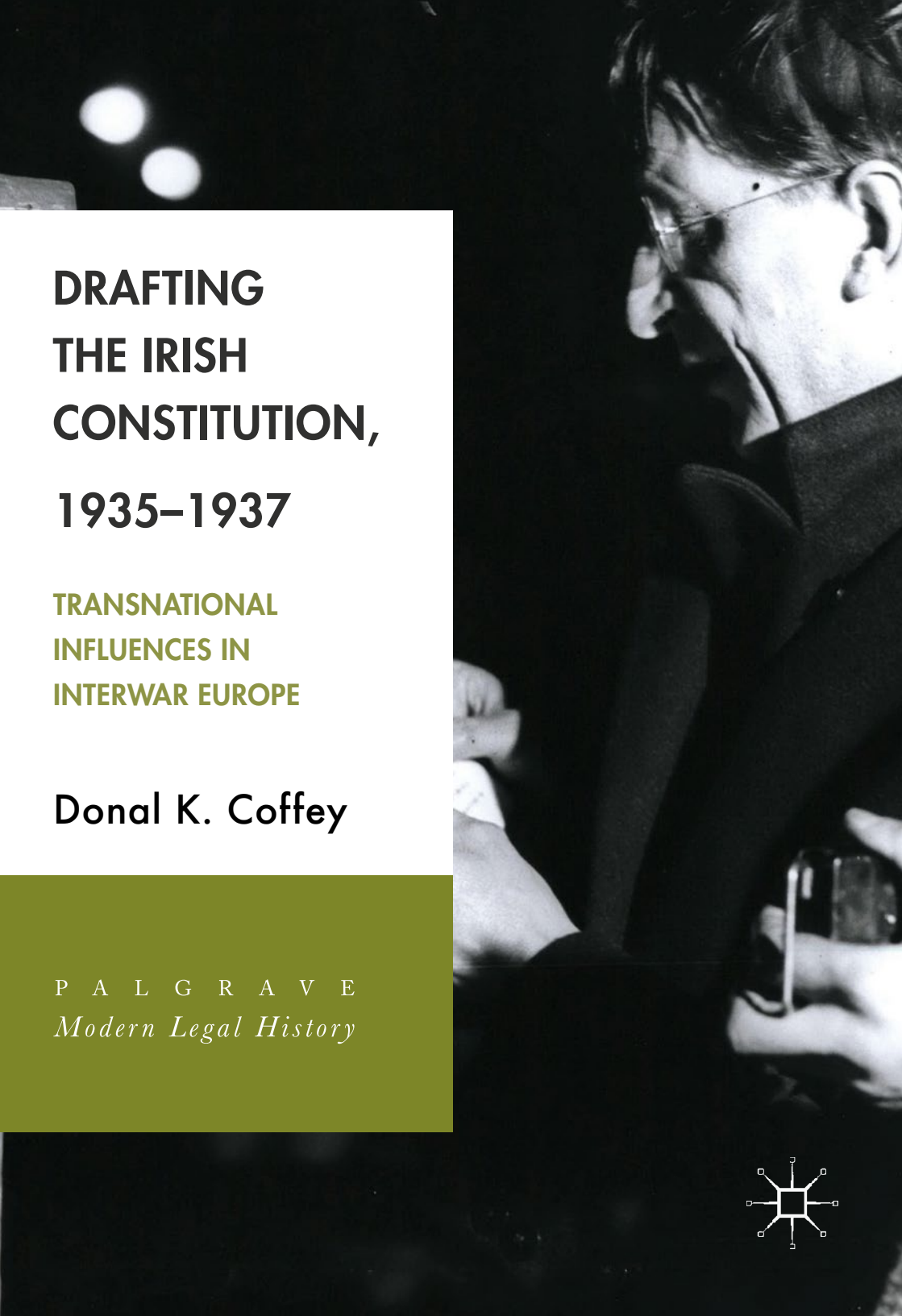

DRAFTING THE IRISH CONSTITUTION, 1935–1937

TRANSNATIONAL INFLUENCES IN INTERWAR EUROPE

Donal K. Coffey

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For my parents - Donal and Eithne

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Introduction

The Irish judiciary have long held that the 1937 Constitution of Ireland 'is written in and construed in the present tense'.[1] As a statement of constitutional interpretation, this proposition is not without its merits.[2] Nonetheless, the Constitution is also a historically embedded document. It came into being in a period of intense historical significance, when the liberal democratic regimes of Europe were crumbling. Moreover, it was passed at a time when the involvement of the country in the British Commonwealth of Nations was fraught. The relationship between Ireland and its larger neighbour, legally based on the 1921 settlement, was strained by the legal framework of the Commonwealth, which was perceived by the Irish Government to constrain the political wishes of the Irish people as expressed in the general elections of 1932 and 1933.

It is not possible to understand the constitutional history of Ireland in the 1930s without due regard to this international context. The constitutional changes which occurred between 1932 and 1936 were influenced by the Commonwealth dimension. Successive constitutional changes were designed to remove the possibility of external influence. The drafting of the Constitution itself, particularly the provisions relating to the presidency, was influenced by this relationship.

[1] Brian Walsh, "200 Years of American Constitutionalism—A Foreign Perspective," *Ohio State Law Journal* 48 (1987): 769. See also McCarthy J, *Norris v Attorney General* [1984] IR 36, 96.

[2] It is not clear what other tense would be appropriate to write a constitution in.

The Constitution was also drafted with an eye to continental constitutional practice. This foreign influence is not always appreciated when the 1937 document is considered. The early drafts, in particular, were heavily influenced by the inter-war European constitutions. This is most evident in relation to the drafting of the human rights articles, which were much more developed than in the 1922 Constitution of the Irish Free State.

Finally, the Constitution was obviously influenced by the domestic political realities of 1930s Ireland. This is perhaps the most well-appreciated facet of the history of the Constitution. Nonetheless, this book shows that elements of the common perception of this influence on the drafting of the Constitution are inaccurate. It re-evaluates the importance of individuals or groups of individuals in an attempt to consider how engaged each actor was in the drafting process.

This book pioneers a new method of constitutional dating in order to reconstruct the historical record in relation to the drafting process. This method involves a sequential ordering of the drafts of the Constitution, allowing a more informed analysis of the drafting process itself. It reveals the importance of European constitutions in the early stages of the drafting process, and also allows us to measure the influence of individuals in a more comprehensive manner than has hitherto been possible.

This book is not intended as an apologia for the form of constitutional interpretation known as 'originalism'.[3] At the risk of over-simplifying, this holds that the sole legitimate way to interpret a constitution is by reference to its original public meaning. It therefore seeks to ascertain this public meaning as a practical legal tool in dealing with contemporary cases. This book does not attempt to provide a philosophical grounding for this method of interpreting the 1937 Constitution.

It seems incontrovertible, however, that there is a place for historicism in constitutional interpretation. This is one, but only one, method of constitutional interpretation.[4] It provides a number of useful additions to

[3] This method of interpretation is most often associated in a judicial context with Antonin Scalia. See *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 37–47. See also, for example, Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Kansas: University of Kansas Press, 1999).

[4] On the plurality of legitimate methods of constitutional interpretation in the US context, see Philip Bobbitt, *Constitutional Interpretation* (Oxford: Oxford University Press, 1991). A similar view was advocated briefly in an Irish context by Hardiman J in *Sinnott v Minister for Education* [2001] IESC 63, [294].

other interpretative methods. It is relevant to understanding the reasons why certain articles are structured in the way that they are, and these reasons may not be apparent when the article is considered in isolation. It also provides us with the means of reading the document holistically (assuming, of course, that the drafters were consistent). A further consideration is that the legitimacy of the Irish Constitution derives, in the first instance, from a democratic plebiscite. This legitimacy means that we should pay some attention to what the people thought they meant when they were enacting it.

This book also aims to make a contribution to the field of Irish history. In a recent review of the historiography of Irish nationalism, Richard English called for 'assessing nationalist history according to a pattern of concentric circles of explanation: individual, local, national, European, international'.[5] The development of Irish constitutionalism in the 1920s and 1930s largely furthered the nationalist project. The 1937 Constitution itself is explicable only by reference to the contribution of individuals to the drafting process, and by considering the broader European and international trends that inspired it.

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[5] Richard English, "Directions in Historiography: History and Irish Nationalism," *Irish Historical Studies*, 37 (2011): 454.

CHAPTER 1

The Drafters of the 1937 Constitution

The 1937 Constitution of Ireland is a mélange of different, and sometimes conflicting, influences: nationalism, Catholicism, inter-war liberalism and the British parliamentary tradition. These influences have been considered in a number of recent volumes, but the drafting process has remained obscure. This book aims to clarify it by applying a sequence to the process: this method is set out here and, more fully, in the drafting appendix. It allows us to use 52 drafts to consider how drafting progressed. Before turning to the articles themselves, it is necessary to provide a brief overview of the various individuals involved in the drafting process and the intellectual arsenal that they had available to them in 1937.

Constitutional Drafting in the Inter-War Period

The 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 of it 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

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be seen in the 1918 Constitution of the Russian Socialist Federal Soviet Republic and the 1917 Constitution of the United States of Mexico. That they were inter-war trends can be seen in their absence from, for example, the 1915 Constitution of Denmark and the Constitutional and the Organic Laws of France between 1875 and 1919.

The inter-war years were a time of constitutional experimentation, which was to end in failure in most instances. Nonetheless, in the early 1920s liberal democracies were ascendant in Europe; it was only as the decade progressed that their precariousness was exposed and they were undermined—first in Italy in 1922, then in Poland and Portugal in 1926, and finally in the Kingdom of the Serbs, Croats and Slovenes in 1929 (this state 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 that change. When Austria introduced a constitution in 1934, for example, it moved from a liberal constitution written by Hans Kelsen in 1920 to 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 European exception before 1937 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. The head of the executive council was the governor-general, who was required to sign legislation, and there still existed the appeal to the Judicial Committee of the Privy Council in 1922. These provisions were gradually removed, until in 1936 all traces of the Crown had been removed 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 underpinning element of the 1922 Constitution: popular constitutionalism.[1] 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 pre-

[1] 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.

ferred the monarchical elements.[2] The position in 1936 was a confused one: the monarchical elements of the Constitution had been removed, but the provisions of the Constitution remained subject to the Articles of Agreement for a Treaty between the United Kingdom and Ireland which imposed constitutional limitations on the Free State according to the Irish courts.[3]

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 at the cross-currents of European constitutionalism at the time. The institutions of state that were established were that 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 enshrined a series of liberal rights. This was expanded in 1937 to include provisions relating to social and economic rights. The drafting of these new articles again reflects 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 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 the product of 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 of these constitutions, and 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

[2] Cahillane, 47–65.

[3] *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. See also *Constitutionalism in Ireland, 1932–1938* Chaps. 1–2. The material outlined here overlaps with chapter 4 of that volume.

to place considerable pressure on the constitutional structures of those countries with colonies. Ireland obviously had 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. The Irish Constitution was, ultimately, a mixture of four broad trends: Commonwealth constitutionalism; popular constitutionalism; the liberal democratic constitutionalism in 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 can be seen even more prominently 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 seen in the Senate. The fundamental rights provisions are a blend of 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 be examined only through a fine-grained analysis of the drafting of the various articles of the Constitution. Certain influences can be seen more clearly early in the process but become less apparent by the final draft due to alterations made during drafting—this applies, for example, to the influence of European constitutionalism on the fundamental rights articles. In order to fully understand the influences that shaped the 1937 Constitution, therefore, we have to trace the drafting process, as best we can, from beginning to completion.

The difficulty of tracking the process of drafting the Constitution, in particular the 1936 drafts, has been noted by historians.[4] It stems from the fact that the various drafts of the Constitution that exist in the de Valera

[4] See Keogh and McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hÉireann* (Cork: Mercier Press, 2007), 78: 'It is difficult to trace in detail the calendar of events in mid 1936.'

papers, which offer the most complete set of drafts, are not all dated. This presents a difficulty for a comprehensive understanding of the drafting process. It is possible, however, to present a chronological ordering of the majority, though not all, of the drafts in the de Valera papers. This has been accomplished by tracking the textual changes that various articles undergo from one draft to another. These drafts may then be listed sequentially until they eventually link with a dated draft, of which there are 37. The draft dating proceeds in this fashion:

1. Draft A dated, for instance, 10 August 1936. Handwritten amendments noted on text.
2. Draft B undated. Amendments noted on draft A are incorporated. New amendments are annotated to the text of draft B.
3. Draft C undated. Amendments noted on draft B are incorporated. New amendments are annotated to the text of draft C.
4. Draft D dated, for instance, 1 September 1936. Amendments noted on draft C are incorporated.

This process provides the means to construct a drafting history. We can stipulate that drafts B and C were written between 10 August 1936 and 1 September 1936. Those drafts which are not dated have been assigned dates to make the drafting process easier to understand. Where these drafts are assigned dates, a note is made in the text to indicate that the date is speculative, for example '19[?] August 1936'. The dates that are speculative are designed to indicate the order in which the drafts were composed. They are cross-referenced, where available, with diary evidence to indicate dates on which the drafting is likely to have occurred, though diary evidence is inconclusive in most instances. The drafters may have composed two or three drafts on a particularly productive day, but the ordering proposed by this method would separate out the drafts onto three consecutive days. The utility of this method, however, is that it allows us to consider the drafting process sequentially and to track the various influences on the drafting process. Further archival discoveries may indicate exact dates for the drafts which vary from those indicative dates in this work; however, they are unlikely to change the order in which the drafts appeared. The details of these changes, and how the drafts were dated, may be found in the drafting appendix. The nomenclature adopted in the text itself is also outlined in the appendix, for example, references to drafts labelled 'X' are more clearly explained in detail in the appendix.

The archives also contain material relating to the Irish-language drafts. This process was carried on in conjunction with the English-language

drafting, but the English was the base text from which the Irish was translated.[5] The sole exception to this appears to be a literal translation from an Irish draft into English that was carried out in February 1937. Further work on the Irish drafts will certainly enhance our understanding of the drafting process, but this work focuses on the English drafts for two reasons. First, the English version was the core text. Second, an analysis of the Irish version requires an ability to understand and analyse Irish legal terminology.

This is not to say that the method outlined here does not introduce a further problem. By focusing on the sources that can be sequentially ordered, there is always the possibility that existing drafts can be added to the order, that the order itself could be questioned or re-ordered, or that hitherto undiscovered drafts may be added. There is no way around this difficulty in relation to the approach outlined here; in fact, such developments are to be welcomed when they occur.

As noted, the de Valera papers present the most valuable resource for the drafting process, in particular the early drafts. However, other archival sources also exist in the national archives and the John Charles McQuaid papers. The chronology presented below and in the drafting appendix indicates where there is overlap between these sources and the de Valera papers.

