workers, National University Women Graduates' Association, the Standing Committee on Legislation Affecting Women of the National Council of Women of Ireland, and the Irish Women Workers' Union all sought to have deputations received.

[86] Article 3.

[87] NAI: Taois s.9931A. The request was made on 8 June and refused on 9 June 1937.

including the phrase 'without distinction of sex' in Article 16, which established the franchise for Dáil elections and the qualifications to stand for office. He also included a new subsection in Article 16: 'No law shall be enacted placing any citizen under disability or incapacity for membership of Dáil Éireann on the ground of sex or disqualifying any citizen or other person from voting at an election for members of Dáil Éireann on that ground.' De Valera also redrafted Article 45.4.2 to eliminate the stipulations that 'inadequate strength of women […] shall not be abused' and that 'women […] shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength'.[88]

This, however, was as far as he was prepared to go. There was to be no compromise forthcoming in relation to equality of the sexes in the economic sphere. In the Dáil debates on the Constitution, Patrick McGilligan moved an amendment to Article 41 which proposed: 'Nothing in this section, however, shall be invoked to prohibit, control, or interfere with any citizen proposing to engage or being engaged in any legitimate occupation for remuneration.'[89] De Valera opposed the amendment on the grounds that it might prevent the state regulating the hours of labour in factories.[90] De Valera's compromises in relation to Articles 9 and 45 allayed some fears amongst the women's groups. The Irish Women Workers' Union (or IWWU) withdrew from the campaign against the Constitution after Articles 16 and 45.4.2 had been changed.[91] Louie Bennett, secretary of the IWWU, continued to write letters against the Constitution but the IWWU did not participate officially in the women's campaign thereafter.[92] This withdrawal weakened the women's campaign.

On the 21 June, a mass rally was held in the Mansion House to protest against the Constitution under the auspices of the National University Women Graduates' Association. A letter from Mrs Tom Clarke, the widow of the 1916 signatory, was read out in which she stated that the movement had not begun to organise itself earlier as they believed de Valera would be

[88] The final version of Article 45.4.2 stated: 'The State shall endeavour to ensure that the strength and health of workers, men and citizens […] shall not be forced.' It also changed 'women […] shall not be forced' to 'citizens […] shall not be forced'.

[89] 68 Dáil Debates col. 222 (9 June 1937).

[90] 68 Dáil Debates col. 222 (9 June 1937).

[91] See Ward, *Unmanageable Revolutionaries*, 242. Ward states: 'It was a short-sighted policy, stemming from an overly economistic view of their function as a trade union.'

[92] See Luddy, "A 'Sinister and Retrogressive' Proposal," 186–189.

willing to amend the impugned provisions.[93] Two motions were passed. The first urged:

> That by reason of the retention of sections objected to in Articles 40, 41 and 45, the general economic position of women is menaced, and this meeting therefore advises all women and all voters to vote against the Constitution.
>
> The second motion advocated the establishment of a Women's Party. This meeting was to temporarily enliven a fairly moribund plebiscite campaign.

There was obviously a groundswell of support for this movement, and they must surely have been hindered in their efforts by the short gap between dissolution and vote.[94] Particularly galling for de Valera would have been the charge by Cumann na mBan that the Constitution would perpetuate the 'present unjust social system'.[95]

The women's campaign stung de Valera. There was noticeable in the shift in the focus of his speeches after the Mansion House meeting. Before this, his speeches had primarily discussed the presidency. After the Mansion House meeting, he focused on the provisions relating to women.[96] De Valera emphasised the political equality guaranteed to women under the Constitution. In the aftermath of the meeting de Valera, addressed the concerns of women in Clonmel and Carlow.[97] In his speeches de Valera pointed at political equality and indicated the political enfranchisement of women would lead to an adequate protection of their rights. Nonetheless, de Valera was lampooned by *Dublin Opinion* in a cartoon depicting an overworked mother of ten saying: 'Will yiz shut up, all o' yiz, while your father's explainin' me position under the New Constitution.'[98]

The women's campaign placed an advertisement in papers which advocated voting against the Constitution. This stated:

[93] *Irish Independent*, 25 June 1937, *Labour News*, 26 June 1937, *Irish Times*, 22 June 1937.

[94] But see *Hibernia*, June 1937.

[95] *Irish Independent*, 26 June 1937.

[96] Compare the speech in O' Connell Street, *Irish Independent*, 17 June 1937, with his statements in Clonmel and Carlow, below.

[97] *Irish Times*, 23 June 1937; *Irish Times*, 26 June 1937.

[98] *Dublin Opinion*, June 1937.

Under Article 40 your equality of status guaranteed in the 1916 Proclamation and the old Constitution can be taken away.

Under Article 41 the State can interfere in the private concerns of the Home.

Under Article 45 the State can interfere in a woman's choice of occupation.

Do you want these things? If not, vote for Fianna Fáil, Fine Gael, Labour or Independents, as you choose, but VOTE AGAINST THE CONSTITUTION.[99]

The Results of the Plebiscite

The outcome of the plebiscite was not a foregone conclusion. Frank MacDermot believed that Fianna Fáil would not have an outright majority and the Constitution would be rejected, 'seeing that Labour, the Old I.R.A., newspapermen and professional women are all crying out against it'.[100] He speculated as to whether de Valera would accept the presidency of the executive council under those conditions, commenting: 'I should not in his place.'

General Trends

The plebiscite took place on 1 July 1937. The total number of votes in favour of the Constitution was 685,105, while the number of votes against was 526,945. The spoilt votes were almost 10%, a total of 104,805 votes. This was on a turnout of 75.84% of the potential total electorate.[101] Sinnott points out the high spoilt vote means the effective turnout was 68.3% and the Constitution was carried by only 38.6%—'hardly an overwhelming endorsement'.[102]

The total of first preference Fianna Fáil votes was 603,172. Fine Gael's first preference vote totalled 460,086. The difference between Fianna Fáil's first preference votes and the votes cast in favour of the Constitution was 81,933. The difference between Fine Gael first preference votes and

[99] *Evening Herald*, 29 June 1937, *Cork Evening Echo*, 30 June 1937.

[100] MacDermot to Law, 1 July 1937 (NAI: MacDermot Papers 1065/10/2).

[101] Richard Sinnott, *Irish Voters Decide: Voting Behaviour in Elections and Referendums since 1918* (Manchester: Manchester University Press, 1995), 220.

[102] Richard Sinnott, *Irish Voters Decide: Voting Behaviour in Elections and Referendums since 1918*, 220.

Table 5.1 Votes in plebiscite and general election

Constituency	*Fianna Fáil first preference votes*	*Votes for the Constitution*	*Fine Gael first preference votes*	*Votes against the Constitution*
Donegal West	14,144	14,140	12,962	11,086
Galway West	18,562	17,836	7246	6234
Louth	15,983	16,326	13,705	11,688
Mayo North	15,935	15,900	9440	8247

First preference votes in two party constituencies compared with plebiscite

the votes cast against the Constitution was 66,859. This would seem to indicate that if voters in the plebiscite followed strict party lines—that is, if a Fianna Fáil voter cast their vote for the Constitution—then the campaign in favour of the Constitution attracted approximately 15,000 more votes than the campaign against it. This would indicate that voters who voted for Labour or Independent candidates favoured the Constitution.

There were four constituencies in which only Fianna Fáil and Fine Gael candidates contested the general election: Donegal West, Galway West, Louth and Mayo North. These constituencies provide an opportunity to determine whether voting was on the basis of party affiliation (see Table 5.1).

This table illustrates the close correlation between party affiliation and voting in the plebiscite. The link is particularly close in the case of Fianna Fáil and votes cast in favour of the Constitution. The number of votes cast in favour of the Constitution expressed as a percentage of the first preference votes cast in favour of Fianna Fáil was 99.4%. The number of votes cast against the Constitution expressed as a percentage of the first preference votes cast in favour of Fine Gael was 85.9%. This indicates the closeness between party affiliation and voting.

This table does not take account of the number of spoilt votes, which in these constituencies were largely provided by Fine Gael voters who did not vote against the Constitution. Fine Gael voters did not account for all of the spoilt votes; some Fianna Fáil voters also did not vote in favour of the Constitution. However, if we take the difference between the first preference votes cast in favour of Fine Gael and the votes cast against the Constitution in the four constituencies, we are left with a figure of 6098. The number of spoilt votes in the four constituencies was 8548. If Fine Gael voters who did not vote for the Constitution spoilt their votes then

this accounted for 71.3% of the total number of spoilt votes in these four constituencies.

Let us assume that the percentage of first preferences in favour of Fianna Fáil and Fine Gael in these four constituencies was replicated on a nationwide scale. The number of Fianna Fáil first preference votes was 603,172 and the percentage of votes that were cast in favour of the Constitution in the four constituencies was 99.4%. This means that if this percentage holds true nationwide then 599,553 of the votes cast in favour of the Constitution were cast by Fianna Fáil voters. The number of Fine Gael first preference votes was 460,086 and the percentage of votes cast against the Constitution in the four constituencies was 85.9%. This means that if the percentage holds true then 395,214 of the votes cast against the Constitution were Fine Gael voters.

If we re-examine the votes cast in the plebiscite using these figures then a different picture emerges. The difference between the projected Fianna Fáil vote in favour of the Constitution and the total number of votes in favour of the Constitution was 85,552 votes. The difference between the projected Fine Gael vote against the Constitution and the total number of votes against the Constitution was 131,731. This indicates that the majority of those not affiliated with Fianna Fáil or Fine Gael voted against the Constitution.

The Constituencies That Voted Against the Constitution

Of the 34 electoral districts, only five voted to reject the Constitution. These were Sligo, Dublin Townships, Dublin County, Wicklow and Cork West. The following section analyses the factors which may have influenced the negative vote in each of these constituencies.

Sligo

Maria Luddy has questioned the extent to which the women's campaign influenced the national result: 'It is impossible to know what impact the women's campaign had on the voting.'[103] An editorial from *The Sligo Champion* provides some anecdotal evidence that the women's vote was important in that constituency:

[103] Maria Luddy, "A 'Sinister and Retrogressive' Proposal," 192.

> A matter which seems to be commonly believed, at least in this constituency, is that the Constitution received a strong negative mark from the lady voters. Whether this is actually so remains to be seen, but it is certain, at the moment, that reports from a large number of booth agents record that for some reason or other the majority of the women of our county sense in the new Constitution not to their liking, and that, accordingly, they plumped against it.[104]

This suggests that the 'no' vote in Sligo may have been influenced by the women's campaign. However, it should also be borne in mind that Sligo returned two Fine Gael deputies as against one Fianna Fáil deputy, so the result may also be explained by party affiliation. It seems likely that it was a mixture of both.