The method used to select the relevant articles to analyse was predicated on the draft dating method outlined above and contained in the drafting appendix. The drafts were analysed to ascertain those in which significant changes had occurred during the drafting process. If no changes had occurred between the initial and final drafts, then there is little value in a historical analysis of the relevant section. Those elements of the Constitution which had undergone significant change, however, are self-evidently the most interesting from a historical point of view. This volume contains the material on the articles that underwent the most significant change between October 1936 and the final draft.[6] The one exception to this is Article 44, which deals with religion. The reason that this has been omitted is straightforward. The drafting of this article was substantially

[5] See Keogh and McCarthy, at 148–149, on the Irish drafting process.

[6] The method used to determine this was to compare the drafts of 19[?] October 1936 (University College Dublin Archives [hereafter 'UCDA']: P150/2385) and 2 March 1937 (UCDA: P150/2387) with the Constitution as enacted. Those provisions that disclosed significant changes during the drafting process were then analysed.

achieved in 1937 and has been the subject of a comprehensive work by Dermot Keogh.[7] There is little that can be added to Keogh's account.

With those articles that do disclose significant change, the provisions of each article are identified along with the historical reasons for the changes which occurred, insofar as they can be ascertained. It is when we pay attention to this process that we gain a better appreciation of the overall trends that are outlined above. They reveal a country that was far more internationally oriented than is commonly appreciated, one drawing on influences from across Europe and beyond to craft a Constitution. This mélange of interests—developed through the network of drafters who composed the Constitution—is the defining characteristic of the 1937 Constitution.

The Drafters

The most useful way to track the input of the different parties is chronological. It may be useful first, therefore, to set out a skeleton timeline when considering the influence of the various actors:[8]

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 the first submission.
19 October 1936—First full draft of the Constitution.[9]
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.

[7] Dermot Keogh, "The Irish Constitutional Revolution: The Making of the Constitution," in *The Constitution of Ireland 1937–1987*, ed. Frank Litton (Dublin: Institute of Public Administration, 1988), 4–84.

[8] For a fuller exposition of the drafting chronology, see the drafting appendix.

[9] Michéal O 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 of it on 14 June 1937; see UCDA: P122/103.

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.

John Hearne

A recent biography of John Hearne by Eugene Broderick traces his career as a supporter of the Irish Parliamentary Party and his attainment of the offices of assistant parliamentary draftsman in 1923, legal adviser to the department of external affairs in 1929 and primary draftsman of the Irish Constitution in 1937.[10] Hearne's memoranda on the foundations of the Irish Free State were important in the constitutional changes made in the 1930s, and in 1934 he sat as 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.[11] In 1987, Brian Kennedy devoted two articles exclusively to the influence of Hearne, published in *The Irish Times*[12] and in *Éire-Ireland*.[13] 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 this monograph 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

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

[11] 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.'

[12] Brian Kennedy, "The Special Position of John Hearne," *The Irish Times*, 8 April 1987.

[13] 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.

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 and instructions. While, unsurprisingly, de Valera dominated the deliberations, Hearne made a significant contribution, as is apparent from an examination of the document.[14]

Broderick then goes to analyse the relationship between de Valera and Hearne on the basis of this document.[15] 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 from the squared paper version in substantial measure. To take one simple example, Article 1 of the draft produced by Hearne on 18 May states: 'Saorstát Eireann is an independent sovereign State.'[16] In contrast, the first two bullet points of the squared paper draft are: 'The name of the State shall be Eire' and 'Éire is a sov[ereign] Indep[endent] Democ[ratic] State.'[17] 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 of in an unordered fashion. 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.

[14] Broderick, *John Hearne*, 88 (endnotes omitted).
[15] Broderick, 88–91.
[16] UCDA: P150/2370.
[17] UCDA: P150/2370. 'Eire' is struck through.

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 book, 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 afterwards. 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.[18]

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.[19] 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.[20] In October 1936, Hearne began to meet frequently with de Valera and O'Connell would sometimes note 're Constitution'.[21] 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 1936, 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 October 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

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

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

[20] UCDA: P150/300.

[21] UCDA: P150/300.

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.[22] On 5 January, de Valera travelled to Zurich to consult with his eye specialist.[23] He returned on 15 January.[24] O'Connell's diary records only two meetings with Hearne in 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 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 suggests the intimacy of Hearne's role in the process. Second, the 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 O'Connell diaries do not reveal how much Hearne contributed to the substance of the drafts, which 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 left Hearne a large degree of autonomy in the compilation of the first draft.[25] 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.[26] Keogh states that it was composed of

[22] UCDA: P150/302.
[23] *Irish Independent*, 6 January 1937.
[24] *Irish Independent*, 16 January 1937.
[25] UCDA: P150/2370.
[26] Keogh, *The Vatican, the Bishops and Irish Politics, 1919–1939*, 207.

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.[27]

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 secretary of the department of the president of the executive council in April 1937. He 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.'[28] 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.[29] In 1937, the department of the president of the executive council and the

[27] Details are taken from the *Dictionary of Irish Biography*.

[28] Keogh, *The Vatican, the Bishops and Irish Politics, 1919–1939*, 207.

[29] Iveagh House was donated to the State in 1939 and the department of external affairs moved there afterwards.

office of the attorney-general actually used the same switchboard.[30] Comments by members of the editorial committee could have been solicited on various discrete topics in an informal matter.

John-Paul McCarthy has written about the influence of Maurice Moynihan on the drafting process in *Portrait of a Mind*.[31] McCarthy's account focuses primarily on the drafting process from 1937 onwards. There are two pieces of historical evidence which show Moynihan's influence in 1936. First, there was a meeting between Hearne, de Valera and Moynihan on 16 December.[32] 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, which establishes some familiarity with the pre-1937 drafting process.[33]

This committee was established on a formal basis on receipt of the departmental comments on the Constitution in March 1937.[34] 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 as a result of these.

De Valera

De Valera remained the leadership figure in the process. Maurice Moynihan provided a description of de Valera's 'almost invariable practice' in producing the final draft of documents in the preface to *Speeches and Statements by Eamon de Valera 1917–73*.[35] 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

[30] The extension number was 62321.

[31] Sean-Pól MacCárthaigh, *Portrait of a Mind: Maurice Moynihan and the Irish State, 1925–60* (MPhil Thesis, University College Cork, 2004), 34–52.

[32] UCDA: P150/300.

[33] National Archives of Ireland (hereafter 'NAI'): Taois s.9715.

[34] NAI: Taois s.9748.

[35] Maurice Moynihan, ed. *Speeches and Statements by Eamon de Valera 1917–73* (Dublin: Gill & Macmillan, 1980).

> 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.[36]

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 highlighted the influence of de Valera on the drafting process, to the exclusion of the cabinet:

> 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.[37]

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.[38]

With the new drafting chronology, we have a clearer view of the importance of the 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

[36] Moynihan, xxvii–xxviii.

[37] Ronan Fanning, "Mr. de Valera drafts a Constitution," in *De Valera's Constitution and Ours*, ed. Brian Farrell (Dublin: Gill & Macmillan, 1988), 36.

[38] Fanning, 37, endnotes omitted.

1936 on the Constitution were crucially important in shaping the early versions. 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.[39] Kathleen O'Connell's diary entries show that the cabinet also met on 23, 26 and 28 October to discuss the Constitution.[40] Her diaries also note a number of meetings with the executive council in April 1937 on the Constitution 'until late'.[41] Maurice Moynihan's diary from the period notes a meeting of the executive council held to discuss the second chamber on 5 February 1937.[42] De Valera's notebooks contain successive drafts dealing with the possible composition of the Senate. The first is headed 5 February 1937 and the final notes, 'App[rove]d 5.3.37.'[43] 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 with 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'.[44] This was apparently because of Maurice Moynihan's belief 'that collective responsibility [of the cabinet] was incompatible with record [*sic*] of any discussion at Cabinet other than those that tended towards the decision

[39] UCDA: P150/2374.

[40] 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, as it does not expressly mention it, I have not included it in the main text.

[41] 2 April, 3 April and 4 April (UCDA: P150/300).

[42] UCDA: P122/76.

[43] UCDA: P150/2379.

[44] J.J. Lee, *Ireland 1912–1985: Politics and Society* (Cambridge: Cambridge University Press, 1998), 202.

actually taken'.[45] 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 on the institutions of state—in particular the presidency.

On 5 November 1936, the Fianna Fáil parliamentary party discussed the draft Constitution.[46] 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 noted:

> 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.[47]

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'.[48] 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

[45] MacCárthaigh, *Portrait of a Mind*, 149.

[46] *Irish Press*, 6 November 1936; *Irish Independent*, November 6, 1936.

[47] *Irish Press*, 6 November 1936.

[48] 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*, 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 in Faughnan's judgment.

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, Edward Cahill. This committee compiled the submission, which was entitled 'Suggestions for a Catholic Constitution'.[49] This submission was sent by Cahill 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,[50] this was due to the covering letter in which Cahill intimated as much.[51] 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 with a personal memorandum of November 1936, one censored by Patrick Bartley to ensure it did not conflict with the committee submission.

Historians disagree as on the influence of the Jesuit submission. Dermot Keogh argues that the view that Cahill 'exercise[ed] some influence' over the drafting process is 'largely mistaken'.[52] 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'.[53] Keogh concludes that the Jesuit submission may have had some influence on the Preamble but that it was not as influential as the suggestions of John Charles McQuaid.[54] In a later work, Keogh states, 'there was really only one clergyman directly involved in the process and that was McQuaid'.[55]

[49] UCDA: P150/2393.

[50] Keogh, "The Irish Constitutional Revolution," 17.

[51] '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.'

[52] Keogh, 'The Irish Constitutional Revolution,' 11.

[53] Keogh, 11.

[54] Keogh, 18–19.

[55] 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.

By contrast, Finola Kennedy argues that Keogh underestimates the role of Cahill. First, Kennedy argues that Cahill's thought was not outside the mainstream of Catholic thinking in the 1930s.[56] 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.'[57]

Kennedy's argument is stronger on the first point. It is doubtful that Cahill was outside the mainstream of 1930s Catholic thinking.[58] Three pieces of evidence support this judgment. First, de Valera solicited the contribution from Cahill in September 1936. It is unlikely that he would have done so if he believed that Cahill's views were not orthodox. Second, de Valera's official biography states that Cahill was 'in the forefront of Irish Catholic social writers at the time'.[59] Third, de Valera intended to introduce the Constitution in the Dáil in November 1936.[60] 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 clerical source other than 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 quotes extensively from Cahill's *The Framework of a Christian State* and compares it to the text of the Constitution.[61] Cahill's work was based on papal encyclicals. McQuaid's

[56] Kennedy, "Two Priests, the Family and the Irish Constitution," 355–356.

[57] Kennedy, 348.

[58] 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.

[59] Earl of Longford and T. O'Neill, *Eamon de Valera* (Dublin: Gill & Macmillan, 1970), 295.

[60] At the Fianna Fáil ard-fheis, or party political congress, 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'. *Irish Press*, 4 November 1936. This intention had been generally known; see *Irish Times*, 31 October 1936.

[61] 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.

submissions to de Valera were based on the same encyclicals. The fact that the Constitution incorporated concepts from such documents, 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.[62]

In an early work, Keogh queried whether '[p]erhaps the Jesuit submission had the advantage of being the all important first draft on which both Hearne and de Valera worked'.[63] He advanced an argument which attributed more importance to the Jesuit submission than his later writings on the topic 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.'[64] 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 dated 21 October, but there are extant drafts, including fundamental rights drafts, from earlier in the month. Therefore, the Jesuit submission appears to have been of less importance, both in terms of being the progenitor of the fundamental rights provisions and of 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.[65] 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',[66] in Jury's hotel;

[62] Keogh, "The Jesuits and the 1937 Constitution," 122.

[63] Keogh, 91–92.

[64] Keogh, 94.

[65] Longford and O'Neill, *Eamon de Valera*, 295–296, and Faughnan, "The Jesuits and the Drafting of the Irish Constitution of 1937," 90.

[66] *Dictionary of Irish Biography Volume 2* (Cambridge: Cambridge University Press, 2009), 241.

there he put forward, at length, his views on constitutional drafting.[67] 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. 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.[68] The speech occurred 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 in which McQuaid re-drafted and revisited 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'.[69] De Valera would have sought similar characteristics in other contributors. McQuaid possessed both; 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 the religious figure who was to have the greatest influence on the drafting of the Constitution: John Charles McQuaid[70].

[67] *Irish Press*, 15 October 1936.

[68] UCDA: P150/2393.

[69] Dermot Keogh, "Church, State and Society," in *De Valera's Constitution and Ours*, ed. Brian Farrell (Dublin: Gill & Macmillan, 1988), 107.

[70] Keogh and McCarthy, *The Making of the Irish Constitution 1937*, 106–122; and Cathal Condon, *An Analysis of the Contribution Made by Archbishop John Charles McQuaid to the Drafting of the 1937 Constitution* (MA Thesis, University College Cork, 1995).

John Charles McQuaid

McQuaid's influence was confined to those articles of the Constitution on which the Catholic Church had issued moral teaching. The Church had stated its agnosticism as to which form of government was the best. Its concerns 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 church–state conflict. Therefore, 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, in which Lucey stated: '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.[71]

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.[72]

[71] Don O'Leary, *Vocationalism and Social Catholicism in Twentieth-Century Ireland: The Search for a Christian Social Order* (Dublin: Irish Academic Press, 2000), 58.

[72] Keogh and McCarthy, *The Making of the Irish Constitution 1937*, 109.

These difficulties are vitiated considerably by using the method outlined at the beginning of this chapter. This makes it possible to produce a chronology of the various titled drafts, such as X and Y,[73] and to construct a much fuller and more accurate view of McQuaid's role in the drafting process.

His role was that of 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 1936.[74] The McQuaid papers contain a partial draft which matches one in the de Valera papers which I have dated 20 October.[75] This was most likely the draft which was sent to McQuaid in November 1936. McQuaid's involvement was limited and did not extend to the structural elements of the Constitution, as 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, 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'.[76] His influence, however, particularly on the fundamental rights provisions, was considerable. The early drafts of the fundamental rights 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'.[77] This claim rests on a detailed analysis

[73] The Q drafts seem to be appended by de Valera to indicate which drafts were to be sent to McQuaid.

[74] See Keogh and McCarthy, *The Making of the Irish Constitution 1937*, 107.

[75] Dublin Diocesan Archives (hereafter 'DDA'): AB8/A/V/48. The de Valera equivalent is contained in UCDA: P150/2385.

[76] 15 March 1937 (DDA: AB8/A/V/53).

[77] See, for example, Cathal Condon, *Contribution by McQuaid*, 16.

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.'[78] 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.'[79] This earlier draft was from October 1936, before McQuaid became involved in the drafting process. Second, Condon attributes any material which is in McQuaid's handwriting to McQuaid. This approach is useful in certain situations. 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. However, the technique is not as useful when considering amendments that are noted on pre-existing drafts. These handwritten notes may have been dictated to McQuaid by de Valera in phone conversations to indicate de Valera's preferred wording. As a result of these two difficulties, Condon's analysis overstates McQuaid's importance.

What, then, was McQuaid's role? An example from the drafting process may illustrate that role 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 relating to the state which:

> 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.[80]

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

[78] Condon, 40.

[79] UCDA: P150/2373.

[80] 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 becomes Article 40.

> 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.[81]

Note how even the example given in de Valera's Dáil speech was the same as that 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 Constitution.[82] These were the financial provisions of the Free State Constitution. The department of finance dealt with inter alia the preparation of estimates and appropriation for state business. 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

The prominent barrister George Gavan Duffy also provided some influential material on the Constitution.[83] He had previously provided legal advice on constitutional questions such as the oath of allegiance, the con-

[81] 67 *Dáil Debates* (2 June 1937) cols. 1591–1592.

[82] 2 January 1937 (NAI: Taois s.9481). The memorandum was forwarded to Hearne on 5 January 1937.

[83] 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.

stitutional 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,[84] who also provided a critique of the direct English translation of the Irish draft of the Constitution.[85] 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 became involved in the drafting process. This was one day before the parliamentary draftsman also became involved.

Arthur Matheson

Arthur Matheson was appointed parliamentary draftsman in 1923.[86] De Valera's official autobiography states that the preparation of the original draft was done by Hearne 'in consultation with the parliamentary draftsman'.[87] Dermot Keogh dates Matheson's involvement from 1936.[88] Matheson's own diaries do not disclose any meetings on the Constitution in 1936. His diary from 1937 contains an entry for 8 February which reads: 'Conference with Mr. Hearne re drafting of new Constitution + allied legislation.'[89] 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.[90] During the same period he met Hearne four times.[91] 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

[84] 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.

[85] UCDA: P150/2397.

[86] 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.

[87] Longford and O'Neill, *De Valera*, 290.

[88] Keogh, *The Vatican, the Bishops and Irish Politics*, 9.

[89] NAI: AGO/2001/49/82.

[90] 20 February, 24 February, 27 February, 1 March, 3 March, 10 March 1937.

[91] 2 March, 3 March, 4 March, 6 March 1937.

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 it.[92] The de Valera papers contain submissions by Matheson on the revised draft that he received on 2 March 1937.[93]

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.'[94] 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' to which it refers 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 provided to others for comment; one such was Conor Maguire, who had just been appointed to the high court. The draft Constitution was the subject of amendment in the Dáil itself.[95] Given the sheer number of contributions after the draft was released to wider circulation, it is impossible to canvass the contribution of individual submissions from March 1937 onwards except on the basis of the article-by-article analysis.

[92] 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).

[93] UCDA: P150/2397.

[94] NAI: Taois s.9748.

[95] On these, see Gerard Hogan, *The Origins of the Irish Constitution, 1928–1941* (Dublin: Royal Irish Academy, 2012), chapters 9–11.

Materials Before the Drafters

In this section, we shall consider the various materials which the drafters drew on in the compilation of the 1937 Constitution. The materials will be divided under six headings: the 1922 Constitution; the 1934 Constitution Review Committee report; contemporary constitutions; Roman Catholicism; republicanism; and legal and political influences.

The 1922 Constitution

The most obvious influence on the 1937 Constitution was the 1922 Constitution of the Irish Free State. Many features of the new Constitution were simply copied from the earlier. It was inevitable that those elements of the 1922 Constitution which had proven practically effective would be preserved. De Valera had ignored the temptation to craft an entirely new Constitution in 1934 when he appointed the Constitution Review Committee. This Committee was instructed to review the 1922 Constitution and ascertain those elements of it which were fundamental.[96] When John Hearne composed his first draft of an entirely new Constitution in 1935, he did so by including verbatim those elements of the 1922 Constitution which he considered valuable.[97] This approach was subsequently discarded, but the 1922 Constitution remained influential in the drafting process. The experience gained through the constitutional development since 1922 was also important. Those elements of the 1922 Constitution which were judged to be defective—for example, the amendment process—were corrected in the 1937 Constitution. It is also important to note that not only the final text of the 1922 Constitution but also the drafts which had led to the 1922 Constitution were consulted by the drafters. Alfred O'Rahilly prepared a minority draft for the 1922 Constitution which was in de Valera's possession. He evidently shared this draft with John Charles McQuaid, who commented that though he felt disappointed with the draft, 'I suppose it was hasty and was all that could be done at the time'.[98] The influence of the 1922 Constitution on the 1937 Constitution led John Maurice Kelly to call the 1937 Constitution 'a re-bottling of wine most of which was by then quite old and of familiar

[96] NAI: Taois s.2979.
[97] 18 May 1935 (UCDA: P150/2370).
[98] McQuaid to de Valera, 17 February 1937 (UCDA: P150/2395).

vintages'.[99] The 1937 Constitution substantively reproduced the provisions of 27 articles of the 1922 Constitution.[100] These dealt primarily with institutions of state: the composition of the Oireachtas, cabinet government, and the establishment of the judicial branch.

1934 Constitution Review Committee Report

The report of the 1934 Constitution Review Committee was compiled by civil servants who were influential in the drafting process.[101] The Committee was formed to review the provisions of the 1922 Constitution in order to ascertain which fundamental rights provisions were necessary to safeguard democratic rights and to suggest the means to protect rights identified in this fashion. It must be treated as an important insight into the intentions of these drafters. Gerard Hogan has suggested that the 1934 report contains the genesis of some aspects of the 1937 Constitution which are not to be found in its Free State counterpart:

> [W]e can see in this report the origins of some of the innovatory features of the subsequent Constitution, among them the declaration of emergency, the refinement of the Dáil's power to declare war, article 37, the Special Criminal Court, the proviso to article 40.6.1.ii and the recasting of the language of what was to become article 42.4.[102]

The committee report was not often mentioned in the drafting documents. This may be attributed to the fact that Hearne and de Valera were already intimately familiar with its contents. However, one may find scattered references to the 1934 report during the drafting process. One example of this may be found in the de Valera papers.[103] Hearne composed

[99] John Maurice Kelly, *The Irish Constitution* (Dublin, 1980), xxviii. He continued later on the same page:

> These reflections are not intended to diminish the existing Constitution by comparison with its predecessor, but merely to show that the basic law of 1937 can be fairly presented as a stabilising and reforming continuation of that of 1922; indeed that it would be misleading to present it in any other way.

[100] These were Articles 13, 16, 18, 19, 20, 22, 24, 25, 26, 35, 39, 40, 43, 44, 46, 52, 53, 54, 57, 62, 64, 65, 66, 67, 69, 71 and 71.

[101] See further Constitutionalism in Ireland, Chap. 2.

[102] 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), 360.

[103] UCDA: P150/2370.

a memorandum on the use of constitutional courts in December 1935.[104] In this report, he included an extract from the report of the 1934 committee on the system of judicial review. The remainder of the memorandum consisted of extracts from foreign constitutions.

Contemporary Constitutions

The official biography of de Valera reveals that, during the drafting process, he drew on the 1922 book *Select Constitutions of the World*, which was compiled by the Provisional government.[105] Hearne also relied on *Select Constitutions*. This may be seen, for example, in the December 1935 memorandum on constitutional courts.[106] The drafting materials also demonstrate that the drafters paid attention to constitutions drafted in the inter-war years. In the 1935 memorandum, Hearne reproduced an extract from the 1931 Constitution of the Spanish Republic.[107] The 1934 report of the Constitution Review Committee also quoted extracts from this constitution on two occasions.[108] The Spanish constitution was not the only example of Hearne's interest in continental constitutions. In early 1937, he requested copies of the Austrian Constitution and the Constitution of the USSR from the London High Commission.[109] Hearne also requested information on the operation of the 1919 German

[104] Hearne to Seán Murphy, assistant secretary of the department of external affairs, 10 December 1935 (UCDA: P150/2370).

[105] Tomas Ó Neill and Padraig Ó Fiannachta, *De Valera* (Dublin: Cló Morainn, 1970), 322. Recently, the influence of foreign constitutions on the drafting of the 1937 Constitution has begun to be canvassed: see Gerard Hogan, "Foreword," in Keogh and McCarthy, *The Making of the Irish Constitution 1937*, 23–24 and Cierlik Bożena, "Bunreacht na hÉireann and the Polish 'April Constitution'," in *Ireland's Evolving Constitution 1937–1997*, ed. Tim Murphy and Patrick Twomey (Oxford: Hart Publishing, 1998), 241.

[106] UCDA: P150/2370. See also P150/2411, which makes use of extracts from the volume.

[107] A later book entitled *Select Constitutions of the World* was compiled by B. Rao in 1934; B. Rao, *Select Constitutions of the World* (Madras: The Madras Law Journal Press, 1934). This volume does not contain reference to any constitution enacted after 1922.

[108] UCDA: P150/2365.

[109] On 28 January 1937, Hearne sent a request for the Austrian Constitution of 1934 to Dulanty, NAI: DFA/116/35. On 17 February 1937, Dulanty made reference to a request from the department of external affairs for a copy of the new Soviet Constitution and passed on a booklet from the Soviet embassy, NAI: DFA/116/55. The front of the file makes it clear that external affairs had a copy of the booklet by 31 March 1937 as Hearne was in possession of it on that date.

Constitution from the Irish representative in Berlin, Charles Bewley.[110] Moreover, Hearne was not alone in his interest in continental constitutions. George Gavan Duffy gave a copy of the Portuguese Constitution of 1933 to de Valera.[111] The draft entitled 'Summary of Draft Heads of the Constitution' has a list in de Valera's handwriting on the front page: 'Portugal, Poland, Czecho-Slov, U.S. Const.'[112] There was no copy of a Portuguese Constitution in *Select Constitutions of the World*. The importance of continental constitutions can be seen throughout the various provisions of the 1937 Constitution, particularly in relation to the early drafts. The basic structure, as we shall see, is that the institutions were formed on the basis of liberal democratic constitutions on the model of the 1919 Constitution of Germany, while the rights provisions were inspired by the Catholic constitutions of Portugal (1933) and Poland (1921).

Roman Catholicism

In 1987, Maurice Moynihan wrote: 'It was unavoidable that a generation built on idealism, devoted to its Church and led by a devout Catholic should reflect the predominant ethos.'[113] The de Valera archives contain the second French edition of the *Code Social*.[114] De Valera's official biography states that this 'was to prove of great help' to de Valera.[115] This document was provided to de Valera by John Charles McQuaid, who also

[110] NAI: DFA 147/2 (1 April 1937).

[111] UCDA: P152/39. Gavan Duffy sent a copy of the Portuguese Constitution to de Valera on 18 April 1935.

[112] UCDA: P150/2375.

[113] As quoted by Brian Kennedy, "The Special Position of John Hearne," *The Irish Times*, 8 April 1987.

[114] UCDA: P150/2366. John Whyte mistakenly refers to the 1929 edition of the *Code of Social Principles*; see John Whyte, *Church & State in Modern Ireland 1923–1979*. 2nd ed. (Dublin: Gill & Macmillan, 1984), 51–52. Whyte refers to Vincent Grogan's work to prove this point but the mistake is Whyte's; Grogan refers to both the 1st and 2nd editions in the cited work. See Vincent Grogan, "Towards a new Constitution," in *The Years of the Great Test*, ed. Francis MacManus (Cork: Mercier Press, 1967), 171. There is a considerable difference between the 1st and 2nd editions. Compare, for example, the section on the family in *A Code of Social Principles* (Oxford: Catholic Truth Society, 1929), 18–22, and *A Code of Social Principles*, 2nd ed. (Oxford: Catholic Truth Society, 1937), 20–25. Whyte's mistake probably arose from the fact that the 2nd edition was published in English in 1937. This would have been too late to have been useful to de Valera. De Valera's archives reveal that he relied on the French 2nd edition of the book, which was published in 1934.

[115] Longford and O'Neill, *Eamon de Valera*, 296.

gave de Valera a copy of *Manuel Sociale* by Arthur Vermeersch and two copies of the *Codex Juris Canonici*.[116] De Valera's official biography also discloses that he 'was keeping a close eye' on the work of Michael Browne, later bishop of Galway, and Cornelius Lucey, later bishop of Cork.[117] In 1936, Browne published an article entitled 'Source and Purpose of Political Authority'.[118] In the same year, Lucey published an article entitled 'Strikes and Compulsory Arbitration'.[119] In 1937, Lucey published an article entitled 'The Principles of Constitution-Making' in *The Irish Ecclesiastical Record*.[120]

One note by de Valera shows his familiarity with natural law theory. It states: 'Look up Supplementum to Summa Q. 65 S. Thos.'[121] Question 65 of the *Supplementum* contains a discussion on the plurality of wives. This page also contains a list of prominent contemporary works on natural law.

John Charles McQuaid drew extensively on papal encyclicals in his submissions on the Constitution, especially the anthology *The Pope and the People*.[122] This volume was supplemented by the social encyclicals which were issued in the inter-war years by Pius XI, for example *Quadragesimo Anno*, *Rappresentanti in Terra*, and *Casti Connubii*.

As already mentioned, there was a trend towards Roman Catholic constitutionalism in the inter-war period, particularly in Poland in 1921, Portugal in 1933 and Austria in 1934. The provisions of these constitutions were influential in early drafts of the Irish Constitution. These constitutional provisions typically became more confessional as the drafting process progressed, and particularly after McQuaid became more heavily involved in early 1937.

Finally, the drafters received a submission by the Jesuit order in October 1936.[123] The Jesuit submission contained draft articles on religion, marriage, the family, education, private property and liberty of speech. The

[116] McQuaid to de Valera, 16 February 1937 (UCDA: P150/2395).

[117] Ó Neill and Ó Fiannachta, *de Valera*, 334.

[118] Michael Browne, "The Source and Purpose of Political Authority," *Studies* 25, no. 99 (1936): 390.

[119] Cornelius Lucey, "Strikes and Compulsory Arbitration," *Studies* 25, no. 98 (1936): 177.

[120] Cornelius Lucey, "The Principles of Constitution-Making," *Irish Ecclesiastical Record* 49 (1937): 14.

[121] UCDA: P150/2382.

[122] *The Pope and the People: Select Letters and Addresses on Social Questions by Pope Leo XIII, Pope Pius X, Pope Benedict XV & Pope Pius XI* (London: Catholic Truth Society, 1932).

[123] UCDA: P150/2393.

submission was based upon both contemporary constitutions and papal encyclicals. It was influential in relation to certain provisions, such as the Preamble.