Dublin Townships

Keogh and McCarthy point out that the Dublin Townships constituency had the largest number of non-Catholics in the state.[105] The constituency was obviously inclined to support the British Commonwealth. An advertisement for Séan Lemass in the constituency called Fine Gael a 'poor commonwealth party'.[106] This claim was intended to weaken Fine Gael's claims to be pro-Commonwealth in the constituency; it was not pursued on a nationwide level by Fianna Fáil. The vote against the Constitution may have been based on this ideological opposition to a republican and Catholic Constitution.

Dublin County and Wicklow

Keogh and McCarthy state that the Protestant vote may also have made a difference in Dublin County and Wicklow.[107] Both constituencies had a similar voting pattern. The number of first preference votes for Fine Gael candidates was less than the number of first preference votes for Fianna Fáil candidates. The votes against the Constitution are therefore attributable to a large number of Labour or Independent supporters voting against the Constitution. This may have been on the basis of religious antipathy to the Constitution.

[104] *The Sligo Champion*, 3 July 1937.
[105] See Keogh and McCarthy, *The Making of the Irish Constitution*, 210.
[106] *Dublin Evening Mail*, 30 June 1937.
[107] Keogh and McCarthy, *The Making of the Irish Constitution*, 220.

Cork West

This constituency was a Fine Gael stronghold. Fine Gael put forward five candidates and garnered 25,894 first preference votes. The total number of votes in favour of the Constitution was 19,741. Thus, the Fine Gael first preference vote was sufficient to defeat the Constitution in the constituency on its own. One interesting feature of the vote, however, is that Fianna Fáil merely garnered 13,292 first preference votes themselves. This leaves a difference of 6449 votes between the Fianna Fáil vote and the number of votes cast in favour of the plebiscite.[108] Thomas Hale, an Independent candidate who had resigned from Fianna Fáil in 1936, received 2207 votes but these votes were more likely to be cast against the Constitution; the local *Southern Star* carried a speech by Hale denouncing the Constitution in June 1937.[109] The explanation is either that a number of Fine Gael supporters voted in favour or that a significant number of supporters of Timothy Murphy, the Labour Party candidate, voted in favour of the Constitution.

One final point is worth noting in relation to the constituencies that voted against the Constitution. I postulated that the number of spoilt votes in the plebiscite was attributable, to a large degree, to Fine Gael supporters. Three of the four constituencies with the largest percentage of spoilt votes voted against the Constitution—Cork West, Sligo and Wicklow.[110] This provides some further evidence that those not inclined to support the Constitution were more likely to spoil their ballot papers.

Spoilt Votes

The number of spoilt votes remains the highest for a constitutional vote. This may reflect ennui with de Valera's constitutional crusade but must also bear a relationship to the quick turnover between the promulgation and ratification of the Constitution, with the result that a number of citizens were simply unfamiliar with its intricacies. The unfamiliarity was satirised by *Dublin Opinion*, which showed a man clapping his face in dismay with the caption: 'study of voter suddenly stricken by a twinge of conscience on realising he has voted for the Constitution and has not read it'.[111]

[108] The figure is 6529 if we apply the 99.4% rate of correlation between Fianna Fáil votes and votes in favour of the Constitution.

[109] *Southern Star*, 5 June 1937.

[110] The largest percentage of spoilt votes was in Leitrim.

[111] *Dublin Opinion*, July 1937.

The discrepancy between the numbers for the general election and the plebiscite was a concern at the time. A letter from Michael McDunphy, assistant secretary to the president of the executive council, to Wilfred Brown in the department of local government and public health, noted: 'the apparent discrepancy is sufficiently large to suggest the desirability of an investigation of the facts.'[112] Brown responded that the discrepancy was due to the high number of unmarked ballots and those void for uncertainty.[113]

The results of the plebiscite were certified and published in *Iris Oifigiuil* on 16 July 1937. Public indifference to the Constitution was high. In this sense the vote cannot be regarded as a ringing endorsement for the Constitution—though the margin was comfortable. It might have been anticipated that the publication of the Constitution would lead to conflict with the Commonwealth. This did not occur, however.

The Dog That Did Not Bark

The dog that did not bark in the constitutional debate of May and June 1937 was the British government.[114] The silence from that quarter in the aftermath of the publication of the Constitution seems puzzling. There were other pressing matters—the coronation of George VI (12 May) and the imperial conference both took place at the same time—but it is interesting that no public pronouncement was made on the Constitution between May and July, except to note the British government was examining the matter. The Free State would, as a member of the Commonwealth, no doubt merit some serious consideration. The British cabinet was aware of the draft Constitution by 5 May 1937, when it was decided to send the Constitution to the Irish Situation Committee to consider the issue.[115]

[112] McDunphy to Brown, 7 August 1937 (NAI: Taois s.9711).

[113] Ibid. 11 August 1937.

[114] See also Deirdre McMahon, *Republicans and Imperialists: Anglo-Irish Relations in the 1930s* (New Haven: Yale University Press, 1984), 214–221.

[115] TNA: PRO CAB 20 (37), item 9. The Irish Situation Committee was composed of Neville Chamberlain, prime minister, Viscount Halifax, lord president of the council, Samuel Hoare, secretary of state for the home department, Malcolm MacDonald, secretary of state for dominion affairs, Thomas Inskip, Minister for the co-ordination of defence, Oliver Stanley, president of the board of trade, William Morrison, minister of agriculture and fisheries, and Donald Somervell, attorney-general.

The Irish Situation Committee considered the issue of the draft Constitution on 9 June 1937.[116] At the meeting, Neville Chamberlain, the prime minister, pointed out that the Free State legislation passed as a result of the abdication crisis had been treated as 'not effecting a fundamental alteration in the position of the Irish Free State as a member of the commonwealth'. The question that the committee had to determine was whether the draft Constitution did so. Malcolm MacDonald, the secretary of state for dominion affairs, pointed out that they could either treat the Constitution as a voluntary self-expulsion from the Commonwealth or accept that it merely continued Ireland's already sanctioned approach to Commonwealth relations. MacDonald stated that he had 'at times' preferred the first option. He pointed out that there were many people in Ireland who wished to remain within the Commonwealth and if the first option were taken, 'it was conceivable' that they would vote to ensure that Ireland remained within the Commonwealth. However, he declared he was 'quite satisfied' this would not be the reaction of Irish voters to such a stance: 'On the contrary, such representations would give rise to much ill feeling.' MacDonald further believed that it would give rise to resentment on the issue of partition. If the Free State was no longer a part of the Commonwealth but Northern Ireland was, this would make ending partition more difficult and '[a]ll hope of reaching a settlement on the other outstanding questions of the Irish Free State would have to be abandoned'.

MacDonald recommended accepting the second course of action, in part as a result of international considerations. He pointed out that a Commonwealth repudiation of the Constitution would result in a negative reaction from the United States. MacDonald noted that acceptance of the Constitution would strengthen the hand of Hertzog in South Africa. It would demonstrate that Commonwealth membership was compatible with complete sovereignty on the part of its members. MacDonald pointed out the king had taken an oath to govern Ireland and the Irish government had not objected to this. Finally, he stressed that de Valera had indicated the Executive Authority (External Relations) Act 1936 was to be given a status commensurate with the Constitution. MacDonald therefore advocated the continuation of the Commonwealth policy reached after the

[116] TNA: PRO HO 144/21046. See also David Harkness, "Mr de Valera's Dominion: Irish Relations with Britain and the commonwealth, 1932–1938," *Journal of commonwealth Political Studies* 8 (1970): 223–224.

abdication crisis; the draft Constitution should not place Ireland outside the Commonwealth.

Samuel Hoare, the home secretary, agreed with the policy but also noted:

> At the same time he very much hoped that it would be found possible to avoid making any public statement in regard to the decision when finally reached. It would be a very great mistake to give the Irish Free State the idea that we were troubled and anxious about their proceedings, or that we were thinking about them to the exclusion of many other much more important matters.[117]

Any response to the Free State which touched on Commonwealth matters would require a coordinated response. MacDonald declared that the matter would not be discussed by the Commonwealth conference; it would be a discussion 'of a purely informal character conducted in a small meeting of the Principal Delegates'.

Chamberlain drew attention to the decision of Gavan Duffy J in *The State (Dowling) v Kingston (No 2)*, where Gavan Duffy stated that 'our citizen is a citizen of Saorstát Éireann for all purposes, municipal and international, and […] he is not a British subject'.[118] It will be recalled that British nationality was based on the concept of the allegiance that was owed by a subject to their monarch. It formed the basis of the 'common status' of Commonwealth citizens. The Nationality and Citizenship Act 1935 revoked the status of British subject from Irish citizens in Irish law. Chamberlain was concerned, as a result of *The State (Dowling) v Kingston (No 2)*, that this revocation would also apply in British law.[119] Thomas Inskip, previously the attorney-general and in 1937 minister for co-ordination of defence, and Donald Somervell, then attorney-general, assured him that it did not. Somervell pointed out that Gavan Duffy J was dissenting in that case. Somervell 'had always thought that this question of Irish citizenship presented dangerous possibilities and that it was in some respects much the most important aspect of the whole constitutional problem'.[120] The committee agreed, however, that the matter of citizenship could not be brought to the attention of the Irish government with-

[117] TNA: PRO HO 144/21046.
[118] [1937] IR 699 at 713.
[119] Above note 124.
[120] Ibid.

out the Irish 'becoming more deeply committed to a view directly contrary to ours'.

The Irish Situation Committee agreed that they would continue to treat the Free State as remaining within the Commonwealth. They also agreed to an informal meeting with Commonwealth representatives, which would not be noted in the proceedings of the conference, to ascertain their views on the Constitution.

It might also be thought that the issue of a new Constitution would complicate matters with Northern Ireland. As Keogh and McCarthy recount, however, it was met with a studied indifference in unionist newspapers and in the public pronouncements of Northern politicians.[121] Aodh de Blacam argued that the comments of the moderator of the Presbyterian Church in favour of the Constitution meant that 'the fears, the foolish fears, of some Northern Protestants have been laid to rest'.[122] This was wishful thinking on de Blacam's part. In April 1937, Malcolm MacDonald had a meeting with Lord Craigavon in which he indicated that de Valera's continued link with the crown, via external association, was due to his wish to remain within the Commonwealth and, more importantly, his belief that if the link were broken, a united Ireland would be impossible.[123] MacDonald was anxious that this belief remain intact. It was clear that Lord Craigavon was unwilling to ever deal with the leaders of the Free State, whom he regarded as being congenitally incapable of keeping their word. This was a view which must have echoed in certain quarters given the ongoing trade war between Ireland and the United Kingdom. Nonetheless, Craigavon's position appears to have been based on a wish not to make matters more difficult for Westminster, rather than any newfound trust in the politicians of the Free State. This was consistent with the 'softly softly' approach favoured by the Commonwealth.