Republicanism

Alongside Catholicism, a second philosophical basis of the Constitution was Irish republicanism. This influence may be seen in certain of the articles in the 1937 Constitution. It is most evident in the Preamble and Articles 1–3. These provisions had no equivalent in the 1922 Constitution. An early handwritten fragmentary draft of the Preamble indicated that it was to incorporate the 'Proc[lamation] 1916, Dec[laration] of In[dependence] 1919 + Dem[ocratic] Prog[ramme]'.[124] There are constant notations of a similar fashion in the early drafts. In the draft of 20 August 1936, we find a note which states '1916, 1921'.[125] The 'Preliminary Draft of the Constitution' contains a handwritten note: '1916, 1919 + Democ. Prog.'[126] De Valera's intention to incorporate these documents into the Preamble was therefore a constant throughout the early drafting process.

Legal and Political Influences

John Hearne's legal training has been noted. What is perhaps not as appreciated is the fact that de Valera himself appears to have some knowledge of legal matters (though he had no formal training). There are three notes in which de Valera revealed such knowledge; these are all in his own handwriting. The first reads as follows: 'Constit[utiona]l Court determining such not to be taken into account. P. 53 SMcN.'[127] This cryptic reference is to page 53 of J.G. Swift MacNeill's book *Studies in the Constitution of the Irish Free State*.[128] This page, and the one preceding it, was on the power of judicial review:

> It is natural to say that the Supreme Court [of the United States] pronounces Acts of Congress invalid, but in fact this is not so. The Court

[124] UCDA: P150/2370.
[125] UCDA: P150/2370.
[126] UCDA: P150/2374.
[127] UCDA: P150/2370.
[128] J.G. Swift MacNeill, *Studies in the Constitution of the Irish Free State* (Dublin: Talbot Press, 1925).

never pronounces any opinion whatever upon an Act of Congress. What the Court does is simply determine that in a given case A. is or is not entitled to recover judgment against X.; but in determining that case the court may direct that an Act of Congress is not to be taken into account, since it is an Act beyond the Constitutional powers of Congress—just as the Irish Courts will determine in a particular case, not that an Act of the Irish Legislature is invalid but that in the case before it an Act of the Irish Legislature is not to be taken into account, since it is an Act beyond the constitutional powers of the Irish Legislature.[129]

Second, in a later draft de Valera proposed two rules of construction of the Constitution.[130] The note appears as follows:

Arrange Canon of Interpretation

1. Principles not for judicial determination—Legislature only the judge
2. Liberal (Marshall) interpret[atio]n of judiciable [*sic*] parts.[131]

The reference to Marshall is to Chief Justice John Marshall of the US Supreme Court. De Valera's comments in the Dáil debates on the Constitution make it clear that this was a reference to Marshall CJ's celebrated judgment in *McCulloch v Maryland*.[132] In *McCulloch*, Marshall CJ wrote:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[133]

[129] Swift MacNeill, 52–53. Italics indicate the portion which de Valera quoted.

[130] UCDA: P150/2392.

[131] In the Dáil debates on the Constitution, de Valera referred to US judgments and canons of interpretation; see 67 *Dáil Debates* 427–428 (13 May 1937).

[132] (1819) 17 US 316. See the Dáil debates for further evidence of this.

[133] (1819) 17 US 316, 421. This was a standard quotation in textbooks on US constitutional law; see, for example, W.B. Munro, *The Government of the United States: National, State, and Local* (New York: The Macmillan Company, 1919).

Third, de Valera made a short annotation, 'Judge recently on the Natural Law'.[134] This reference was almost certainly to the case of *The State (Ryan) v Lennon*,[135] though it is not clear which judgment in the case de Valera was referring to. In his dissenting judgment, Kennedy CJ famously contended that a statutory amendment to the 1922 Constitution which was in violation of the natural law was *ultra vires*.[136] It may also refer to the judgment of Fitzgibbon J in which he denied that the court could have any recourse to natural law. Edward Cahill drew de Valera's attention to this facet of Fitzgibbon J's judgment in a letter on 4 September 1936.[137] Cahill referred to articles by Alfred O'Rahilly[138] and Edward Coyne[139] which were deeply critical of Fitzgibbon J's judgment in the case. De Valera's may also have had Fitzgibbon J's decision in mind when he made the terse note. These three examples indicate de Valera's familiarity with legal concepts lying beyond contemporary constitutions. This familiarity would not have equalled Hearne's but it indicates a more than passing knowledge of constitutions.

De Valera also demonstrated a familiarity with academic political theory. On squared notepaper, he noted: 'Page 187—German Pres. + F.A.'[140] The note is not as clear as those outlined above. Nonetheless, if we turn to pages 186–187 of Agnes Headlam-Morley's influential *The New Democratic Constitutions of Europe*, we find the following passages:

> Nevertheless the President is intended to retain a certain amount of independent power. If he considers that the policy of the Reichstag is contrary to the national interest it is his duty to oppose this policy. In all cases of dispute the ultimate decision rests with the people. If a difference of opinion arises in regard to a particular law it can be submitted to a referendum for a separate decision. If, however, a serious difference of opinion arises between the President and the Reichstag, and such a difference leads to an irreconcilable conflict, the people must decide which of these two organs of government they wish to maintain in office. The Reichstag by a two-thirds majority

[134] UCDA: P150/2382.
[135] [1935] 1 IR 170.
[136] At 204–205.
[137] Cahill to de Valera, 4 September 1937 (UCDA: P150/2393).
[138] Alfred O'Rahilly, "The Constitution and the Senate," *Studies* 25, no. 97 (1936): 17–18.
[139] Edward Coyne, "The Inadequacy of Christian Politics," *The Irish Monthly* 64 (1936): 248–249.
[140] UCDA: P150/2370.

> may demand a referendum on the removal of the President before the expiration of his term.[141]

It seems likely that it was this procedure, with its similarities to the Article 27 procedure under the 1937 Constitution, which de Valera was referring to in the cryptic note. The reference to 'F.A.' remains unclear, but it may be a reference to 'Foreign Affairs'.[142] De Valera's appears to have been interested in the operation of the 1919 Weimar Constitution. Another handwritten note from late 1936 runs as follows:

Personal responsibility of Ministers to Parliament –

> The chairman of the Reich determining the main lines of policy for which he is responsible to the Reichstag. Within these lines each Min[ister] of the R[eich] shall direct indeped[ent]ly the department entrusted to him + for which he is personally responsible.[143]

De Valera's interest in constitutional matters undoubtedly contributed to a more coherent Constitution. It meant, however, that its substance had been decided upon in the private drafting process. This meant that it would come to seem a partisan document, one which de Valera was unwilling to change, when the Constitution came to be debated in the Dáil.

Conclusion

The drafting process of the 1937 Constitution was complex and difficult to unravel. The drafting chronology that I have developed helps to simplify this complexity. This makes it possible to evaluate different theses that have been put forward about the 1937 Constitution and its drafting. It is clear that the drafting process was quite long and that the most important drafters were de Valera and Hearne. De Valera's constitutional thought has often been undervalued. He possessed a more than passing

[141] Agnes Headlam-Morley, *The New Democratic Constitutions of Europe: A Comparative Study of Post-War European Constitutions with Special Reference to Germany, Czechoslovakia, Poland, Finland, the Kingdom of the Serbs, Croats & Slovenes and the Baltic States* (Oxford: Oxford University Press, 1928), 186–187.

[142] De Valera uses "Foreign Affairs", as opposed to "External Affairs" on at least one more occasion, see UCDA: P150/2370.

[143] UCDA: P150/2379. It occurs on a page between one labelled 14 November 1936 and another labelled 9 December 1936.

interest in legal argument and paid close attention to the drafting process. He was also willing to consider innovative constitutional structures, and his antipathy to the judiciary and judicial decision-making is not without parallel amongst later Taoisigh.[144] More important than this antipathy, however, was the fact that judicial review of legislation was included. Moreover, it is worth noting that the 1937 Constitution of Ireland introduced greater checks on the executive than applied in other European constitutions drafted in the inter-war period. This was, quite simply, without parallel at that time. The case can be overstated—there was never any indication that the Irish people would accept a dictatorship, for example. Nonetheless, the fluidity of the 1922 Constitution meant that, in 1936, the government operated with few checks on its operation. There was no upper house and the position of the governor-general had been removed. It seems probable that the Irish people would have been prepared to live with this arrangement—as New Zealanders currently do, to a large extent. These substantive elements were, however, changed for the 1937 Constitution, and changed in a manner likely to lead to future difficulty for the government.

It is notable that, in this instance, the Constitution did not draw on contemporary practice, but on the practice of the liberal democracies immediately after the First World War. It is clear, however, that the fundamental rights provisions were influenced by contemporaneous continental constitutions. Moreover, this influence was predominantly Catholic. The drafting of these provisions began once it had been decided to discard the 1922 Constitution; work began in earnest in October 1936, on the basis of a Catholic model. This method was perhaps best suited to ensure political acceptance of the document, but it was based, in the first instance, not on political calculation but on principled belief in the truth of Catholic doctrine.[145] Moreover, this belief was likely shared by both the principal drafters, Hearne and de Valera. The simplest way to demonstrate these cross-currents is to investigate the drafting of the provisions of the 1937 Constitution.

[144] See, for example, the famous comment by Jack Lynch about the judiciary: "It would be a brave man who would predict, these days, what was or was not contrary to the Constitution."

[145] The question whether this is still the case in an Ireland which is not as devout falls outside the scope of this work.

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CHAPTER 2

The Preamble

The inclusion of a preamble in a constitution can sometimes appear as a form of political virtue signalling—the really important legal elements remain to be fleshed out in the document itself. The virtues that a preamble chooses to single out are, however, historically important. In the Irish context, the Preamble is also interesting in terms of the dynamics that it exposes between officials and religious drafters, and between nationalism, liberalism and Roman Catholicism. Each of the provisions of the Constitution has a unique drafting history, but the Preamble contains all of the elements that are present in other parts of the document. In order to track the drafting process, the text of relevant provision of the Constitution as adopted in 1937 will be presented first in full, and then the constitutional history which gave rise to the quoted text will be identified.

The Preamble

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

We, the people of Éire,

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

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

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be

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assured, true social order attained, the unity of our country restored, and concord established with other nations,

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

…

Dochum Glóire Dé agus Onóra na hÉireann

Influences on Drafting

Alfred O'Rahilly's draft for the 1922 Constitution contained a preamble which stated:

> Chun Gloire De agus Onora na hEireann
>
> We, the Irish people, acknowledging that political authority comes from God to the people, asserting our natural right to national independence and unity, and in pursuance of our claim to determine freely the forms of Irish Government, hereby vote and confirm this Constitution in the Constituent Assembly of the Irish Free State, in order to base the organization and development of our country on the principles of justice and liberty.[1]

John Hearne's first draft of the Constitution dates from 18 May 1935. This draft contained the following preamble:

> 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.[2]

The draft of 20 August 1936 noted that a preamble was to be inserted.[3] De Valera made a handwritten note next to this: 'Source of Auth. National life. People. Family. Protect.—1916, 1921—Give themselves the Const.' This note suggests two concerns. First, the preamble was to adopt a republican tone: '1916' was, of course, a reference to the 1916 Proclamation, and '1921' a reference to the 1921 democratic programme of the First

[1] Dublin Diocesan Archives (hereafter DDA): AB8/A/15.
[2] 18 May 1935 (University College Dublin Archives (hereafter UCDA): P150/2370).
[3] 20 Aug 1936 (UCDA: P150/2370).

Dáil.[4] Second, the preamble was at this stage envisaged as including elements which would later end up in the Constitution proper: the protection of the family would later become Article 41. An undated preamble with the note 'Mr. Hearne' stated:

> 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].[5]

It seems that this preamble was the counterpart to the de Valera note on the 20 August 1936 draft of the Constitution. De Valera must have been dissatisfied with this draft preamble as, notably, subsequent drafts of the Constitution did not contain draft preambles. They did state, however, that a preamble was to be included.

An October 1936 draft contains a note which stated 'Portugal, Poland, Czecho-Slov, U.S. Const.' at the beginning of the Constitution.[6] Each of these constitutions contained a preamble, which illustrates that de Valera considered contemporary constitutions when drafting the preamble. Finally, the Jesuit submission of October 1936 contained a draft preamble, which stated:

> IN THE NAME OF THE MOST HOLY TRINITY AND OF OUR LORD JESUS CHRIST THE UNIVERSAL KING,

[4] See also Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* (Newbridge: Irish Academic Press, 2017), 174–175.

[5] UCDA: P150/2425.

[6] UCDA: P150/2375.

we, the people of Ireland, being the parent nation of the Irish race, mindful of the long centuries of persecution we have had to endure, and full of gratitude to God who has so mercifully preserved us from innumerable dangers in the past;

hereby, as an independent Christian nation, establish this sovereign Civil Society of the Irish people.

Acknowledging that all supreme political and civil authority, legislative, executive and judicial, and all other moral powers of government come to us from God;

and recognising that for the just and efficient exercise of this authority and these powers it is necessary to transfer, separate and distribute them to such persons and bodies as are hereinafter described and set up in and by this Constitution;

we declare that all such authority and powers shall be exercised only in accord with the precepts of the Divine Law, natural and positive, and that any other exercise of them is, and shall be null and void, and of no moral force, and in no way sanctioned by us.

With the sacred purpose and intention of maintain social unity and order on the eternal principles of Justice, and Liberty and of ensuring the development of all the moral, spiritual and material resources of our citizens and country,

we guarantee to all citizens of this State full equality, before the law as human persons, and full recognition and protection by the State of all their personal and family rights.

And so in accordance with the principles laid down in this Preamble and the following fundamental Law; we freely and deliberately, to the glory of God, and the honour of Ireland, sanction this Constitution, and decree and enact as follows:-[7]

The draft of 5 November 1936 included the following provision: 'First there will be a Preamble acknowledging that all lawful authority comes from God and setting forth the ideals of the Nation and the purposes of the people in establishing this new Constitution.'[8] The attempt to draft a satisfactory preamble resumed in February 1937. The first February draft was as follows:

IN THE NAME OF THE MOST HOLY TRINITY, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred.

WE, THE PEOPLE OF EIRE, Motherland of the Irish Race,

[7] UCDA: P150/2393.
[8] UCDA: P150/2375.

> HUMBLY ACKNOWLEDGING all our obligations to Our Divine Lord, Jesus Christ, for Whose true worship our fathers have endured so many centuries of pain.
>
> GRATEFULLY RECALLING the heroic and unremitting struggle, especially in these latter times, to regain the rightful independence of our Nation,
>
> AND SEEKING to promote the common good by due observance of the Christian principles of Prudence, Justice and Charity, whereby the dignity and freedom of the citizens may be rightfully secured and true social order adequately established and maintained,
>
> DO NOW VOTE, CONFIRM and PROCLAIM this our CONSTITUTION.[9]

It has been claimed that this draft was composed by John Charles McQuaid.[10] In terms of comparative influence, it is clear that the Jesuit submission was more influential than the Hearne draft. The February draft corresponds in a number of respects to the Jesuit draft, which began with the phrase 'In the name of the Most Holy Trinity', as did the McQuaid draft. The Jesuit draft referred to 'the people of Ireland, being the parent nation of the Irish race' and the McQuaid draft to 'THE PEOPLE OF EIRE, Motherland of the Irish Race'. The Jesuit draft referred to 'the long centuries of persecution we have had to endure, and full of gratitude to God who has so mercifully preserved us from innumerable dangers in the past' and the McQuaid draft to 'our obligations to Our Divine Lord, Jesus Christ, for Whose true worship our fathers have endured so many centuries of pain'. These references have no counterpart in the Hearne draft.

One final influence was a criticism of the French charter of 1814 by Pope Pius VII. McQuaid sent an extract from Pius' criticism to de Valera on 16 February 1937.[11] De Valera's official biography refers to the criticism as 'interesting and useful'.[12] Pius' criticism did not provide a template for the Preamble as a whole but its influence may be seen in certain clauses.

[9] 28 February 1937 (UCDA: P150/2387).

[10] There is a handwritten draft of the Preamble in the McQuaid papers (DDA: AB8/A/V/61). Sean Farragher also states that McQuaid 'actually provided the most satisfactory draft of the preamble to the Constitution,' *Dev and his Alma Mater: Eamon de Valera's Lifelong Association with Blackrock College 1898–975* (Dublin: Paraclete Press, 1984), 173.

[11] The original letter is dated 16 February 1937 (UCDA: P150/2395). The extract itself may be found in UCDA: P150/2410.

[12] Earl of Longford and T. O'Neill, *Eamon de Valera* (Dublin: Hutchinson and Co, 1970), 296.

These are the general influences on the Preamble. We will next deal with the specific provisions included in it.

> In the Name of the Most Holy Trinity So begins the Irish Constitution. This opening was not uncommon in constitutions in 1937. The Polish Constitution of 1921,[13] the Federal Constitution of the Swiss Confederation of 1874 and the Constitution of the Federal State of Austria of 1934 began with the phrase '[i]n the name of Almighty God'. The Hearne draft also began with this invocation.[14] Interestingly, the Jesuit submission began with the phrase '[i]n the name of the Most Holy Trinity and of our Lord Jesus Christ the Universal King'.[15] The Jesuits cited the Austrian and Polish constitutions in this regard. Neither the Austrian nor the Polish constitutions were as denominational as the Jesuit's draft preamble. The Jesuits did, however, refer to Article 54 of the Polish Constitution, which concerned the oath of office of the Polish president. This oath began, 'I swear before Almighty God, One in the Holy Trinity' and ended, '[i]n this, may God and his Holy Passion be my aid. Amen.'[16] It was this reference to the presidential oath, rather than the Polish preamble, which grounded the Jesuit submission. The February draft incorporated the beginning of the Jesuit submission.

from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred

This clause is similar to one in the Preamble of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922, which 'acknowledg[es] that all lawful authority comes from God to the people'.[17] The 1922 formula had been attacked as incorrect by Alfred O'Rahilly and by Edward Coyne,

[13] *Select Constitutions of the World 1922* (Dublin: The Stationery Office, 1922), 63. Interestingly, the 1935 Constitution of the Polish Republic did not begin with the same phrase but Article 2(2) stated that responsibility fell upon the President 'before God and history, for the destinies of the State'.

[14] UCDA: P150/2370.

[15] UCDA: P150/2393.

[16] B. Shiva Rao, ed. *Select Constitutions of the World* (Madras: The Madra's Law Journal Press, 1934), 93.

[17] This proposition may also be found in the O' Rahilly 'C' Draft proposal for the 1922 Constitution, which began: 'We, the Irish people, acknowledging that political authority comes from God to the people'.

DDA: AB8/A/15.

Coyne noted 'it may be that it is heretical as well'. Coyne stated that the authority of parents over their children or of bishops did not come 'from God to the people'. He believed that the phrase 'political authority', rather than 'lawful authority', was correct.[18] As we have seen, the O'Rahilly draft preamble prepared as the 'C' draft for the 1922 Constitution declared that 'political' rather than 'lawful' authority came from God to the people. The 1937 draft remedied this problem but not by following the O'Rahilly/Coyne proposals. The Preamble, like the 1922 Constitution, acknowledged that God is the source of all authority, but, in contrast to the 1922 Constitution, did not mention that all authority comes from the people.

The Preamble to the 1937 Constitution may be contrasted with the French Declaration of the Rights of Man of 1789. Sections 2 and 3 of the French Declaration stated:

2. The aim of all political associations is the preservation of the natural and imprescriptable rights of man. These rights are liberty, property, security, and resistance to oppression.
3. The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the Nation.

The emphasis in the Irish Constitution is on the supernatural 'end' of man. In his St. Patrick's Day address of 1935, de Valera stated:

> [Ireland] remains a Catholic nation and as such she sets the eternal destiny of man high above the 'isms' and idols of the day. Her people will accept no system which denies or imperils that destiny. While that is their attitude, none of the forms of State worship prevalent in our time can flourish in this land.[19]

[18] E. Coyne, "The Inadequacy of Christian Politics?", 240.

[19] UCDA: P150/1958. McQuaid, in his preface to Denis Fahey's *The Kingship of Christ* (Dublin: Browne and Nolan, 1931), 11, lamented a Catholic history which 'is rendered almost useless by its failure to explain the revolutionary movements of the last century, in the light of their true origins, the effort to dethrone Jesus Christ in favour of a religion of Naturalism and the action of secret societies that espouse their cause'. Fahey's views of the precedence the supernatural takes over the natural order, of which McQuaid approved, may be found at 23–25, while Fahey deals with the French position at 42–46.

McQuaid sent extracts from encyclicals to de Valera relating to the supernatural end of man but, given de Valera's 1935 statement, it is likely that these merely bolstered a pre-existing opinion.[20]

We, the people of Éire … Do hereby adopt, enact, and give to ourselves this Constitution

This seemingly innocuous phrase was actually quite novel by contemporary constitutional standards. The 1922 Constitution had been enacted by the Dáil sitting as a constituent assembly. The majority of inter-war constitutions were enacted by such assemblies.[21] Other constitutions were enacted by, for instance, statute[22] or decree.[23] The only modern constitution which relied upon direct popular sovereignty was the US Constitution, and even that precedent had notable omissions from the body politic.[24] The 1937 Constitution was to be enacted by the people acting on their own authority; it would not be based upon the action of any subordinate body.[25]

The original draft of the operative clause was: 'DO NOW VOTE, CONFIRM and PROCLAIM this our CONSTITUTION.' This was redrafted in April 1937 as 'confirm, enact, and give to ourselves this Constitution'.[26] One potential difficulty was the use of 'confirm', which might be taken to imply making a pre-existing situation definite. It could be argued that the word implicitly acknowledged that the power to enact the Constitution came from the Oireachtas, acting as a constituent assembly, and that the people were merely to put their imprimatur on the action of that body. This difficulty was eliminated in the draft of 10 April 1937, which included the final formula.[27]

[20] DDA: AB/8/A/48.

[21] The 1921 Constitution of the Polish Republic, the 1920 Constitution of the Republic of Austria, the 1920 Constitution of the Estonian Republic, the Preliminary to the Constitutional Charter of the Czechoslovak Republic of 1920, the Constitution of the German Reich of 1919, and the Political Constitution of the United States of Mexico of 1917 were all adopted by national assemblies sitting as constituent assemblies.

[22] See, for example, Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict c. 12.

[23] See, for example, 1918 Constitution of the Russian Socialist Federal Soviet Republic, which was adopted by decree of the fifth All-Russian Congress of Soviets.

[24] Neither women nor slaves could vote, and the franchise was restricted among men.

[25] See further Constitutionalism in Ireland, Chaps. 2 and 5.

[26] 7 April 1937 (UCDA: P150/2425).

[27] 10 April 1937 (UCDA: P150/2425).

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

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

This section was influenced by two different sources. First, the 1919 declaration of independence stated: 'In the name of the Irish people we humbly commit our destiny to Almighty God who gave our fathers the courage and determination to persevere through long centuries of a ruthless tyranny'.[28] Second, the Jesuit submission declared itself 'mindful of the long centuries of persecution we have had to endure, and full of gratitude to God who has so mercifully preserved us from innumerable dangers in the past'.[29] It is possible that the latter was based on the former. The Jesuit submission also referred to the 1921 Constitution of the Polish Republic, which 'thank[ed] Providence for having delivered us from a slavery that lasted for a century and a half, recalling gratefully the heroic and persistent sacrifices in which every generation spent itself in the cause of independence'.[30] De Valera made annotations such as '1919' and 'Dec[laration] of In[dependence] 1919' on early drafts of the Constitution.[31] These drafts precede the Jesuit submission, so it may be that the Jesuit submission provided a focus for pre-existing ideas. Third, Pius VII criticised the French charter of 1814 for not favouring Catholicism:

> which France embraced even in the first centuries of the Church, which in that very realm so many glorious martyrs sealed with their blood, which is the religion of the great majority of Frenchmen, clung to by them with courage and constancy in the midst of terrible calamities, persecutions, and dangers of recent years.[32]

The original draft of this was:

> HUMBLY ACKNOWLEDGING all our obligations to Our Divine Lord, Jesus Christ, for Whose true worship our fathers have endured so many centuries of pain,

[28] 1 Dáil Debates (21 January 1919) col.16.
[29] UCDA: P150/2393.
[30] Rao, *Select Constitutions of the World*. 147, 85.
[31] UCDA: P150/2374; UCDA: P150/2370.
[32] UCDA: P150/2410.

> GRATEFULLY RECALLING the heroic and unremitting struggle, especially in these latter times, to regain the rightful independence of our Nation.[33]

This first iteration was problematic because of its reference to 'true worship'. This was re-drafted in April 1937 to refer to Jesus Christ, 'who kept our fathers constant to His worship through centuries of trial'.[34] Again, the reference to 'His worship' proved problematic. The section was re-drafted in its entirety to read 'HUMBLY ACKNOWLEDGING all our obligations to HIM, who sustained our fathers through centuries of trial'.[35] This reference was less strident than the earlier versions. Interestingly, it was regarded as not strident enough as the final version of 11 April, which reinstated the reference to 'Our Divine Lord, Jesus Christ'.[36] The most likely explanation for this change is that it was an attempt to bolster the Catholic credentials of the Constitution: this final draft was the one which Joseph Walshe, secretary of the department of external affairs, brought with him to the Vatican in an attempt to obtain papal support for the Constitution.[37]

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

The first draft labelled 'X' of 28 February 1937 explicitly stated that the virtues of prudence, justice and charity were 'Christian principles':[38]

> AND SEEKING to promote the common good by due observance of the Christian principles of Prudence, Justice and Charity, whereby the dignity and freedom of the citizens may be rightfully secured and true social order adequately established and maintained.[39]

Interestingly, the reference to 'Prudence, Justice and Charity' may have been taken from what went on to become Article 40.6.1(i). A draft from

[33] UCDA: P150/2425.
[34] 7 April 1937 (UCDA: P105/2425).
[35] 9 April 1937 (UCDA: P105/2425).
[36] 11 April 1937 (UCDA: P105/2425).
[37] See, further, Dermot Keogh, "'The Constitutional Revolution: An Analysis of the Making of the Constitution," in *The Constitution of Ireland 1937–1987*, ed. Frank Litton (Dublin: Institute of Public Administration), 32–53.
[38] UCDA: P150/2387.
[39] UCDA: P150/2387.

earlier in February 1937 stated that the education of public opinion was of such public importance 'that all who undertake it should be guided by prudence, justice and charity'.[40]

The reliance on Catholic theory was weakened slightly in the re-draft of 10 April, which was to be the final version of this clause.[41] The addition of 'the unity of our country' and 'concord established with other nations' was closer in tenor to the Hearne draft of the preamble of May 1935, which had referred to the need to 'ensure harmonious relations with neighbouring peoples, and promote the ultimate unity of Ireland'.[42]

> Prudence The word 'prudence' may have been influenced by the precautionary decision to seek Vatican approval in order to prevent local resistance by the Catholic hierarchy. The use of the word seems, in particular, to be a coded reference to papal encyclicals. In *Immortale Dei*, Leo XIII stated:
>
> The Church, indeed, deems it unlawful to place various forms of Divine Worship on the same footing as the true religion, but does not, on that account, condemn those rulers who for the sake of securing some great good, or hindering some great evil, tolerate in practice that these various forms of religion have a place in the State.[43]

Immortale Dei did not explicitly state that 'prudence' was to guide the rulers of the State in this decision but this was provided in a later Encyclical. In *Libertas Praestantissimum*, Leo XIII advocated the view that the Roman Catholic ethos provided the basis for a stable state, but noted:

> But, to judge aright, we must acknowledge that, the more a State is driven to tolerate evil, the further is it from perfection; and that the tolerance of evil which is dictated by *political prudence* should be strictly confined to the limits which its justifying cause, the public welfare, requires.[44]

[40] UCDA: P150/2392.
[41] UCDA: P150/2425.
[42] 18 May 1935 (UCDA: P150/2370).
[43] www.papalencyclicals.net. Accessed 23 November 2017. All subsequent references to papal encyclicals come from this site unless otherwise indicated.
[44] Emphasis added.

De Valera sought McQuaid's advice as to Leo XIII's meaning. In an undated letter, McQuaid wrote:

> I think that there can be no doubt that in the Papal pronouncements the word State means both civil society organised as a political unit and then more particularly, that through which civil society speaks and functions, the Prince or Government.
>
> Hence the society and the Government ought per se to profess the true Faith and legislate in accord with it: per accidens it may not be *prudentially* possible to have that public admission. This seems to me the meaning of Leo XIII.[45]

The importance of this phrase was, therefore, that in failing to acknowledge the Roman Catholic Church under the 'one true Church' formula de Valera could appeal to 'political prudence' for his acknowledgement of the Church of Ireland and other religious bodies.

> Justice and Charity In 1927, the Bishops of Ireland issued a pastoral letter following a meeting held in Maynooth, the letter touched on the concepts of Justice and Charity:
>
> To give each one his due is a dictate of the natural law of justice. As a free intelligent being, man is endowed with a faculty for self-development. He is also given the right to live, which implies that he has power to procure means of subsistence for himself and his family. In this way arises the right of private property, which lies at the root of justice, for no one can be deprived of the things he owns without doing violence to the principles on which social order is based.
>
> […]
>
> Akin to Justice is Charity, but they differ in this, that the former is founded on one's distinct individuality, while the latter is rooted in the consciousness that we are all children of a common Father.[46]

[45] McQuaid to de Valera (UCDA: P150/2395) (emphasis added).