The Commonwealth and the Constitution

The Commonwealth conference was held in London in May and June 1937. On 14 June, an 'informal meeting' was held in the prime minister's room in the House of Commons. An informal meeting would not appear

[121] Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937*, 199–203.

[122] *The Leader*, 26 June 1937.

[123] TNA: PRO PREM 1-273.

on the minutes of the Commonwealth conference. The meeting was held to discuss relations with the Irish Free State and was attended by delegations from the United Kingdom, Canada, Australia, New Zealand, South Africa and India.[124] Donal Lowry records that in South Africa, Dr D.F. Malan sought an assurance from Hertzog that no discussion of Ireland would take place without the consent of the Irish government, but was rebuffed by Hertzog on that grounds that '[w]hat the British government does now as regards Ireland […] is most important for the future of the commonwealth'.[125]

At this meeting Malcolm MacDonald identified 'four outstanding questions' between the Free State and Great Britain which did not concern other members of the Commonwealth.[126] There were other matters which raised constitutional issues which did implicate the Commonwealth, however. These included what MacDonald called 'his Internal Affairs Constitution'. MacDonald summarised the relevant provisions of the Constitution, as they related to the Commonwealth, in the following manner:

> So far as the position of the King is concerned, it confirms that all the Powers in internal affairs previously belonging to him are transferred to a popularly elected President. It makes even more clear than the [Constitution (Amendment No. 27) Act 1936] that the King is eliminated from the internal affairs of the Irish Free State, e.g., the President has been given precedence over all other persons in the State. In effect, it is a Republican Constitution.[127]

MacDonald therefore believed 'the situation as regards internal affairs is less satisfactory [than in December 1936]'. However, MacDonald believed that the external affairs of the Free State were more satisfactory

[124] NASA: BTS PM 1/31/1 (14 June 1937). This meeting is described in McMahon, above note 121, at 220.

[125] Donal Lowry, "The Captive dominion: Imperial Realities behind Irish Diplomacy, 1922–49," *Irish Historical Studies* 36 (2008): 218.

[126] These were, according to MacDonald:

1. The partition between the North and the South.
2. A difference about certain monies, e.g. the Land Annuity payments.
3. This has led to a minor tariff war.
4. A difference about our occupation of the Free State ports under the Treaty of 1921.

[127] National Archives of South Africa: BTS PM 1/31/1 (14 June 1937).

than in December 1936. De Valera had indicated the Executive Authority (External Affairs) Act 1936 would be immune from amendment except by referendum, the coronation oath of George VI would refer to 'Ireland' and that de Valera had acquiesced in this, and the king would continue to sign documents for the external affairs of the Free State, such as accrediting foreign consuls. MacDonald therefore proposed to adopt 'the kind of formula which we employed before, not saying […] that the legislation makes no fundamental difference in the position, but that we would be prepared to treat it as not making such a fundamental alteration'.[128]

The dominion prime ministers accepted the British position. The prime ministers expressed regret that the situation had become strained but advocated the retention of Ireland within the Commonwealth.[129] General Hertzog, the prime minister of South Africa, went furthest in his support for de Valera. He accepted the proposed British formulation but went on to state:

> In March last the King's external functions with regard to consuls, ministers, treaties, etc., were still left. If these were taken away and entrusted to a President I think it would be unwise to exclude Ireland from the commonwealth. I should be in favour of allowing her to continue a Member [*sic*] so long as she wishes to be a Member.
>
> […]
>
> If the Irish Free State declared herself a Republic I do not see why she should necessarily cease to be a Member of the commonwealth. But naturally the symbol of co-operation must be the King.[130]

In Hertzog's opinion, there was no necessity for the king to act in external affairs, as well as internal affairs, in order for a country to remain within the Commonwealth. Hertzog's view, while radical, shows the problems of co-ordinating a Commonwealth response on constitutional issues.

The only change which the Constitution was to make with regard to the Commonwealth was the deletion of Article 1, which had declared the

[128] National Archives of South Africa: BTS PM 1/31/1 (14 June 1937).

[129] Joseph Lyons, the prime minister of Australia, said: 'We all regret the present situation, and if there were anything we could do to bring back closer relations with Ireland we would most gladly do it.' Walter Nash, the prime minister of New Zealand, stated: 'I think we ought to keep Ireland, if Ireland will let us.'

[130] National Archives of South Africa: BTS PM 1/31/1 (14 June 1937). On South Africa's relationship with Ireland, see Lowry, "The Captive Dominion."

Free State to be a member of the Commonwealth. The position of the Commonwealth was, however, that such a change could be accommodated within the existing legislative framework. This seems to be, in part, prompted by de Valera's intransigence with regard to the internal affairs of the Free State and the promise of a 'constitutionalisation' of the Executive Authority (External Affairs) Act. Such a promise was, of course, never followed through on. The position of *The Irish Times* in the aftermath of the abdication seems, at least insofar as the Commonwealth was concerned, to be correct:

> It is not altogether surprising that the great majority of people have failed to realize that an important feature of the special sittings of the Dáil on Friday and Saturday last has been the disclosure and putting into legislative effect of all that really mattered in the new Constitution of the Free State.[131]

When we turn to the actual Constitution enactment itself, therefore, the British issue was moot. The Commonwealth had already accepted the Executive Authority (External Affairs) Act and the Constitution (Amendment No. 27) Act as not affecting the position of the Free State within the Commonwealth. This meant that the British had accepted the right of the Irish Free State to manage its own internal affairs. They had also accepted the proposition that the use of the crown in executive matters externally was consistent with Commonwealth membership. The new Constitution did not alter these relationships, and so the British were silent.

International Reception of the Constitution

The Constitution, as we have seen in Chap. 4, was influenced by contemporary constitutional practice. It is useful, therefore, to consider the international context in which the Constitution was published. The Free State was not immune to international opinion. Joseph Walshe, secretary of the department of external affairs, compiled press cuttings from American newspapers about the Constitution, which he gave to de Valera.[132] One issue which figures in most foreign commentary was the contention that

[131] *Irish Times*, 14 June 1936.
[132] UCDA: P150/2432.

the Constitution had made ending partition more difficult to attain.[133] The Constitution tends to have been considered in terms that reflected national debates in those countries.

Great Britain

In England *The Manchester Guardian* argued that the Constitution need not 'unduly disturb' British politicians.[134] The editorial argued that while it made no mention of the king it did not alter the situation as it then stood. The editorial argued that '[w]hatever the constitutional significance of the changes in the law of the British commonwealth of Nations, it should not be beyond the digestive powers of that amorphous body to assimilate a domestic republic, if that is what a majority of its people insists on having'.[135]

Interestingly, *The Times* did not take an editorial line on the new Constitution. It reported the features of the Constitution and the Dáil debates on the draft, but carried no editorial leader on the matter.[136] On the eve of the election the newspaper's Irish correspondent stated:

> Mr. de Valera has not handled this matter of the Constitution too well. The draft contains 63 clauses, and the electors are being asked to vote for it in their entirety. There is every possibility that many people will reject if for the sake of one or two objectionable clauses. The greater likelihood, however, is that it will be regarded entirely as a party measure, and that the vote on the Constitution will follow closely that for the parties. This view is the more probably, inasmuch as very few people can have taken the trouble to read the document or the Dail debates on it.[137]

This was obviously a commentary on the plebiscite campaign rather than the terms of the Constitution itself. This interesting stance mirrored the official British government attitude, which was to minimise the importance of the Constitution.

[133] See, e.g, *Toronto Globe and Mail*, 4 May 1937, *New Zealand Herald*, 1 July 1937, *Journal de Genève*, 4 May 1937, *Manchester Guardian*, 3 May 1937.

[134] *Manchester Guardian*, 3 May 1937. On British press reaction, see also Keogh and McCarthy, *The Making of the Irish Constitution 1937*, 197–199.

[135] *Manchester Guardian*, 3 May 1937.

[136] *The Times*, 1 May 1937; *The Times*, 13 May 1937.

[137] *The Times*, 1 July 1937.

Canada

The Toronto Globe and Mail stated the Constitution was:

> [r]evolutionary in its alterations of the legislative processes, bold in its preparations and provisions for a complete and reunited 'Christian social State' of Éire, it bears a remarkable resemblance to the man who dictated its sixty-three clauses. The whole philosophy and even the contradictory characteristics of President Eamon de Valera are impressed in every line.[138]

The editorial pointed out it resembled Engelbert Dollfuss' planned Austrian state. This emphasis on Catholicism was interesting as it did not feature in the newspaper coverage from other Commonwealth countries; these tended to concentrate on how the Constitution would affect the Commonwealth. This may have been a reflection of the large Catholic minority in Quebec, which made awareness of Catholic dogma more familiar to Canadian readers.

New Zealand

The New Zealand Herald drew attention to the fact that although the Constitution enshrined the internal sovereignty of the state, external relations were still regulated by the Executive Authority (External Relations) Act:

> So Éire becomes a republic at home and a kingdom abroad, a status that maybe the Irish will understand […] [de Valera's] assertion of Irish sovereignty will remain no more than words so long as in fact the Free State rests its security and integrity on British arms; his declaration of political independence means nothing so long as the Free State is economically dependent on Britain. His 'sovereign, independent State' is still bound to the British market.[139]

This antipathy to the Constitution, and to Fianna Fáil's policies in the 1930s, can also be seen in Australia.

Australia

The Sydney Morning Herald stated the Constitution 'might be described as the natural culmination of a policy which has already brought about the

[138] *The Toronto Globe and Mail*, 4 May 1937.
[139] *New Zealand Herald*, 1 July 1937.

abolition of the Oath of Allegiance, the office of Governor-General, and the Senate'.[140] The article proceeded to set out the main features of the Constitution, as well as the political debate which occurred in the Free State. It concluded damningly, '[the Constitution confers] no measure of liberty or privilege which cannot be enjoyed by the people of any British dominion, but merely pander[s] to that strange racial antagonism which is the heritage of past centuries of maladjustment'.