[46] *Acta et Decreta Concilii Plenarii Episcoporum Hiberniae, quod Habitum Est apud Maynutiam Die 2 Augusti et Diebus Sequentibus usque as Diem 15 Augusti 1927* (Dublin: Browne and Nolan, 1929), 147. On 149, they continue:

> It has been said that the twin virtues of Justice and Charity are called into play at almost every stage of our intercourse with each other—the one ever bidding us to respect the rights of the neighbour, and the other, with equal insistence, urging us to help him in spiritual or temporal need, even to the extent of risking our lives on occa-

The reference to 'Prudence, Justice and Charity' in the 1937 Constitution is interesting in that it did not have any forebear in Irish constitutional documents. The 1919 Democratic Programme declared that Irish rule would be on the basis of 'the principles of Liberty, Equality, and Justice',[47] the Hearne draft referred to 'freedom, equality and justice', while the Jesuit submission and the O'Rahilly draft made reference to 'Justice, and Liberty'. None of these drafts referred to 'prudence' or 'charity', which seem to have been included at de Valera's prompting.

A Proposed Amendment to the Preamble

The fact that the Preamble was not included in the first printed draft of the Constitution meant it did not undergo review by the governmental departments in March 1937. During the committee stage of the Dáil debates, Frank MacDermott tabled an amendment to the Preamble.[48] The amendment attempted to recognise the close bonds between Great Britain and Ireland, and also that 'the long agony of Irish history' was not 'due […] solely to foreign oppression, but also to conflict of ideals and loyalties amongst Irishmen'.[49] Such a recognition would not find its way into the high-minded rhetoric of nationalism of the preamble. De Valera stated: 'Deputy MacDermott should be satisfied now that he has got that off his chest.'[50] MacDermott tried to force a division on the amendment but was unable to secure the numbers to do so.

> Dochum Glóire Dé agus Onóra na hÉireann This phrase, which can be translated as 'for the glory of God and the honour of Ireland', ends the 1937 Constitution. It is curious in that in both the English and Irish versions the final phrase occurs in Irish. The phrase was in wide currency

> sions to gain his higher good. Their exercise is also demanded in our relation with the State or Society into which we are incorporated.

On background to the synod, see Edward Rogan, *Irish Catechesis: A Juridico-Historical Study of the Five Plenary Synods, 1850–1956* (Rome: Ennio Appignanesi, 1987), 256–321.

[47] First Dáil Debates (21 January 1919) col. 22.

[48] DDA: AB 8/A/49. Frank MacDermott had signalled his unease with the Preamble when the Constitution was introduced, 67 *Dáil Debates* (11 May 1937) cols. 83–84. MacDermott actually tabled two amendments to the preamble but one was a house-keeping measure to do with the name of the State.

[49] Amendment No. 150, 67 Dáil Debates (4 June 1937) cols. 1923–1925.

[50] Amendment No. 150, 67 Dáil Debates (4 June 1937) cols. 1924.

at the time. De Valera's first address to the ard-fheis of the newly formed party in 1926 ended with the same phrase.[51] The phrase was the by-line of *The Irish Press* newspaper at the time. The phrase also occurred in the O' Rahilly 'C' proposal for the 1922 Constitution at the very beginning of the preamble.[52]

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[51] UCDA: P150/2047.

[52] Above note 1.

CHAPTER 3

Nation and State

The inter-war period was one of a burgeoning interest in the nation. To take one example, Article 16 of the 1921 Constitution of the Kingdom of the Serbs, Croats and Slovenes stipulated that 'the State shall encourage the fostering of nationality'. The question of nationality and nationalism was to be dealt with in the preliminary articles of the 1937 Constitution. This was complicated by the manner in which nationalism and republicanism had played a part in Ireland's struggle for independence. The establishment of the state was also a more complicated matter than it had been in 1922—the question of the nature of the state and the relationship between the state and the citizen were permeated by issues such as religious teaching, which are present in other elements of the document.

The Nation

Article 1

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

The most obvious influence on Article 1 was the 1916 Proclamation:

D. K. Coffey, *Drafting the Irish Constitution, 1935–1937*,
Palgrave Modern Legal History,
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> We declare the right of the people of Ireland to the ownership of Ireland and to the unfettered control of Irish destinies, to be sovereign and indefeasible. The long usurpation of that right by a foreign people and government has not extinguished the right, nor can it ever be extinguished except by the destruction of the Irish people.

More interesting, however, are the similarities between Article 1 and de Valera's proclamation of 27 April 1923 which accompanied the more famous cessation of hostilities order issued by Frank Aiken. In the 1923 proclamation, de Valera suggested points for negotiation with the Free State Government. The first of these proposals was: 'the sovereign rights of this nation are indefeasible and inalienable.' The third proposal began: 'the ultimate Court of Appeal for deciding questions of national expediency and policy is the people of Ireland'.[1] Further, the army council of the Irish Republican Army had indicated on 20 April 1923 the grounds on which they were prepared to negotiate to de Valera before he sent this message. The army council stated the fundamental point was that '[t]he sovereignty of the Irish nation and the integrity of its territory are inalienable'.[2] Articles 1 and 2 of the 1937 Constitution enshrined, therefore, those points of republican theory which de Valera had refused to abandon even in the face of serious adversity.[3]

The draft of 20 August 1936 contained a note that there would be a declaration of:

> The right of the People of E. to determine the form of the State and to decide the manner in which the said powers of government (or any of them) shall from time to timw [*sic*] be exercised or exercisable is hereby declared to be absolute and indefeasible.[4]

This may be regarded as the first iteration of Article 1 of the 1937 Constitution. By October 1936, the broad outlines of the articles dealing with the nation had been established. These were a definition of the national polity, a '[d]eclaration that the national territory consists of the whole of Ireland and its territorial seas and that the right of the Nation to

[1] Dorothy MacArdle, *The Irish Republic* (Dublin: Wolfhound Press, 1999), 846–847.

[2] MacArdle, *The Irish Republic*, 846–847.

[3] The Cosgrave government noted in response to de Valera's suggestion that 'Paragraphs (1) […] of this document are guaranteed by the Constitution, and, therefore, should have no place in peace conditions.' MacArdle, *The Irish Republic*, 853.

[4] 20 August 1936 (University College Dublin Archives (hereafter UCDA): P150/2370).

the whole of the national territory is indefeasible' and a declaration that the national language was Irish.[5] The drafts prepared for cabinet in October 1936 did not contain any formula for the nation.[6] By November 1936, however, the fundamental idea had been sketched out—the people were to be determinants of the institutions of state, the state should engage in relations with other states, and the people would act as ultimate arbiters of public policy.[7]

The McQuaid files contain notes and drafts on the nation. The drafts prepared in McQuaid's own hand pre-date the draft labelled 'X' of 28 February 1937.[8] These drafts provide an interesting measure of McQuaid's importance to the drafting process. The final versions certainly remain, in essence, close to McQuaid's drafts but they lack the elegance of the finished version.[9] However, as we have seen, the broad outlines of the nation had

[5] UCDA: P150/2373 (14 October 1936).
[6] UCDA: P150/2385.
[7] See UCDA: P150/2375:

> The declarations relating to sovereignty will be to the effect that sovereignty resides in the people, that the people have the right to determine the form of government and of the institutions of government under which they desire to live, and also the right to determine the extent of the co-operation of the State with any other State or any league or group of States. The people will be declared to be the ultimate arbiters on all disputed issues of national public policy.

[8] The printed versions of McQuaid's drafts contain subsequent pencil amendments of phrases that occur in the 28 February draft. These amendments may have been suggestions by McQuaid or suggestions noted by McQuaid.
[9] Dublin Diocesan Archives (hereafter DDA): AB 8/A/48. They read in full as follows:

1. The Irish nation—that social and historical grouping of men and women, who (having been born either within the territory of Eire or outside its territory of Irish parents) and having been marked by common qualities of character and outlook, constitute separate spiritual and physical unity—has, within its own territory, an inalienable, indefeasible and sovereign right, to the unfettered control of its own destinies, by declaring what its form of Government shall be and by designating its own rulers who shall promote the common weal, social economic and political.
2. The National Territory consists of the whole of Ireland and its territorial seas.
3. The Irish Nation, for the benefit and protection of its citizens and the promotion of peace, both national and international, may enter into Treaties and Agreements with other States for the purpose of attaining these objects.
4. All disputed questions of national policy and expediency, within the State of Eire, shall, in last resort and without recourse to arms, be determined, in a referendum as by law defined, by the final vote of the citizens of the Irish nation.

already been sketched out, so McQuaid's submissions must be regarded as having relatively little influence on the composition of Article 1.

The X draft of 28 February 1937 contained the first iteration of this article.[10] It was similar to the finalised text, although the ability of the nation to develop its own life was declared to be 'free from external interference' rather than 'in accordance with its own genius and traditions'.[11] This formulation was dropped in the 1 April draft, which contained the final version of Article 1.[12]

Article 2

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

Article 2 of the Constitution was obviously based on republican claims to Northern Ireland. There are some subtleties to the original article which are not immediately apparent, however. The first point to note is that in 1937 the British still retained control of the ports of Cobh, Lough Swilly and Berehaven. Thus, the claim encompassed these ports as well as Northern Ireland. Early drafts of the Constitution reveal de Valera's preoccupation with territorial claims. In an undated file, de Valera composed a brief note on territory, which appears to be an early progenitor of Article 2.[13] The draft of 20 August 1936 reveals that there was to be an article which dealt with 'the territory of the State'.[14] The 13 October draft contained an article which stated:

> The national territory is the whole of Ireland and the territorial seas of Ireland.
>
> The right of the Irish Nation to the whole and every part of the national territory is absolute and indefeasible. No part of the national territory may be surrendered.[15]

[10] 28 February 1937 (DDA: AB8/A/51).

[11] The forms of life in the X draft were 'economic, social and political' rather than 'political, economic and cultural', as in the final version.

[12] UCDA: P150/2416. The insertion of 'cultural' occurred at this stage in response to a query by the department of the president of the executive council (NAI: Taois s.9715B).

[13] 'The territory of Eire shall be such as from time to time may come within the jurisdiction of Eire' (UCDA: P150/2370).

[14] UCDA: P150/2370.

[15] 13[?] October 1936 (UCDA: P150/2373). The draft of 14 October contained a similar note: there was to be a '[d]eclaration that the national territory consists of the whole of Ireland and its territorial seas and that the right of the Nation to the whole of the national

This claim—in particular the use of the phrase 'surrendered'—was more strident than the final version, which retained only the first line. The ultimate draft first appeared when the X draft of February 1937 deleted all but the first line.[16]

Government departmental input, although influential in the drafting of certain articles, was ignored in this case. The department of finance, both in its original response to the first printed draft and in its subsequent response to the re-draft, was harshly critical of Article 2. The first response of the 23 March 1937 decried the inclusion in the Constitution of a 'fiction […] which will give offence to neighbouring countries with whom we are constantly protesting our desire to live on terms of friendship'.[17] Besides pointing out the difficulties which it would raise within the context of the Commonwealth and the fact that it would retard rather than advance progress towards a united Ireland, the departmental submission also pointed out that it could give rise to an adverse judgment by the 'Hague Court', presumably on the basis of Article 10 of the covenant of the League of Nations, which guaranteed the territorial integrity of the members of the League.[18] The department stated: 'It is not usual in a Constitution to define the national boundaries.'

In fact, this final assertion was demonstrably incorrect. The constitutions of the 1920s showed that it was not uncommon to delimit the national boundaries; the 1920 Constitution of Austria,[19] the 1920

territory is indefeasible' (UCDA: P150/2373). An earlier draft in the same folio does not contain an article on territory but has a handwritten note 'Territory? Fundamental Declaration' (UCDA/P150/2373).

[16] UCDA: P150/2387.

[17] NAI: Taois s.9715B.

[18] Article 10 of the Covenant of the League of Nations stated:

> The Members of the League undertake to respect and preserve as against eternal aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

[19] Article 3 stated:

1. The Federal territory embraces the territories of the Federal Provinces.
2. An alteration in the Federal territory involving an alteration in the territory of a Province […] can be made only by identical Constitutional Laws of the Federation and of the Province the territory of which is altered.

Federal Provinces were defined in Article 2 of the Constitution.

Constitution of Esthonia[20] and the 1920 Constitution of Czechoslovakia,[21] among others, all defined national boundaries to a greater or lesser extent. If anything, the process was more prominent in the 1930s than the 1920s. The 1934 Constitution of Austria contained a similar provision to the 1920 Constitution, while the 1931 Constitution of Yugoslavia contained remarkably detailed provisions about boundaries which had no antecedent in the 1921 Constitution of the Kingdom of the Serbs, Croats and Slovenes.[22] Similarly, the 1933 Constitution of Portugal[23] and the 1931

[20] Article 2 stated:

> The territory of Esthonia includes Harhumaa, Lāānemaa, Jārwamaa, Wirumaa, with the town of Narwaa and district, Tartumaa, Wiljandimaa, Pārnumaa, the town of Walk, Wörumaa, Petserimaa and other border regions inhabited by Esthonians, the islands of Saaremaa (Oesel), Muhumaa (Moon), and Hiiumaa (Dago), and other islands and reefs situated in Esthonian waters.
>
> The delineation of the Esthonian frontiers shall be determined by International Treaties.

[21] Article 3 stated:

1. The territories of the Czechoslovak Republic shall form a united and indivisible unit, the frontiers of which may be altered only by Constitutional Law ….
2. In accordance with the treaty concluded […] between the Principal Allied and Associated Powers […] and the Czechoslovak Republic […] the autonomous territory of Carpathian Russinia […] shall be and remain an integral part of the Republic […].

[22] Article 83 of the 1931 Constitution goes into great detail about the individual regions, or Banovinas, of the Kingdom of Yugoslavia. It is sufficient to cite only one of the nine regions:

> The Drava Banovina is bounded by a line passing from the point where the northern boundary of the district of Čabar cuts the State frontier, then following the State frontier with Italy, Austria and Hungary to a point where the State frontier with Hungary reaches the river Mura (north-east of Čakovac). From the river Mura the boundary of the Banovina follows the eastern and then the northern boundaries of the districts of Lendava, Ljutomer, Ptuj, Šmarje, Brežice, Krško, Novo Mesto, Metljika, Črnomelj, Kočevje and Logatec, including all the districts mentioned.

[23] Article 1 stated:
The territory of Portugal is that which at present belongs to it and comprises:-

1. In Europe: the mainland and the archipelagos of Madeira and the Azores.
2. In West Africa: Cape Verde archipelago, Guinea, S. Tomé and Principe and their dependencies, S. João Baptista de Ajudá, Cabinda and Angola.
3. In East Africa: Mozambique.
4. In Asia: the State of India and Macao and their relative dependencies.
5. In Oceania: Timor and its dependencies.

Constitution of Spain[24] contained provisions detailing the national borders. By 1937, therefore, it would have been unusual for a Constitution *not* to delimit its boundaries.

De Valera was not persuaded by the department of finance argument that Article 2 should be abandoned as a 'fiction'. He refused to accept that a principle should be abandoned merely because it was not capable of immediate implementation. Earlier, in April 1935, Frank MacDermott had urged the Government either to give up republicanism or seek authority from the electorate to establish a republic, accusing DeValera of 'shamming'. Responding to this charge, de Valera remarked: 'If I desire to see a thing done and if, at the moment, I have not the means to secure its being done, am I shamming, because I do the best for the time being to secure my desires?'[25]

The department of finance re-stated its objections to the inclusion of Articles 2 and 3 in its second submission on the draft Constitution:

> It gives a permanent claim in the Constitution to a claim to 'Hibernia Irredenta'. The parallel with Italy's historical attitude to the Adriatic Seaboard beyond its recognized territory is striking, and as in that case it is likely to have lasting ill effects on our political relations with our neighbors.[26]

Despite these forceful representations, Article 2 was retained in its previously drafted form.

Article 3

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

The draft of 12 October 1936 contained the first iteration of this article:

> Without prejudice to the foregoing [right to the national territory], provision may be made by law for the application of any enactment to the area

[24] Article 8 began: 'The Spanish State, within the irreducible limits of its present territory ….'

[25] 55 Dáil Debates (10 April 1935) col. 2270–2271.

[26] UCDA: P67/184.

> for the time being within the jurisdiction of the Parliament and Government of E__.[27]

The X draft of February 1937 stated:

> Pending the re-integration of the national territory, the area of jurisdiction of the State established by this Constitution shall be that portion of the national territory recently termed SAORSTAT EIREANN, without prejudice to the right of that State to exercise jurisdiction over the whole of the national territory.[28]

The original impetus for this draft may have been McQuaid: a handwritten version of the article (which excludes the final clause) can be found in the McQuaid papers.[29] A later X draft contained a more elegant formula, which was adopted, with minor modification, in the final draft.[30]

One important difference between the first and final drafts is the inclusion of the phrase 'extra-territorial effect'. It had been suggested, prior to the passage of the Statute of Westminster 1931, that Dominions could not legislate with extra-territorial effect.[31] The drafting of the 1937 Constitution expressly precluded the levelling of such a suggestion against it.

The State

Article 4

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

[27] 12[?] October 1936 (UCDA: P150/2373).

[28] 28 February 1937 (UCDA: P150/2387).

[29] A handwritten version of the draft which excludes the final clause may be found in the McQuaid papers (DDA: AB/8/A/V/48). Cathal Condon attributes the entire X draft of Article 3 to McQuaid. However, the final clause does not appear in the handwritten draft and is circled in the subsequent X draft, which indicates it was an addition he did not foresee (*An Analysis of the Contribution made by Archbishop John Charles McQuaid to the Drafting of the 1937 Constitution* (MA thesis, University College Cork, 1995), 41). It is possible that the original note may have been dictated by de Valera.

[30] 2 March 1937 (NAI: AGO/2000/22/796).

[31] Thomas Mohr has provided an excellent account of the difficulties associated with extra-territorial legislation during the life of the Irish Free State, "The Foundations of Irish Extra-Territorial Legislation," *Irish Jurist* 40 (2005) 86.

Hearne's draft of 18 May 1935 retained the name 'Saorstát Eireann'.[32] A handwritten note by de Valera on the draft states that '[t]he name of the State shall be Eire'; de Valera apparently rejected the use of the term 'Saorstát Eireann' as it had 'a connotation completely unacceptable to Republicans'.[33] In a draft of a foreign relations bill from August 1936, Hearne referred to the State as 'Poblacht na h-Éireann' which can be translated as 'the Republic of Ireland'.[34] De Valera rejected this because it would have been a direct challenge to Britain and because it was a 'sacred' name which covered the whole of Ireland.[35] No draft of the Constitution used this name. The reference was to 'Éire' from the draft of 6 August 1936.[36]

De Valera declared in the Dáil that Article 4 was 'purely a nominal matter'.[37] An amendment was moved by MacDermott on the grounds that the country should be called by the name by which it was known to the 'English-speaking inhabitants of Ireland'.[38] While de Valera preferred his formulation on the basis that it was more 'logical' and that it introduced Irish terms into English usage, he stated that he was prepared to accept the amendment if it received more support from the Dáil.[39] It was ironic, therefore, that 'Éire' was the word subsequently preferred by the British Government to refer to the state.

MacDermott also introduced an amendment into the text which would have given a constitutional basis to Commonwealth membership. This read as follows:

> The Irish nation hereby declares its free and equal membership as a sovereign State of the British Commonwealth of Nations, and so long as such membership continues, recognises King George VI and each of his successors at law as King of Ireland.[40]

[32] UCDA: P150/2370.
[33] Earl of Longford and T. O'Neill, *Eamon de Valera* (Dublin: Hutchinson and Co, 1970), 294.
[34] 31 August 1936 (UCDA: P150/2370).
[35] Earl of Longford and T. O'Neill, *Eamon de Valera*, 294–295.
[36] UCDA: P150/2370.
[37] 67 Dáil Debates (25 May 1937) col.947.
[38] Amendment no. 2, 67 Dáil Debates (25 May 1937) col. 968.
[39] Amendment no. 2, 67 Dáil Debates (25 May 1937) col. 970.
[40] Amendment no.1, 67 Dáil Debates (25 May 1937) col. 953.

Although the text was obviously based on Article 1 of the 1922 Constitution, the amendment only garnered three votes in favour, while 56 deputies voted against it.[41] Interestingly, the Fine Gael members abstained on the vote. Their conduct on the vote was used against Fine Gael by Sean MacEntee in the general election campaign after the dissolution of the Dáil.[42]

Article 5

Ireland is a sovereign, independent, democratic state.

This article had no forebear in the 1922 Constitution. It was not exceptional, however, by European standards. Article 1 of the 1814 Constitution of the Kingdom of Norway stated: 'The kingdom of Norway shall be a free, independent, indivisible and inalienable kingdom. Its form of Government shall be a limited and hereditary monarchy.' Similarly, Article 1 of the 1809 Constitution of the Kingdom of Sweden,[43] Article 1 of the 1915 Constitution of the Kingdom of Denmark,[44] Article 40 of the 1917 Political Constitution of the United States of Mexico,[45] Article 1 of the 1918 Constitution of the Russian Socialist Federal Soviet Republic,[46] Article 1 of the 1919 Constitution of the German Reich,[47] Article 2 of the 1920 Constitutional Charter of the Czechoslovak Republic,[48] Article 1 of the 1920 Constitution of the Estonian Republic,[49] Article 1 of the 1920 Federal Constitutional Law of the Republic of Austria[50]

[41] Amendment no. 1, 67 Dáil Debates (25 May 1937) cols. 967–968; Article 1 stated: 'The Irish Free State […] is a co-equal member of the Community of Nations forming the British Commonwealth of Nations.'

[42] See *Constitutionalism in Ireland 1932–1938*, Chap. 5.

[43] Article 1 stated: 'Sweden shall be governed by a king and shall be a hereditary monarchy'.

[44] Article 1 stated: 'The form of government is a limited monarchy. Royal power is hereditary.'

[45] Article 40 stated: 'It is the will of the Mexican people to constitute themselves into a democratic, federal, representative Republic, consisting of States, free and sovereign in all that concerns their internal affairs, but united in a federation according to the principles of this fundamental law.'

[46] Article 1 stated: 'Russia is declared a Republic of Soviets of Workers', Soldiers' and Peasants' Deputies.'

[47] Article 1 stated: '[t]he German Reich is a Republic.'

[48] Article 2 stated: '[t]he Czechoslovak State shall be a Democratic Republic'.

[49] Article 1 stated: 'Esthonia is an independent Republic in which the sovereign power is in the hands of the people.'

[50] Article 1 began: 'Austria is a democratic Republic.'

and Article 1 of the 1921 Constitution of the Polish Republic[51] all laid out the forms of government of the respective states.

The inter-war constitutions contained similar provisions. The 1934 Constitution of Austria declared in its preamble: 'The Austrian people receive for their Christian, German Federal State on a corporative foundation the following constitution.' Similarly, the 1933 Constitution of the Portuguese Republic,[52] the 1928 Constitution of the Republic of Lithuania[53] and the 1931 Constitution of the Spanish Republic[54] defined the states established under their respective constitutions. Moreover, there were even traces of it in Commonwealth constitutionalism at the time, as more independent-minded Dominions sought to provide more precise definitions of their status. In 1934, South Africa declared in the preamble to its Status of the Union Act that it was a 'sovereign independent state'.

The Hearne draft of 18 May 1935 claimed that the state was 'an independent sovereign State'.[55] This corresponds most closely to the South African definition than contemporaneous European definitions. The draft of 6 August 1936 contained the phrase 'independent sovereign democratic'.[56] Interestingly, two drafts from October 1936 declared the state was 'sovereign, democratic [and] Christian'.[57] One draft went further and declared that the state was 'governed by a Parliamentary democracy on the basis of the principles of the Christian religion and in the interests of personal freedom, family welfare, social justice, and the common good'.[58] These drafts were closer to the Austrian formulation than to the South African. This Austrian influence was quickly abandoned and the final version was adopted in October 1936.[59]

[51] Article 1 stated: '[t]he Polish State is a Republic.'

[52] Article 5 began: '[t]he Portuguese State is a unitary and corporative Republic.'

[53] Article stated: '[t]he Lithuanian State is an independent democratic Republic.'

[54] Article 1 began: 'Spain is a democratic Republic of workers of every class, organized under a system of liberty and justice.'

[55] 18 May 1935 (UCDA: P150/2370).

[56] 6 August 1936 (UCDA: P150/2370).

[57] UCDA: P150/2373.

[58] UCDA: P150/2373.

[59] UCDA: P150/2374.

Article 6

1. *All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.*
2. *These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.*

All powers of government … derive, under God, from the people,

Article 6 of the 1937 Constitution introduced the phrase 'under God', which was absent from Article 2 of the 1922 Constitution. The 1922 Constitution declared that powers and authority 'are derived from the people of Ireland'.[60] We have seen in relation to the Preamble how Alfred O'Rahilly and Edward Coyne described the formula used by the 1922 Constitution as erroneous because it suggested that all lawful authority came from the people.[61]

According to Longford and O' Neill's biography of de Valera, he 'read carefully the writings of such Catholic professors as Dr Michael Browne […] in *Studies* and other periodicals'.[62] The reference to Browne is to the article 'The Source and Purpose of Political Authority', which appeared in the 1936 edition of *Studies*.[63] Browne sent a copy of the paper to de Valera before the official publication, although the exact date it was sent is not clear.[64] In fact, de Valera and Browne had been in contact on the nature of

[60] Article 2 of the 1922 Constitution stated:

> All powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organizations established by or under, and in accord with, this Constitution.

In his construction of Article 2 in *Lynham v Butler (No 2)*, Kennedy CJ noted: 'the Divine delegation to the people is acknowledged in the preamble to the enactment' [1933] IR 74, 95.

[61] See Chap. 2.

[62] The Earl of Longford and T. O' Neill, *Eamon de Valera*, 218, 295.

[63] Michael Browne, "The Source and Purpose of Political Authority," *Studies* (1936): 390.

[64] Letter from Browne to de Valera: 'I have not been able to get in touch with Dr. Lucey yet. It is probable that all the papers will appear in the Sept. issue of *Studies*.' A letter does exist from Browne to de Valera dated 23 Sept 1936 which encloses Lucey's paper, so we may

authority since at least 20 October 1933, when Sean Moynihan wrote to Browne at de Valera's direction:

> The President is very pleased to learn that you have been asked to contribute an article on the principle of authority to the December issue of *Studies*. He believes that a clear exposition of the Catholic teaching on the question would be of great service at the present time.[65]

Browne's aim in the paper was to 'state the official teaching of the Catholic Church'. He explained the difference between authority and the state: 'Catholic doctrine says that authority is from God' but '[t]he State, the particular community based on race or territory, is not from God'.[66] When Browne dealt with the transfer of authority, he said: 'Catholic scholars recognize several titles by which authority is legitimate: (1) consent of the people'.[67] It is this view which the Constitution, in Article 6, enshrines. The idea that a constitution should express an overtly religious basis was not, however, without precedent, even among the dominions. Article 1 of the South Africa Act 1909 stated in 1937 that '[t]he people of the Union acknowledge the sovereignty and guidance of Almighty God'.[68]

The first draft of 18 May 1935 contained a reference to God.[69] Similarly, Article 3 of the draft extant on 6 August 1936 stated that '[a]ll authority and all powers of government, legislative, executive and judicial come from Almighty God'.[70] It seems, therefore, that Browne's views on the Catholic derivation of authority are to be viewed as the definitive statement of a pre-existing idea; de Valera's beliefs in this regard were most likely merely confirmed by Browne's article.[71] This wording, however, did not survive until the cabinet discussions of October 1936 and the reference to God was not to resurface until February 1937. The extant drafting material indicates the

surmise the letter with Browne's paper enclosed pre-dates 23 September 1936 (UCDA: P150/2895).

[65] 20 October 1933 (UCDA: P150/2895).

[66] Browne, "The Source and Purpose of Political Authority," 394.

[67] Browne, "The Source and Purpose of Political Authority," 396.

[68] B. Shiva Rao, ed. *Select Constitutions of the World* (Madras: The Madras Law Journal Press, 1934), 359. It had been amended in 1925 to include this section.

[69] UCDA: P150/2370. It begins 'All powers of government and all authority, legislative, executive and judicial, are derived from God though the people […]'

[70] UCDA: P150/2370.

[71] 47 Dáil Debates (3 May 1933) col. 431.

difficulties which de Valera had with making Article 6 fit the Catholic model. On 14 October 1936, the powers of Government were said to 'emanate' from the people,[72] but this was revised during the cabinet round of discussion to read 'are vested in'[73] and then 'reside'[74] in the people. The difficulty de Valera experienced seems to have been due to the fact that divine authority would be recognised in the Preamble and it was his attempts to marry this with popular sovereignty which proved problematic.[75] Subsequent drafts reverted to the original 'emanate' wording up until the draft of 3 February 1937.[76] It is against this backdrop, therefore, that one must gauge the contribution of John Charles McQuaid, who became more intimately involved in the drafting of Article 6 thereafter.

Derive … Designate

The main influence which McQuaid provided regarding Article 6 of the 1937 Constitution was not the inclusion of the phrase 'under God' but the clarity of the doctrinal argument which he provided against the views espoused by Alfred O'Rahilly in the early 1920s in a series of articles in *Studies*.[77] In these articles, O'Rahilly took aim at 'the recently resuscitated theory that the people do not transfer power but merely designate its recipients'.[78] He proposed instead what he called the 'Scholastic theory' as the correct Catholic view of political authority, which he defined as follows:

> The immediate and primary subject of political power is the people, not as a mere aggregate, but as forming a mystical body and as constituting a corporate personality. This power resides in the people *ex natura rei*, not by any

[72] UCDA: P150/2373. Interestingly, the Constitution of the Republic of Austria of 1920 stated in Article 1 that '[i]ts law emanates from the people'. Article 82.1 stated: 'All judicial power emanates from the Federation.' Article 1 of the 1919 Constitution of the German Reich also uses the word 'emanates'.