USA

The New York Times carried the text of the entire draft Constitution on 2 May 1937.[141] The newspaper referred to the Constitution as 'the crowning achievement' of de Valera's term of office.[142] The editorial of 2 May referred to the Constitution in those hagiographic terms that Americans sometimes use when they speak of Ireland:

> The plan for a 'Christian social State,' democratic and sovereign, has been shaping in the mind of Mr. DE VALERA ever since he became head of the Free State five years ago, following a fifteen-year struggle, first to free Ireland from the United Kingdom, and then to change Dominion status, established by the Anglo-Irish treaty and the Constitution of 1922, into that of the independent republic proclaimed in the present charter. It is the 15,000 word scripture of the dream of one of the most remarkable revolutionaries of our team—mathematician, idealist, stubborn political strategist—and back of him the dream of countless generations of Irishmen, conspiring at home, homesick in the far places of the earth, Home Rulers in Westminster, troubled always and everywhere by the ache to be 'free.'[143]

The newspaper concluded that the eventual majority in favour of the Constitution 'seems ample enough' in light of the opposition it faced.[144]

The Washington Post said that 'those familiar with Irish affairs said that the constitution, while revolutionary on its face, actually was not'. They described it as part of the 'progression toward freedom'.[145] The same

[140] *Sydney Morning Herald*, 24 June 1937.
[141] *New York Times*, 2 May 1937.
[142] *New York Times*, 1 May 1937.
[143] *New York Times*, 2 May 1937.
[144] *New York Times*, 8 July 1937.
[145] *The Washington Post*, 1 May 1937.

commentators believed that 'no Irishman could afford to vote against [the] document'. The difference in coverage between New York and Washington can be explained by the large number of emigrants living in New York who would have an interest in Irish affairs.

France

Le Figaro contained a very brief synopsis of changes wrought by the Constitution but no editorial comment on it.[146] In contrast, *Le Temps* contained a detailed examination of the various provisions of the draft Constitution.[147] The paper provided a guide to the major features of the Constitution.[148] The article ended by noting that it was 'not yet possible to predict the effect which this unilateral denunciation of the Anglo-Irish Treaty of 1922 will produce in England'. The key legal issue, according to the article, was 'whether the articles of the new constitution infringe in any way the statute of Westminster, which had declared the principle established by the Balfour committee at the Imperial Conference in 1926'.[149]

Germany

The *Frankfurter Zeitung* noted the introduction of the draft Constitution with some interest. The paper carried three articles on it in the space of two days.[150] The edition of 4 May contained articles on 'The Irish Draft Constitution' and 'Ireland and the Empire'.[151] The first article was a synopsis of the provisions of the Constitution. The second noted the possibility that the Constitution could further strain Ireland's relationship with the Commonwealth. An editorial on 5 May was entitled 'Republic Eire'.[152] The editorial quoted Article 1 and noted that the words 'the Republic of

[146] *Le Figaro*, 2 May 1937. I would like to thank Dr Maebh Harding for her translations of the French newspapers.

[147] *Le Temps*, 2–3 May 1937.

[148] It went into considerable detail in this description; for example, it pointed out that three members of the Senate were to be elected by the NUI and Trinity College.

[149] *Le Temps*, 2–3 May 1937.

[150] *Frankfurter Zeitung*, 4 May 1937, 5 May 1937.

[151] *Frankfurter Zeitung*, 4 May 1937.

[152] *Frankfurter Zeitung*, 5 May 1937.

Eire' replaced the Free State with a sovereign, independent state.[153] The editorial proceeded to examine the various features of the draft Constitution. An interesting feature of the editorial is the fact that while most of it was devoted to the structural features of the Constitution, such as the presidency, it drew attention to two fundamental rights. First, the editorial mistakenly stated that the Roman Catholic Church was constituted as a '*Staatskirche*' or 'State Church' by the draft. The editorial noted that the draft also guaranteed the freedom of religious practice. Second, the editorial stated:

> The guarantee to citizens of the right to freedom of expression is found in the outline, but also the instruction that the radio, the press, or the cinema are not allowed to be used to undermine public order and morals or the authority of the State.[154]

The fact that these two rights, and no others, were mentioned is interesting as it illustrates how the international reception accorded to the draft Constitution was sometimes framed by domestic concerns in the various countries. In March 1937, Pius XI issued *Mit Brennender Sorge*, which castigated the Reich government for their attacks on Catholicism.[155] Similarly, the right to freedom of expression was under increasing threat from the Nazis. These two rights were therefore singled out for mention by the *Frankfurter Zeitung*.

Switzerland

In Geneva the *Journal de Genève* was strongly condemnatory of the actions of the Free State. The city was the headquarters of the League of Nations and an editorial in the newspaper condemned de Valera for acting 'in total disregard of the clauses of the Treaty'.[156] It described the absence of mention of the king as a 'true fracture', although it pointed out that it was difficult to understand what all the consequences of this break would be. In a later edition, the newspaper praised the British reaction to the Constitution:

[153] *Frankfurter Zeitung*, 5 May 1937.
[154] *Frankfurter Zeitung*, 5 May 1937.
[155] See William Harrigan, "Nazi Germany and the Holy See, 1933–1936: The Historical Background of *Mit Brennender Sorge*," *The Catholic Historical Review* 47 (1961): 164.
[156] *Journal de Genève*, 4 May 1937.

> Ireland is no longer linked to the British Empire by the presence of the king but by its own wishes. And the organisation of its government functions in an independent manner. By accepting this solution to the problem, England has demonstrated a largesse which is as remarkable as it is wise and generous.[157]

Spain

Spain was in the grip of civil war in 1937. *ABC* published two editions in 1937: one in Seville, under the control of Franco, and another in Madrid, under the control of the Republicans. The two editions did not contain the same analysis of the Constitution, which was provided by the London correspondents of the paper. In the Madrid edition, it was the work of 'Fabra', in the Seville edition of 'D.N.B.' This led to a difference of emphasis between the two versions of the paper. The Seville edition drew attention to the fact that the Constitution guaranteed the freedom to practice one's religion.[158] This was presumably done to highlight the Republican's antipathy to religion. In contrast, the Madrid edition emphasised the declaration that the state was to be sovereign, independent and democratic.[159] This was presumably done to highlight Franco's antipathy to democracy.

Italy

The Fascist *Il Popolo d'Italia* focused on the fact that the new Constitution was 'a document of exceptional importance to Great Britain's interests and imperial status'.[160] It drew attention to the fact 'that neither Great Britain nor the King of England are mentioned in the new constitution', a fact which the correspondent declared had 'shocked and impressed the English'. The Italian newspaper also drew attention to the Catholic aspects of the Constitution; it noted the wording of the preamble and the 'corporate' nature of the Senate. More surprisingly, perhaps, it also referred to the territorial guarantees of Articles 2 and 3, and stated: 'In other words,

[157] *Journal de Genève*, 8 July 1937.

[158] *ABC* (Seville edition) 2 May 1937. I would like to thank Niamh Coffey for her translation.

[159] *ABC* (Madrid edition) 6 May 1937.

[160] *Il Popolo d'Italia*, 1 May 1937. I would like to thank Dr Giulia Liberatore for her translation.

the new constitution aims to establish a free Irish republic that encompasses the entire island: it envisages the fusion of catholic Ireland with protestant Ireland.'

Russia

The Russian official organ, *Pravda*, merely noted the results of the plebiscite and of the general election. While it is not possible to discern an editorial line on the basis of this alone, it is clear that the Russians were not taken with the new Fine Gael party. It was described, in the election results column as consisting of a 'fascist blue-shirt organization and kulak farmers' league'.[161]

The feature of the Constitution which most international newspapers focused on was the fact that it made ending partition more difficult. Most newspapers focused on the manner in which it would affect the link between Ireland and Britain. The reception of the Constitution depended on the political biases of the newspapers themselves. Thus, the newspapers in New Zealand and Australia were outraged at the breaking of the link to the crown. The *Journal de Genève*, where the League of Nations was based, condemned the abrogation of treaty obligations. Spain and Germany provided interesting examples of the influence of political bias on reporting; in both countries, the features of the Constitution which newspapers chose to highlight were motivated by domestic political struggles.

Conclusion

The comments of Edward Cahill SJ in a letter to de Valera in May seem, in retrospect, prophetic.[162] Fr. Cahill advised against holding the plebiscite and general election at the same time to allow 'considerable time' for people to study and discuss the draft 'apart from ephemeral political considerations'. He feared 'that the association of the Constitution with a general election will do much to injure its prestige in people's minds; and will tend to embitter opposition'.[163] On the other hand, it is difficult to

[161] *Pravda* accessed online at http://www.oldgazette.ru/pravda/05071937/text1.html. I would like to thank Dr Kanstantsin Dzehtsiarou for his translation.

[162] For Cahill's role in the drafting of the Constitution, see Chap. 3 and Sean Faughnan, "The Jesuits and the Drafting of the Irish constitution of 1937," *Irish Historical Studies* 101 (1988): 79.

[163] Cahill to de Valera, 13 May 1937 (NAI: Taois/s 9856). Emphasis in original.

imagine that more time would have produced a non-partisan atmosphere. The criticisms levelled by the opposition parties against the Constitution could only be proven incorrect by experience. It was difficult to envisage in the abstract what protection the fundamental rights provisions would confer on the citizen. If the plebiscite had been held on its own then de Valera would surely have faced charges of wasting public funds.

The fact that the plebiscite was held at the same time as the general election detracted from the level of constitutional debate. Deputies faced with losing their seats were unlikely to engage in abstract constitutional argument. It was notable that those who objected most strenuously to the Constitution were unelected citizens—specifically, women's groups. This same problem would not have attended a constituent assembly, where delegates would have ample time to consider constitutional issues without fear of losing their positions. There were, however, legal difficulties with establishing a constituent assembly and this avenue was not pursued. One disappointment was the high number of spoilt votes, which reflected a degree of public indifference to the document. This fact coupled with the brief turnover period meant Ireland had nothing approaching the level of sophisticated constitutional argument of the *Federalist Papers*.

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CHAPTER 6

Aftermath

We have seen how the Constitution was viewed both on the campaign trail and in the international press. There was an interregnum until December 1937—the Constitution had been ratified but had not yet come into effect. In this chapter, we will consider the reception of the Constitution in the aftermath of its ratification. In particular, we will consider its reception by the two largest domestic opposition parties, Labour and Fine Gael, and by the United Kingdom.

Fine Gael

Fine Gael was not prepared to accept the Constitution. In the Dáil, W.T. Cosgrave accepted some of its provisions but attacked it on the grounds that he had advanced in the campaign trail: the powers which could be conferred on the president could give rise to dictatorship; there was a possibility of the infringement of civil liberties and the rights of the press; the position of women was undermined by the Constitution; and there was an 'ultimate destruction of parliamentary democracy which caused and must continue to cause great perturbation'.[1] The tone of this speech must be put in context. It was made in the debate proposing de

[1] 69 *Dáil Debates* col. 20 (21 July 1937). *The Irish Times* recorded that when Cosgrave spoke of the 'ultimate destruction' of parliamentary institutions, 'Mr. de Valera laughed gently, and made a brief note on the pad in front of him'. *Irish Times*, 22 July 1937.

D. K. Coffey, *Constitutionalism in Ireland, 1932–1938*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76237-1_6

Valera as president of the executive council; he would not become Taoiseach until the Constitution came into operation in December, and this would be expected to be a partisan speech.

What was striking was the extent to which Fine Gael later refused to make peace with the Constitution. It was the subject of repeated questioning by senior members of the opposition after the result of the referendum. James Dillon repeatedly questioned in the Dáil where the power of the people to enact the Constitution was derived from.[2]

During the debates on the Constitution (Consequential Provisions) Act 1937, Patrick McGilligan and Professor John Marcus O'Sullivan questioned the legitimacy of the plebiscite itself. McGilligan asked:

> [F]irst of all, in what enactment or series of enactments, were the people given power to legislate in this country and, secondly, whether what has been discussed as the Constitution is not an amendment of the Constitution that was in being here, and if not, why not?[3]

Oddly, given that McGilligan was an academic constitutional lawyer, this question overlooked the theory of constitutional enactment by means of constituent assembly propounded in *The State (Ryan) v. Lennon*. McGilligan's argument seems to have been based on the idea that the 1922 Constitution could only have been amended or repealed by virtue of its own provisions. According to McGilligan, while the people could have been given the power to amend the 1922 Constitution, they had not been given this power, and therefore the exclusive power to legislate in the Free State remained vested in the Oireachtas.[4]

The exchanges may have been prolonged by an early mistake made by Seán T. O' Kelly: he indicated that the Constitution was enacted by the Dáil with the consent of the people.[5] When questioned on this point, de Valera did not make the same mistake. As a legal proposition, however, it was clear from *The State (Ryan) v Lennon* that the exercise of the constituent power, whether through an assembly or directly, was not limited by any bodies of inferior legitimacy—that is, the power of the people to enact a constitution is unfettered by the operation of the Oireachtas. As a rhetorical

[2] See, for example, 69 *Dáil Debates* cols. 1782–1783 (7 December 1937).
[3] 69 *Dáil Debates* col. 2637 (16 December 1937).
[4] 69 *Dáil Debates* col. 2637–2368 (16 December 1937).
[5] 69 *Dáil Debates* col. 482 (20 October 1937).

device, these arguments were designed primarily to score political points and to sow seeds of doubt about the pedigree of the new document.

This antipathy towards the Constitution was reflected in the *Irish Independent*, which was sympathetic to Fine Gael at the time. The *Irish Independent* was scathing in its assessment of the democratic credentials of the Constitution:

> This 'complete charter of nationhood' had a majority of only 158,160, or one-eleventh of the electorate. More than 526,000 votes were cast against it: very much less than half of the electorate voted in favour of it. In no democratic country would a Constitution be carried on such figures. It is impossible for the people to have for this Constitution the respect that would rightly be accorded to one adopted with the deliberation and dignity required for such an instrument.[6]

This editorial was extremely misleading; the ratification process for the 1937 Constitution was the most democratic of its time.[7] Moreover, the focus on the figures as a fraction of the total electorate for those in favour of the Constitution, 'one-eleventh' and 'half of the electorate', indicates an editorial slant designed to impugn the democratic pedigree of what was after all a free vote; one could as easily have pointed out that just shy of 30% of the total electorate disapproved of the Constitution.

The comments of Cosgrave, McGilligan O'Sullivan, and the editorial in the *Irish Independent* were symptomatic of the deep mistrust of de Valera which Fine Gael harboured, no doubt based on memories of the Irish civil war. This mistrust prompted them to attack the document as 'the ultimate destruction of parliamentary democracy', as illegal or undemocratic. This approach was not, however, taken by all Fine Gael members. In November 1937, the Fine Gael TD, John A. Costello, advocated the acceptance of the Constitution: 'let us leave it as it stands, embodying the principles of democratic government and parliamentary institutions, and set ourselves to work them in a spirit of liberty and tolerance for the common good.'[8]

[6] *Irish Independent*, 29 December 1937. This vehement passage provoked a strong rejoinder by *The Irish Press* on the following day: *Irish Press*, 30 December 1937.

[7] See further Chap. 5.

[8] *Irish Times*, 8 November 1937.

Labour

The Labour Party's approach to the Constitution was also unfavourable, but not as vehemently expressed as Fine Gael's. On 9 July, the Labour Deputies issued a statement which declared:

> The Labour Party welcomes the enactment of many Articles in the new Constitution, but it is opposed to those Articles which are calculated to give undue, and possibly dictatorial, powers to the new President, or which make it possible for the Legislature to enact legislation to curb the effectiveness of the Trade Unions in their fight—often against foreign capitalists—for a decent standard of living for Irish workers.[9]

The Labour Party were committed, by the terms of their party's constitution, to the 'establishment in Ireland of a Workers' Republic founded on equal justice and equal opportunities for all citizens who render service to the Nation and fealty to its institutions'.[10] This was to be achieved by 'win[ning] control of the machinery of the State'.[11] In light of its commitment to more radical social change, the party was indifferent to the constitutional adjustments affected by the 1937 Constitution. Nonetheless, its adherence to the 1937 document could not be guaranteed and as the government was dependent on the support of the Labour deputies to enact legislation, the possibility of the Constitution coming into force before the date dictated by the terms of Article 62, that is, in 180 days or at such earlier time as the Dáil specified, was scuppered. In a sense, this was a boon to the government as a significant amount of consequential legislation was necessary before the Constitution became law. The most important were identified by Arthur Matheson:

1. An Act to amend the Interpretation Act 1923,
2. An Act to amend the Adaptation of Enactments Act 1922,
3. Two Acts relating to the Presidency—the first to regulate the elections, the second to establish the office, secretariat, etc.,

[9] *Labour News*, 17 June 1937.
[10] *Constitution and Standing Orders* (Dublin, 1936).
[11] *Constitution and Standing Orders.*

4. A new code for the regulation of senate election—Matheson noted there would need to be at least two Acts dealing with general and by-elections, and
5. An Act providing for the continuance in office of the Chairman of the Dáil.[12]

Nonetheless, the antipathy of the Labour Party to the Constitution continued. In the aftermath of the entry into force of the Constitution, *Labour News* contained an editorial which stated: 'The state of Éire was stillborn on December 29 […] We shall govern in spite of it and not by virtue of anything it pretends to establish. And in good time a worthwhile Constitution will be set up here.'[13]

The interregnum between the plebiscite campaign and the entry into force of the Constitution in December 1937 provided an opportunity for the opposition parties to attempt to prey on the weakness of the Fianna Fáil majority in one particular constitutional instance: the composition of the senate.

The Senate

The Constitution provided, under Article 18, for the establishment of a second chamber and laid down certain procedures which had to be followed. Article 18 provided for 49 elected members, 6 by university constituencies and 43 by panel elections, and 11 members to be nominated by the Taoiseach.[14] A person who was eligible to become a member of the Dáil was also eligible to become a member of the Senate.[15] The Constitution stipulated that the election of senators was to be by secret postal ballot.[16] The election was to be based on proportionate representation by means of the single transferrable vote.[17] The Constitution further stipulated that three members were to be elected from the National University of Ireland and three from the University of Dublin.[18] Forty-three members of the Senate were to be elected from five panels, which were named in the

[12] Matheson to Lynch, 4 March 1937 (NAI: AGO/2000/22/796).
[13] *Labour News*, 1 January 1938.
[14] Article 18.1.
[15] Article 18.2.
[16] Article 18.5.
[17] Article 18.5.
[18] Article 18.4.1°.

Constitution.[19] No more than 11 and no fewer than five senators could be elected from a single panel.[20] A general election of the Senate was to take place not later than 90 days after a dissolution of the Dáil.[21]

These provisions were constitutionally enshrined. The Constitution left considerable scope for innovation in all other matters relating to the election of senators. Article 18.10.1 stipulated: 'Subject to the foregoing provisions of this Article elections of the elected members of the senate shall be regulated by law.' Article 53.3 stated that the first assembly of the Senate was to take place not later than 180 days after the Constitution had come into operation, which meant the legislation necessary to bring the institution into existence had to be completed within the timeframe.[22]

There were two major questions which dominated the drafting of the Senate legislation. Who was to constitute the electorate for the Senate? And how were the panels to be constructed?

There were a number of different possibilities for the constitution of the electoral college. The first draft prepared by Matheson stated that the electorate would be based on candidates from the previous general election, who would receive one vote for every 1000 first preference votes received.[23] The question of vote-weighting was one which concerned Fianna Fáil, and Hugo Flinn, the parliamentary secretary to the minister for finance, analysed whether the party would receive a greater number of seats if the threshold was set at one vote for every 500 first preference votes.[24]

In the aftermath of the passage of the Constitution, cabinet discussion returned once again to the Senate and on 15 July Seán T. O'Kelly prepared a memorandum on the issue. O'Kelly questioned the composition of the Senate electorate—specifically, whether county council members would have a vote in senate elections. He argued that membership of a council was not 'proportionate to population or importance'.[25] He also pointed out that some county councils had been dissolved, which would mean people in those counties would not have even an indirect say in such elections. He questioned whether a Commissioner who had been

[19] Article 18.7.1°.

[20] Article 18.7.2°.

[21] Article 18.8.

[22] It would also be necessary to hold the elections themselves within this time, which meant the time for finalising the legislation was considerably less than the 180 days.

[23] 8 May 1937 (NAI: Taois s.10087A).

[24] 4 June 1937. It seems as if this memorandum was composed by Flinn without formal instruction to do so.

[25] 15 July 1937 (NAI: Taois s.10087A).

appointed to administer a dissolved county council should be allowed to vote in any case, presumably again because such a Commissioner lacked a democratic mandate.

Article 18 of the Constitution provided that the Senate was in part to be made up of members elected from one of five panels. Candidates were qualified to be nominated to one of these panels when they possessed practical experience and knowledge in the fields which these panels were supposed to represent. The panels were:

1. National Language and Culture, Literature, Art, Education and such professional interests as may be defined by law for the purpose of this panel;
2. Agriculture and allied interests, and Fisheries;
3. Labour, whether organised or unorganised;
4. Industry and Commerce, including banking, finance, accountancy, engineering and architecture;
5. Public Administration and social services, including voluntary social activities.

These panels were to be formed in a 'manner provided by law' and the government set about elaborating the meaning of the terms in legislation. Two questions occupied much time. The first was whether 'medicine' was broad enough to include professions such as dentistry and veterinary medicine. The first drafts of the Seanad Electoral (Panel Members) Bill simply made reference to 'medicine' as a professional interest but it was not clear whether this incorporated these other related fields.[26] It was decided to broaden the statutory definition in order to incorporate these terms.[27]

There was a great degree of debate as to whether journalism fell within the ambit of the term 'profession'. On 9 September, Maurice Moynihan, Arthur Matheson and Philip O'Donoghue conferred on the question and concluded that 'it need not be defined as a professional interest'.[28] Interestingly, de Valera suggested the inclusion of a provision which would enshrine journalism as a profession.[29] On 15 September, the executive council approved the text of the Bill, subject to de Valera's concurrence on the text dealing with professions.[30] O'Donoghue continued to press for

[26] 27 August 1937 (NAI: Taois s.10087A).
[27] NAI: Taois s.10087A, s 4(2)(b) of the Seanad Electoral (Panel Members) Act 1937.
[28] 9 September 1937 (NAI: Taois s.10087A).
[29] Memo of 14 September 1937 (NAI: Taois s.10087A).
[30] Cab 8/9, 15 September 1937 (NAI: Taois s.10087A).

the exclusion of journalism as a professional interest.[31] He argued that journalists could qualify under some other professional interest, such as those relating to the national language, but that the inclusion of journalism as a specific interest would expand the definition of profession too much. Journalism did not make an appearance in the final text of the Bill.

The government's Bill proposed that senatorial seats should be distributed as follows: 'five for the cultural and educational panel, 11 for the agricultural panel, 11 for the Labour panel, nine for the industrial panel, and seven for the administrative panel'.[32] More controversially, the electoral college was to consist solely of candidates who had stood at the previous Dáil election. Every candidate who received between 500 and 1000 first preference votes would receive one electoral college vote, and every candidate who received 1000 or more first preference votes would receive one electoral college vote per 1000 first preference votes.[33] This provision had originally been included in the Constitution itself but was abandoned at the Dáil stage as a result of interventions by the opposition.[34]

De Valera stated that the Bill simply contained 'detail' which was designed to implement the Constitution and that if an attractive method of forming the Senate could be devised by the opposition parties then Fianna Fáil would not stand against it. He therefore proposed that the Dáil pass the second stage of the Bill but send it to a select committee, which would propose alternative methods of election that might be adopted by the Dáil at the committee stage of the Bill.[35]

The proposal which garnered the support of the select committee was not that favoured by the government. The committee advocated the establishment of a transitional electoral college of 22 members, to be composed of ten government members, seven members of the largest opposition party, four members of the second largest opposition party and one member elected by the independent deputies. Each grouping would then propose twice the number of candidates than it had nominees—in other words, the government would propose 20 candidates, of whom ten would be elected. These candidates would be voted upon on the basis of proportional representation by the members of the Dáil who were not affiliated

[31] 20 September 1937 (NAI: Taois s.10087A).

[32] 69 *Dáil Debates* col. 288 (7 October 1937).

[33] The numbers would be rounded up or down to the nearest thousand; see 69 *Dáil Debates* col. 297 (7 October 1937).

[34] This fact was not overlooked by the press; *Irish Independent*, 23 September 1937.

[35] 69 *Dáil Debates* cols. 369–370 (7 October 1937).

with the nominating party.[36] Thus, the government would propose 20 candidates and all TDs except the government party would then elect ten candidates from the proposed candidates. This electoral college would then vote on the senatorial candidates. Crucially, this proposal offered 11 votes to the opposition parties, but only ten to the government, which would give the opposition a majority in the Upper House.

The defeat of the government proposals prompted a despairing letter from Seán MacEntee, minister for finance, to de Valera on the issue: 'The method of constituting a constituent part of the oireachtas is a fundamental constitutional issue. The Executive must have a policy in regard to it, and if it is beaten on that policy it must resign.'[37] An earlier drafted letter in the MacEntee papers contains a handwritten precursor to the letter sent to de Valera; in the handwritten version, MacEntee offers to resign.[38]

The eventual provisions of the Seanad Electoral (Panel Members) Act 1937 were not carried in line with the report of the special committee.[39] The electoral college established under the Act was confusing. Members of Dáil Éireann were also members of the electoral college.[40] Each county council would elect seven councillors to act as electors for that council.[41] These councillors and TDs would act as the electoral college for the Senate panel members.

MacEntee's resignation letter indicates the seriousness with which senior members of the cabinet viewed the question of the constitution of the upper house. The cabinet were surely wary of the composition of Senate given the perceived obstructiveness of the previous body.

Constitution Day

The Constitution came into force on 29 December 1937. The celebrations were a microcosm of the various influences on the Constitution and the ways various groups viewed it. First, the ceremonies were both reli-

[36] 69 *Dáil Debates* cols. 1395–1400 (1 December 1937).

[37] 14 November 1937 (UCDA: P67/185).

[38] UCDA: P67/186. Keogh intimates that MacEntee's letter of resignation came in the aftermath of the report of the Second House Commission, which was in 1936; see *Twentieth-Century Ireland: Nation and State* (Dublin: Gill & Macmillan, 1994), 103. This cannot be squared with what MacEntee states in the letter; the 1936 Commission did not represent a defeat for the government.

[39] See Tom Garvin, *The Irish Senate* (Dublin; Institute of Public Administration, 1969), 19–22.

[40] S. 36(a).

[41] S. 36(b), s. 37.

gious and political, reflecting the twin bases of the drafting of the Constitution. This distinction was expounded by de Valera in his radio broadcast on the day. Second, the response of the British government revealed a broad acquiescence with the terms of the Constitution, but a rejection of specific provisions of it. Third, the opposition parties largely ignored the celebrations on constitution day.

Military Observation

At 9.15 a.m. all troops at garrison centres paraded.[42] The flag was hoisted to the sound of the Reveille at 9.30 a.m. At this time a 21-gun salute was performed at the Royal Hospital, Kilmainham by the 4th Howitzer Battery, which used four eighteen-pound guns.[43] The guns were pointed eastward so that their sounds could be heard in the city.[44] The most descriptive account of the firing of the howitzers was carried in *The Irish Press*:

> White horses, chestnuts, and bays, six to each team; their coats steaming in the morning air; their hooves thudded softly on the damp grass, and the limbers made no sound as they wheeled the shining eighteen-pounders into position in the middle of the twenty-acre field beside Bully's acre.
>
> …
>
> And as one iron mouth after another opened with a roar, the thunderous and prolonged salute shook the quiet fields and boomed through the city—salute to destiny that echoed, not only through the streets of its capital, but from shore to shore of this island—triumphant salvo that will echo down the years.[45]

At 9.40 a.m., a *feu-de-joie* was fired in each garrison centre. If there was a band present, the firing of the *feu-de-joie* was interspersed with the playing of the national anthem. The *feu-de-joie* was accomplished by the soldiers forming two ranks,[46] angling their rifles at 135°; the firing commenced with the soldier at the right of the front rank, ran down and then back up

[42] Details taken from memorandum by Liam O-hAodha, 22 December 1937 (UCDA: P150/2450).

[43] *Dublin Evening Mail*, 29 December 1937, *Irish Times*, 30 December 1937.

[44] *Dublin Evening Mail*, ibid.

[45] *Irish Press*, 30 December 1937.

[46] The total number of soldiers was, if possible, of company strength.

the ranks, and concluded with the soldier at the right of the second rank. It was described by one newspaper account as 'a rippling, machine-gun-like volley of rifle fire which looked as if a point of flame leapt from one gun-barrel to another'.[47] In the Portobello barracks, the 2nd battalion of the regiment of rifles was accompanied by the No. 1 Army Band.[48] In Collins' barracks in Cork, the *feu-de-joie* was performed by the 4th Battalion Regiment of Rifles and was accompanied by the No. 2 Army Band.[49] Mass was held thereafter in all garrison churches at 10 a.m.

Religious Services

A votive mass of the Holy Ghost was held in the Pro-Cathedral. The service began with the singing of the '*Veni Creator Spiritus*'.[50] The *Catholic Encyclopaedia* stated that the hymn was sung 'at such solemn functions as the election of popes, the consecration of bishops, the ordination of priests, the dedication of churches, the celebration of synods or councils, the coronation of kings, etc.'[51] The mass was not well attended by opposition deputies. Fine Gael was represented by Cecil Lavery and Sir John Esmonde. Labour was represented by Thomas Lawlor and Gerrard McGowan. None of these deputies were very senior members of their parties. There was a calculated decision by William Cosgrave, head of Fine Gael, and William Norton, leader of the Labour Party, to boycott the event. This point was commented on in the press.[52] The mass ended with the 'Hallelujah' chorus from Handel's *Messiah*.[53]

A contemporaneous service was held in the Anglican St. Patrick's Cathedral. A special service of intercession for Ireland was led by the dean of the cathedral, David Wilson.[54] The government was represented by David Robinson, a former vice-chairman of the Senate. Robinson had been badly injured in both legs in the First World War and a car was there-

[47] *Dublin Evening Mail*, 29 December 1937.
[48] *Irish Independent*, 30 December 1937.
[49] *Cork Examiner*, 30 December 1937.
[50] *Irish Press*, 30 December 1937.
[51] Accessed online at http://www.newadvent.org/cathen/15341a.htm.
[52] *Dublin Evening Mail*, 29 December 1937: 'Notable absentees were the leaders of the Opposition parties in the Dail.'
[53] *Irish Press*, 30 December 1937.
[54] *Irish Times*, 30 December 1937.

fore sent to convey him from the St. Stephen's Green Club to St. Patrick's Cathedral.[55]

Services were also held by the other major congregations in Ireland. Reverend R. Lee Cole offered prayers for the new government and officers of the state in the Methodist Centenary Church.[56] The Religious Society of Friends held a special meeting for worship.[57] Special prayers were said in synagogues to commemorate the entry into force of the Constitution. Rabbi Gudansky in the synagogue on Adelaide Road stated: 'This Constitution will go down in history as a memorable system of government, truly fashioned after the pattern of God's holy law, containing the loftiest creeds of justice and equity of freedom, of conscience and equality of rights for all.'[58]

Radio Broadcasts

A number of radio broadcasts commemorated constitution day. A 'constitution ceilidhe' was held in the Mansion House, attracting a crowd of over 700 people.[59] This was broadcast on Radio Athlone. The most notable broadcasts to mark the occasion were, however, a programme on the Constitution and de Valera's address. *The Cork Examiner* contained a detailed description of the radio programme designed to celebrate the Constitution:

> It began with an account of the changing of some of the laws with the coming of St. Patrick to Ireland and the predominance of Christian laws in the country until England began her oppression by legislative, as well as military, measures. The Parliament of Kilkenny in 1367 forbade intermarriage between Irish and English, also the game of hurling and the use of Irish as the national language of the people. The new Constitution made Irish the national language and the Irish text final in cases of conflict between the Irish and English texts of the Constitution. In Drogheda in 1494, Poynings' Law enacted that the laws to be brought before the Irish Parliament must receive the consent of the king of England. The Constitution gave the Irish people the absolute right to enact their own laws and to determine their

[55] NAI: Taois s.10437.
[56] *Irish Times*, 30 December 1937.
[57] *Irish Times*, 30 December 1937.
[58] *Irish Press*, 30 December 1937.
[59] *Irish Independent*, 30 December 1937.

> own requirements … Ireland had now a native government, which would rule by right and might, but would not yield to the arrogance of any other nation: it would make laws for the country and no other body would have the right to make laws for the State. Ireland was the whole of the island and its seas and in the words of Parnell 'No man has the right to fix the bounds to the march of a nation, no man has the right to say, "Thus far shall thou go and no further," we have never attempted to fix the ne plus ultra to the progress of Ireland's nationhood and we never shall.'[60]

The programme presented a partisan view of Irish history, bordering on propaganda, which was designed to make the Constitution look good by comparison. This programme was followed by a speech read by de Valera to mark the entry of the Constitution into law. The speech may be divided into two elements: political and religious. First, he advocated the Constitution as a final settlement to the problem of democratic governance:

> Within [the] Constitution the unity of the national territory can be restored. With it the people's right to enter into, determine, or maintain any relationship with other nations may be open to them can be freely exercised. Within it any man, or group of men, commanding the support of the majority in the National Parliament can legally carry through any programme in the domain of our internal or external relations which he or they may conceive to be in the national interest.[61]

We have seen in Chap. 1 that de Valera advocated the deletion of the oath of allegiance on the grounds that it was a bar to the democratic involvement of republicans. His constitution day speech argued that this republican objection had been removed entirely by the new Constitution. He also argued that the Constitution provided the template for the integration of Northern Ireland:

> The day that this Constitution becomes effective over the whole of the national territory, that day Emmet's epitaph may be written. The hastening of that day is one of the great tasks to which I would this evening summon the Irish race to dedicate itself anew. I would ask all our people, especially those who in the past differed from the majority in their political opinions, to let all former differences disappear in the "common name of Irishmen."

[60] *Cork Examiner*, 30 December 1937.
[61] *Irish Times*, 30 December 1937.

> Our country is dear to all of us, and all of us are needed to bring her to the destiny which we believe can be hers. Our nation seeks to injure no other nation or people. We want nothing that is not ours by every title of justice and right.[62]

The second element of de Valera's speech concerned the religious elements of the Constitution: political freedom, he said, was merely 'a means and not an end'. The end of political freedom was 'a community living rightly and nobly':

> The State exists to promote the welfare of the individual—his spiritual as well as his material welfare—and the social order to be right must be consistent with the maintenance of the dignity of the human person and with man's supernatural destiny. The attitude of the Irish people in regard to these questions—the purpose of civil society and the scope of its function in relation to the individual citizen—is not in doubt.
>
> The Christian philosophy of life has determined the character of our people for long over a thousand years. The chief significance of the new Constitution coming at the present time is that it is in complete accord with national conviction and tradition in these matters, and that it bears upon its face from the first words of its preamble to the dedication at is close the character of the public law of a great Christian democracy.[63]

De Valera's broadcast revealed the two principal influences on the drafting of the Irish Constitution. First, he wished to effect a political settlement which could claim the allegiance of all elements of the community. This settlement required an indigenous Constitution which was not subject to influence from abroad in the manner of the 1922 Constitution. Second, he wished to enshrine a particular vision of man in the Constitution. The political settlement was necessary to allow human flourishing; this could only occur within the confines of Christian philosophy and this was enshrined in the Constitution.

The coming into operation of the Constitution on 29 December offered de Valera a moment of triumph, but questions still lingered about whether normalisation of relations with the United Kingdom was possible.

[62] *Irish Times*, 30 December 1937.
[63] *Irish Times*, 30 December 1937.

Relations with the United Kingdom

The internal success of the constitutional movement in 1937 removed any internal legal restrictions which the 1922 settlement sought to impose. However, there remained two major constitutional obstacles from the Irish point of view: the retention of the ports of Lough Swilly, Berehaven and Cobh (or Queenstown) as a result of the Anglo-Irish treaty (the so-called 'treaty ports'); and the question of partition. There also remained the possibility of British objections to the operation of the Constitution itself. These issues were addressed in meetings between Irish and British officials in 1937 and 1938.

The initiative for this change in Anglo-Irish relations on the British side dates may be traced to a change in ministerial personnel in 1935. The intransigence of J.H. Thomas was recognised by commentators as a serious bar to any rapprochement between the Irish and British governments in the 1930s.[64] The appointment of Malcolm MacDonald in November 1935 as secretary of state for dominion affairs gave some hope that a deal between the Free State and the United Kingdom was possible.[65] An article that appeared in *The Manchester Guardian* in November 1936 stated: 'The feeling is growing here that conditions have changed since 1932–33 … At that time Right Hon. J.H. Thomas, who was in charge of the Dominions Office, emphasised the political and constitutional side rather than the financial.'[66] The feeling in 1936, however was that 'it is unlikely that anything definite will be done until the text of the new Constitution is available'.[67] One finds a similar sentiment on the Irish side; Walshe,

[64] Arthur Bromage, "Anglo-Irish Accord," *Political Science Quarterly* 53 (1938): 516, 531.

[65] *Manchester Guardian*, 23 November 1935. MacDonald's rapid ascent to ministerial office in the 1930s was the source of some controversy at the time; he was described at the time of his appointment as 'the perfect Under Secretary. So much so that the House of Commons was astonished—it is the simple truth—to discover one summer day this year that he had been made Colonial Secretary.'

[66] *Manchester Guardian*, 15 November 1936. The antipathy to Thomas was not confined to the Irish Free State. An editorial Melbourne in *The Age* declared: 'Mr. Thomas … lacks the statesmanlike vision and the appreciation of the Dominions' outlook that is imperative in a Minister representing Great Britain in the increasing intricacy and delicacy of relations with the Dominions. He is a "positive menace" to the harmony and success of the negotiations between the [British and Australian] governments.' As excerpted in *The Times*, 19 November 1935.

[67] *Manchester Guardian*, 15 November 1936.

secretary of the department of external affairs, stated to Bewley, Irish minister plenipotentiary and envoy extraordinary to Germany, that 'relations between the two countries are improving since the removal of Mr. Thomas'.[68] Perhaps less noted is the extent to which the British civil service, in particular Sir Warren Fisher, Sir Edward Harding and Sir Harry Batterbee, sought to end the Irish crisis.[69] As Clyde Sanger notes:

> When the more die-hard Conservatives in the cabinet—in particular, Lord Hailsham, the Lord Chancellor, and Sir Samuel Hoard—proved obstructive, [MacDonald] had the brains and the backing of these senior officials to help him find a way through.[70]

The abdication crisis meant that the Irish side were dealt rather a freer hand in 1937 than they could have anticipated, and the subsequent grounds of disagreement with the British were unlikely to be as weighty as they would have been if it had not occurred.

Nonetheless, there was a considerable amount of contact between MacDonald and de Valera behind the scenes. They held repeated meetings when de Valera was in transit in London on his way to Zurich for eye treatment. These meetings were eventually reported on by the press in January 1937. In a stroke of serendipity, a retired J.H. Thomas was present in the hotel in which MacDonald and de Valera held a preliminary discussion. Asked to comment on these discussions, Thomas replied: 'I wish them good luck. That is all I care to say.'[71] Thomas must surely have had some intimation of the progress in constitutional relations which any agreement would require—a constitutional agreement which had eluded his powers during his time in office. The timing of press reporting on these meetings is also instructive. The first such recorded press report dates from January 1937; the preliminary meetings in 1936 were entirely confidential and were not reported in the press. One may conclude from the press presence

[68] NAI: DFA 105/46 (1 October 1937), as reproduced in *Documents on Irish Foreign Policy Volume V 1937–1939* (Dublin: Royal Irish Academy, 2006), hereinafter *Documents Vol V*, 110.

[69] Fisher was at the time Head of the Civil Service, Harding was permanent under-secretary of the dominions office and Batterbee was Assistant under-secretary of the dominions office.

[70] Clyde Sanger, *Malcolm MacDonald: Bringing an End to Empire* (Montreal: McGill-Queen's University Press, 1995): 112.

[71] *Irish Times*, 15 January 1937, *Irish Independent*, 15 January 1937, *Irish Press*, 15 January 1937.

in January 1937 that they had been tipped off about these meetings; this was surely an indication that both sides were sufficiently confident that progress was being made that they could risk press reporting without fearing the subsequent implosion of talks.[72] Moreover, the fact that this publication came after the abdication crisis indicates that the Irish Free State had not overplayed its hand in that crisis and a détente looked increasingly possible.

MacDonald was also dealt one final, and perhaps most important, card in 1937 which meant that the possibility of a final deal between Ireland and the UK was possible. This was the ascension of Neville Chamberlain to prime ministerial office. The importance of Chamberlain to MacDonald's cause lay in the fact that MacDonald had persuaded Chamberlain of his line of argument in 1936. Sanger recounts that after an interrupted meeting of the Irish Situation Committee, Chamberlain took MacDonald aside and asked him to continue with what he would have said in the meeting. After MacDonald explained his position, Chamberlain declared: 'I entirely agree with you, and you can count on my support throughout future discussions.'[73] When Chamberlain became prime minister following the resignation of Baldwin, the value of this support increased in importance immeasurably.

Despite the increasing possibility of a deal between the Irish and British sides in 1937, a number of constitutional points of considerable difficulty remained. First among these were the return of the treaty ports and the end of partition. De Valera was adamant that the state could not be regarded as independent until the treaty ports were returned. Speaking on the Bill to abolish the Senate in May 1934, de Valera responded to Frank MacDermot's claim that the Free State was independent:

> If we have independence is it with the will of the people and of the Deputies on the opposite benches that Cobh is held: that we have parties of British troops on our shores? It we have independence in this nation is it with the will of the people that we have the Six Counties cut off? Is it not obvious that we are not free in this country? […] It is quite true that we are free to a

[72] We may eliminate from consideration the fact that a journalist came by this source on the basis of their own work by the fact that all major newspapers had their correspondents in the hotel for the same meeting. Some of the newspapers described the meeting as 'unexpected' (*Irish Times*, 15 January 1937), but this seems more likely to refer to general populace than the press corps.

[73] Sanger, *Malcolm MacDonald*, 118.

> very large extent, but there are certain things which we would not have if we were truly free, and they are there because they are imposed on us.[74]

In fact, both of these issues were to be the primary constitutional claims made by the Irish side in the negotiations in 1938. In mid-1937, it was not clear whether there would be any official objection by the British to the 1937 Constitution; a sufficiently strong objection could possibly derail any subsequent discussions on these claims.

The preliminary talks took place on 15 and 16 September 1937 in Geneva between de Valera and Malcolm MacDonald. De Valera divided a memorandum prepared on these talks into five sections: the new Constitution, partition, the ports, general defence and trade.[75] In regard to the new Constitution, MacDonald noted the British government would need to make a formal protest regarding Articles 2 and 3. This, however, removed the main body of the Constitution as a possible point of contention. It also became clear that there was no possibility of compromise on the issue of partition, and de Valera had to content himself with warning that the Irish would mount a campaign to highlight internationally the inequity of the situation. De Valera noted that, in the absence of agreement on partition, any agreement that was reached would be regarded as partial but crucially did not rule out the possibility of reaching some form of agreement on other issues.[76] MacDonald stated the British government were prepared to hand over the treaty ports immediately if the Irish government would guarantee an invitation to use them in the case of war; de Valera noted this would be an inconsistent with Irish sovereignty over the ports.[77]

On 24 November, de Valera contacted the British proposing an intergovernmental conference to consider 'all the important matters involved' in advancing Irish war preparations.[78] When agreement had been reached that such a conference would take place, Maurice Moynihan suggested it should 'be publicly announced beforehand, and should be of a formal character … Once there is a formal Conference, with due publicity, either

[74] 52 *Dáil Debates* col. 1869, 25 May 1934. This was a refrain not confined to de Valera alone, see Hugo Flinn, 27 *Dáil Debates* cols. 468–469, 21 November 1928.

[75] 17 September 1938 (UCDA: P150/2349).

[76] Memorandum of 15 September 1937 (UCDA: P150/2349).

[77] Memorandum of 17 September 1937 (UCDA: P150/2349).

[78] TNA: PRO DO 35/891/4 (23 November 1937), as reproduced in *Documents Vol V*, 120–121.

a settlement must result or each side must be prepared to justify from its own point of view the failure to reach a settlement.'[79] The issue of the return of the ports was identified in an editorial in *The Irish Press* of 15 December, which stated that the two problems which remained were partition and the ports.[80]

On 29 December, the British prime minister's office issued a statement on the new Constitution. This statement dealt with two areas of concern: the Commonwealth and Northern Ireland. First, on behalf of the Commonwealth, the United Kingdom stated that it was 'prepared to treat the new Constitution as not effecting a fundamental alteration in the position of [Ireland] […] as a member of the British Commonwealth of Nations'.[81] Second, the United Kingdom government noted with some concern the text of Articles 2, 3 and 4 and stated:

> They cannot recognise that the adoption of the name 'Eire' […] or any other provision of those articles involves any right to territory or jurisdiction over territory forming any part of the United Kingdom of Great Britain and Northern Ireland, or affects in any way the position of Northern Ireland as an integral part of the United Kingdom of Great Britain and Northern Ireland.
>
> They, therefore, regard the use of the name 'Eire' […] in this connection as relating only to that area which has hitherto been known as the Irish Free State.[82]

This press communiqué was in line with MacDonald's September indications and prevented the Constitution from becoming a live issue in the subsequent discussions.[83]

The conference proposed by de Valera in November began on 17 January 1938.[84] De Valera's initial salvo was on the issue of partition but he must have realised no such agreement, despite public posturing, was likely to succeed in light of MacDonald's negotiations with him in Geneva.

[79] UCDA: P150/2179 (3 December 1937), as reproduced in *Documents Vol V*, 127–128.
[80] *Irish Press*, 15 December 1937.
[81] *Irish Times*, 30 December 1937.
[82] *Irish Times*, 30 December 1937.
[83] See, for example, the statement of Malcolm MacDonald in 331 *House of Commons Debates* 7–8 (1 February 1938).
[84] NAI: DT S10389, as reproduced in *Documents Vol V*, 141. See Deirdre McMahon, *Republicans and Imperialists: Anglo-Irish Relations in the 1930s* (New Haven: Yale University Press, 1984), Chaps. 11 and 12.

When the meeting turned to the question of the occupied ports, de Valera stated that the claim 'rested primarily on the doctrine of National Sovereignty. As the Irish people saw it, the presence of British detachment in these ports was nothing less than an act of aggression.'[85] The negotiations between the British and Irish on this issue turned on whether the Irish government were willing to provide a guarantee to the British of a right to use the ports in time of war. De Valera intimated that in the event of the end of partition he would be prepared to meet British concerns some way but he did not think it possible to guarantee a right of use. In a subsequent meeting of 18 January, the British government agreed in principle to the handing over of the treaty ports but stated that they would need to have a written agreement to show the House of Commons, particularly as the transfer would involve an alteration of Article 7 of the Anglo-Irish treaty. Both sides agreed that the draft would be produced by the British.

The question of the ports was not the only, and perhaps not even the most important, issue which was addressed in the conference. Issues such as payments by both sides to one another, in the form of land annuities and reparations, and defence continued to occupy the time of the delegates, and although agreement had been reached quite early on the issue of the ports, it was unlikely that this would be carried through in isolation. The British side were dealt an internecine blow during the negotiations with the resignation of the foreign secretary, Anthony Eden, on 20 February 1938, which had as its proximate cause the insistence of the Italians that the British should go to Rome for talks on Italian 'volunteers' in the Spanish Civil War.[86] Although Eden did not take part in the Anglo-Irish negotiations this blow must have placed the British government under pressure to deliver a victory in the field of international affairs—a tangible sign that the policy of appeasement pursued by Chamberlain was capable of yielding concrete results. Moynihan's insistence on a formal conference proved inspired in this regard; the Anglo-Irish conference provided the best possibility of such a swift triumph.

The Tripartite Agreement on Trade, Finance and Defence was signed in London on 25 April 1938. Agreement had been announced on 23 April.[87] A measure of the importance of the agreement may be seen from

[85] *Documents Vol V*, 151.
[86] See *Oxford Dictionary of National Biography* entry for 'Eden, (Robert) Anthony'.
[87] *Irish Press*, 23 April 1938.

the fact that it received greater coverage than the nomination of Douglas Hyde for the post of the president, which happened on the previous day. Hyde's election was as a consensual candidate agreed between the major political parties. De Valera's initial preference had been for Seán T. O'Kelly, but was fearful that the popular Dublin politician Alfie Byrne might run against O'Kelly.[88] The possibility of a Byrne presidency was enough to secure Fianna Fáil support for an agreed candidate.[89]

The Irish Press carried the entire text of the Anglo-Irish agreement on 26 April, while an editorial argued that 'perhaps the chief remaining limitation on the absolute independence of this nation has been removed'.[90] On his return to Ireland de Valera stated:

> The unconditional restoration of the port defences and the abrogation of the rights claimed by Britain under Articles 6 and 7 of the 1921 Agreement for facilities in time of war and strained relations with foreign Powers completes the recognition of Irish sovereignty over the territory of the 26 counties.[91]

The 1938 agreement was also heralded as a new departure in the constitutional links between Ireland and the United Kingdom in the UK itself. Perhaps the most succinct description of the changes wrought by the 1938 agreement and the change that it heralded was provided by *The Manchester Guardian*:

> The agreement writes on a clean slate. All the old disputes are cleared off. Eire receives belatedly a trade agreement on the lines of those negotiated with the other Dominions at Ottawa. And, politically important, the last vestige of subordination to Britain under the treaty disappears with the handing over to Irish control of the naval stations reserved to British occupation since 1921. Read this along with the acceptance of the new Constitution for Eire by the British government and we can see how completely Eire has achieved the independent status to which she aspires and how firm a basis for friendly co-operation has now been laid.[92]

[88] See *Irish Press*, 20 April 1938, 23 April 1938.
[89] *Irish Press*, 8 April 1938, 20 April 1938.
[90] *Irish Press*, 26 April 1938.
[91] *Irish Press*, 27 April 1938.
[92] *Manchester Guardian*, 26 April 1938.

Conclusion

The plebiscite campaign signalled a formal acceptance by the people of the 1937 Constitution. However, we have seen in Chap. 1 how a determined opposition to the 1922 Constitution by an initially minority party was eventually successful in undermining the viability of the settlement. It was therefore important that the 1937 document would receive at least the acquiescence of the opposition parties in order to have a chance of survival. The initial statements of these parties did not auger well but, crucially, all parties were committed to democratic norms and therefore any attempt to amend the Constitution would come from within the democratic system. This guaranteed the life of the Constitution, at least in the short term.

Also important to the survival of the Constitution was the agreement with the United Kingdom. This was important for two reasons: first, it guaranteed the territorial integrity of the new state; second, it provided a fillip to the electoral prospects of Fianna Fáil and the party's chances of being able to nurse the Constitution through its early years. The importance of the return of the treaty ports to the Irish State is relatively uncontroversial in constitutional terms. Without their return, it was unlikely that Ireland could have effectively dictated its foreign policy in times of belligerence between the United Kingdom and a foreign state. Thus, the fact that the 1937 Constitution expressly provided that the state would not go to war except with the assent of the Dáil would have been practically obviated. The return of the ports meant practical observation of the theoretical position of the Constitution.

The second, and perhaps less noted constitutional point, is that the settlement with the United Kingdom provided de Valera with the confidence to seek a fresh electoral mandate in 1938. The success of Fianna Fáil in that election, in which it was returned as a majority government, was notable for a number of reasons. First, it provided a capstone of popular assent to the constitutional project that de Valera had engaged in throughout the 1930s, a project which had brought about a trade war but which was ultimately settled on terms favourable to Ireland. Second, it meant that the machinery of state would be operated by Fianna Fáil during the early years of the 1937 Constitution. This provided time for the normalisation of the new constitutional settlement.

It has rarely been commented upon that the remarkable longevity of the Constitution in Ireland has coincided with a period in which one

political party has achieved sustained electoral success. The advent of governmental change in 1948, for example, heralded the immediate declaration of a republic. In the twenty-first century, it is not clear that the same political hegemony will materialise. It is possible, though far from certain, that the settlement wrought in 1937 will also be eroded. The constitutional changes which have taken place since 2010 have been formidable, particularly the marriage equality amendment, but there is a pattern to these changes. The successful amendment campaigns have sought to extend the rights provisions to individuals who were not previously so protected, whether by dint of constitutional intention or judicial interpretation. In contrast, the proposed abolition of the Seanad, not typically regarded as an institution with popular support, was unsuccessful. This provides us with an indication that the machinery established under the 1937 Constitution has a large degree of popular acceptance. This might seem to be an indication that the institutions established by the 1922 Constitution are those that have stood the test of time, a vindication of Kelly's 're-bottled wine' view of the 1937 Constitution. While credit must be attributed to the 1922 Constitution, it must also be noted that the failures noted in Chap. 1 were not replicated in the 1937 Constitution. The provision of judicial review, the establishment of the presidency, the establishment of the Seanad, and the protection of fundamental rights are all innovations which have contributed to the continued vitality of the 1937 Constitution.

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