[73] 19[?] October 1936 (UCDA: P150/2374). Article 39 of the 1917 Constitution of the United States of Mexico stated, 'The national sovereignty is *vested* essentially and originally in the people. All public power *emanates* from the people, and is instituted for their benefit' (italics added).

[74] 22 October 1936 (UCDA: P150/2374).

[75] See 'Summary of main provisions of the Constitution,' 5 November 1936 (UCDA: P150/2375).

[76] See UCDA: P150/2387.

[77] Alfred O'Rahilly, "The Sovereignty of the People," *Studies* 10 (1921): 39–56; and Alfred O'Rahilly, "The Sovereignty of the People," *Studies* 10 (1921): 277–287. See also Alfred O'Rahilly, "The Democracy of S. Thomas," *Studies* 9, no. 33 (1920): 6–13.

[78] O'Rahilly, "The Sovereignty of the People," 287.

> special concession of God, apart from creation and conservation, but rather by way of natural concomitance or immediate result
>
> […]
>
> That is, assuming the consent of men to form a community, sovereignty by the very fact pertains to that community without any further intervention of human wills. Men have power to delimit this political authority, to make contours and boundaries in its distribution, to determine the totalities in which it is localized; but they neither create such authority nor can they suppress it, for it is a moral fact, inevitably and immediately consequent on the existence even of a consent-formed community.[79]

This view contrasts with O'Rahilly's presentation of the designation theory. This, according to O' Rahilly, consisted of the view that the rulers of a polity receive their authority directly from God and the influence of the people extends only to nominating them as leaders.[80] O'Rahilly characterised this view as being of 'Imperialistic-Gallican-Protestant' parentage and attempted to counter the view by appealing to Cardinal Billot and the Jesuit scholastic, Francisco Suarez.[81] O'Rahilly contended that the donation or Scholastic theory was the only correct Catholic theory for explaining political authority in the State.

In contrast to O'Rahilly's uncompromising stance on the 'correct' Catholic view, McQuaid wrote a memorandum which explained that both the donation and designation theories were consistent with Catholic theology and that Article 6 had been drafted to accommodate both views. McQuaid's view was that authority came from God to the rulers of the state by virtue of the natural law.[82] He stated further:

1. Catholic philosophers and theologians are unanimous in teaching that all power comes from God, Author of Nature […] Further, Catholic philosophers are at one in teaching that Civil power does not come immediately from God, the author of Nature, to a determinate Subject of power or Ruler, but mediately, through human intervention.

[79] O'Rahilly, "The Sovereignty of the People," 46–47 (footnote omitted). The section omitted here refers to a Suarez quotation.

[80] O'Rahilly, "The Sovereignty of the People," 278–279.

[81] Billot (1846–1931) was made a cardinal by Pius X in the consistory of 1911. He resigned his office in 1927 as a result of Pius XI's condemnation of *Action Francaise*. According to Cooney, 'McQuaid accepted completely these neo-scholastic teachings [of which Billot was the distal proponent] on the unchanging nature of the Catholic Church.' See John Cooney, *John Charles McQuaid: Ruler of Catholic Ireland* (Dublin: O'Brien Press, 1999), 44–45.

[82] UCDA: P150/2406.

2. There is a divergence of opinion among Catholic philosophers and theologians as to the manner in which Civil authority, while it has God for Author, derives from God to the ruler or rulers, through the intervention of the community.

   (A) One opinion, that of Suarez and his School, holds that Civil power derives from the people in the sense that the people, in virtue of the natural law, first holds the Civil authority and then, by a sort of self-abdication, transfers it in donation or contract to the Ruler or Rulers of the State.
   (B) Another opinion, which is claimed to be more traditionally Thomist, holds that civil power derives from the people in the sense that the people in virtue of the Natural Law, holds, not the political power itself, but only the right to specify the legitimate form of government and the legitimate mode of investiture of power. The people exercises this right when it assents to and enacts the fundamental law establishing a particular form of Government and when, under that law, it specifies the subject of authority, the Ruler or Rulers.[83]

The viewpoint outlined as (A) was called by McQuaid the 'Donation' theory, while the (B) viewpoint he termed the 'Designation' theory. In support of the designation theory, McQuaid pointed out the fact that it had been accepted by Cardinal Billot,[84] Vitoria, Cardinal Zigliara[85] and Leo XIII.[86]

[83] UCDA: P150/2406.

[84] Francis of Vittoria (c. 1480–1546) was a Dominican who held the principal chair in theology at the University of Salamanca between 1524 and 1544.

[85] Zigliara (1833–1893) was created a cardinal by Leo XIII in his first consistory of 1879. He was responsible for the first draft of the papal encyclical *Rerum Novarum*. See Eduardo Soderini, *The Pontificate of Leo XIII: Volume I (Carter tr)* (London: Burns Oates & Washbourne, 1934), 192–193. Soderini stated that Leo XIII found the work 'profound, but the Pope judged it too prolix and perhaps too theoretical'. The 1913 *Catholic Encyclopedia* noted that 'not very long ago [his *Summa Philosophica*] was adopted as the textbook for the philosophical examination in the National University of Ireland'. McQuaid received a BA from University College Dublin.

[86] Vincenzo Gioacchino Raffaele Luigi Pecci (1810–1903) was made cardinal in 1853 and pope (as Leo XIII) in 1878. His most famous encyclical, *Rerum Novarum* (1891), was the subject of intense interest in the 1930s due to the 1931 publication of *Quadregesimo Anno*,

It is clear from the use of the word 'derive' that the 1937 Constitution indicates a view congruent with the donation theory; obviously, the word 'designate' is congruent with the designation theory. In the Dáil debates, de Valera, in response to an attack by James Fitzgerald-Kenney, stated:

> What is more, this drafting has been very carefully done so as to leave the people of either school of thought to hold their views under it. In other words, it agrees with the doctrine in which it is held that authority, as everybody admits, does not come immediately and directly to the rulers, but that it comes immediately through the people who designate the rulers. There is a difference of opinion as to the manner in which it comes. This is open to either school of thought, and the interpretation does not hold for one rather than for the other. It is perfectly in accord with either of the two schools of thought.[87]

The views espoused by McQuaid were not accepted uncritically. Alfred O' Rahilly wrote in the *Irish Independent*:

> It is plain that [de Valera] has had some adviser, who has led him into using language he would not have otherwise employed […] Mr. De Valera has been led, all unwitting, by some academic theorist to adopt the subtly dangerous theory known as 'designation.'[88]

This criticism seems to have particularly stung McQuaid—himself a proponent of the designation theory—because in his response he rather petulantly pointed out: 'Leo XIII is very explicit in not calling the designation theory by the strange names that Professor O' Rahilly found to fit it.'[89] In a draft he prepared for Article 1, McQuaid referred to a nation's right to control of its destiny 'by *declaring what its form of Government shall be* and by *designating* its own rulers who shall promote the common weal, social economic and political'.[90] McQuaid's support for 'designationism' may explain why O'Rahilly's insistence that the theory was incorrect as a matter of Catholic doctrine so irritated him.

which celebrated 40 years of *Rerum Novarum*. McQuaid displays a knowledge of other encyclicals by Leo XIII, for example *Immortale Dei* (1885).

[87] 67 Dáil Debates (25 May 1937) cols. 977–978.

[88] *Irish Independent* 15 May 1937.

[89] 25 May 1937 (UCDA: P150/2395).

[90] DDA: AB 8/A/48. Emphasis added.

Article 7

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

The 1922 Constitution contained no provision similar to Article 7. The draft of 20 August 1936 contained an article which stated that '[t]he National Flag shall be the tricolour (Note: suitable heraldic description to be inserted)'.[91] The first draft of this article appears to date from October 1936; this stated that '[t]he national flag is the tricolour in green, white and gold honoured by the people'.[92] There is a note next to this draft which states: 'Orange white green. Staff Pole.' The next draft replaced the word 'gold' with 'orange' but retained the order. It seems from the extant materials that this article was subject to some criticism at the cabinet table as the draft of 22 October did not contain such an article but did contain an inserted question mark about a flag.[93] This perhaps reflects questions about whether or not such a provision really belonged in a constitution.

On 5 November 1936, the 'Summary of Main Provisions of The Constitution' included a provision about a flag.[94] The 11 January 1937 draft contained a provision relating to the flag, and this was to be preserved throughout the drafting process.[95] The provision was subjected to some criticism by the parliamentary draftsman Arthur Matheson in both the revised draft form and in the literal translation of the Irish text. When dealing with the literal translation of the Irish text, Matheson stated a preference for an exact definition of the flag.[96] On the revised draft, Matheson stated that '[t]he full details of the flag must be prescribed somewhere, but it might be better to prescribe them by ordinary law instead of in the Constitution'.[97] This may

[91] 20 Aug 1936 (UCDA: P150/2370).

[92] UCDA: P150/2373.

[93] 22 Oct 1936 (UCDA: P150/2370).

[94] 5 Nov 1936 (UCDA: P150/2375).

[95] 11 Jan 1937 (UCDA: P150/2387).

[96] UCDA: P150/2397: 'The national flag of Éire consists of the three colours green, white, and saffron arranged vertically in that order, the green being next to the hoist.' Matheson's proposals were consistent with Article 2 of the 1921 Constitution of the Kingdom of the Serbs, Croats and Slovenes.

[97] UCDA: P150/2397. Matheson suggested it might be preferable if it stated that '[t]he national flag of Éire is a tricolour of green, white, and orange in such form as shall be defined by law'. This method of determining the flag by law had been followed both in those constitutions which made no mention of a flag and others such as Article 111 of the 1814 Constitution of the Kingdom of Norway.

have reflected the unease felt at the cabinet table. Matheson's suggestions were not accepted.[98]

Some inter-war constitutions stipulated a flag.[99] Interestingly, while the Austrian Constitution of 1934 provided for the 'colours' of Austria in Article 3(1), it continued in Article 3(2)[100] to deal with the coat of arms of Austria in a great deal more detail, along the lines suggested by Matheson.[101] Similarly, Article 2 of the 1931 Constitution of the Kingdom of Yugoslavia stated that '[t]he national standard is blue-white-red in the horizontal sense against a vertical staff'.[102]

Article 8

1. *The Irish language as the national language is the first official language.*
2. *The English language is recognised as a second official language.*
3. *Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.*

Article 4 of the 1922 Constitution declared:

[98] The 1937 Constitution was, in this regard, similar to Article 5 of the 1920 Constitutional Charter of the Czechoslovak Republic—'[t]he colours of the Republic are white, red and blue'—and Article 3 of the 1919 Constitution of the German Reich—'[t]he colours of the Reich are black, red and gold'.

[99] Article 3(1) of the 1934 Austrian Constitution stated: 'The colours of Austria are red, white and red.' See also Article 8 of the 1928 Constitution of the Republic of Lithuania, and Article 1 of the Constitution of the Spanish Republic of 1931.

[100] Article 3(2) stated: 'The coat of arms of Austria consists of a detached double-headed black eagle, with a golden halo, golden claws and red tongue. Its breast is covered with a red shield with a silver cross-bar.'

[101] The 1928 Constitution of the Republic of Lithuania did the same in Article 8, which stated: 'The State colours are yellow, green and red. The State arms consist of a white knight on a red background.'

[102] Article 2 began:

> The arms of the Kingdom are a two-headed white eagle with outspread wings on a red shield. On the two heads of the double-headed eagle is the Crown of the Kingdom. On the breast of the eagle is a shield bearing: a white cross on a red shield with a flint and steel in each corner, a shield divided into 25 fields, alternately silver and red, and below it a blue shield with 3 gold six-pointed stars and a white crescent.

> The National language of the Irish Free State … is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Parliament … for districts or areas in which only one language is in general use.[103]

The constitution review committee of 1934 considered Article 4 in Appendix C of their report. They stated it was 'important because of the status which it gives to the Irish language'.[104] They did not accord the same importance to the recognition given to English, which 'in course of time it may be found desirable to modify' and therefore recommended the article should be capable of statutory amendment.

Article 4 formed the basis for Hearne's first draft of 18 May 1935. The only major difference was in the re-casting of the final clause to read '[s]pecial provisions may be made by law for districts in which only one of the said languages is in general use'.[105] Interestingly, de Valera circled the word 'equally' and indicated English should 'also be recognised'.[106]

Subsequent drafts did not adopt de Valera's suggested change. The draft of 12 October 1936, however, did address this issue. At this point, the provisions relating to language were contained in two separate sections. First, in the provisions relating to the nation, there was a declaration that '[t]he national language of Ireland is the Irish language'.[107] Second, there was an article which regulated the use of language in the state. It adopted the Hearne formula but English was only 'recognised' as an official language. This formula was retained for the final draft.

Of more difficulty was the final provision. As we have seen, Hearne had re-cast this formula to read: 'Special provision may be made by law for districts in which only one of the said languages is in general use.' This

[103] See Leo Kohn, *The Constitution of the Irish Free State* (London: George Allen and Unwin, 1932), 123–125.

[104] UCDA: P150/2365.

[105] UCDA: P150/2370. It should be borne in mind that the Hearne draft was based on the 1922 Constitution; the recognition of English as an 'equal' language was not necessarily in accordance with Hearne's preferences. In the report on the second house, which was compiled in 1936, a number of members, including Hearne, expressed a reservation, stating they were 'strongly of opinion that it is due to the dignity of the National Language that effective provisions should be made at the outset to ensure and maintain the gradual predominance of Irish as the language of the Second House'. Saorstát Eireann, *Report of the Second House of the Oireachtas Commission* (Dublin: Stationery Office, 1936), 13.

[106] Eireann, *Report of the Second House of the Oireachtas Commission*, 13.

[107] UCDA: P150/2373.

draft was apparently contested at the cabinet table. The draft of 20 October stated: 'Special provision may be made by law for the recognition of only one of the said languages as the official language in districts or areas in which that language only is in general use.'[108]

The clause was obviously designed to provide for the promotion of the use of Irish in the Gaeltacht areas. The difficulty was that the draft provided only for the 'recognition' of a language as the sole official language. Second, Irish had already been guaranteed status as the 'official language' in Section 1 of the article. Therefore, the draft did not provide any greater recognition for Irish than it already had by virtue of Section 1. This 'recognition' formula survived until the draft of 15 March 1937.[109] The draft of 1 April re-cast the clause to read: 'Special provision may be made by law *as to the use* of these languages (or of either of them) as official languages in particular areas.'[110] This draft eliminated the problem with the word 'recognition'. The draft of 24 April provided for the use of one language for 'official purposes' rather than as the 'official language' within an area.[111]

Article 9

1. *1º On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.*
   2º The future acquisition and loss of Irish citizenship shall be determined in accordance with law.
   3º No person may be excluded from Irish citizenship by reason of the sex of such person.
2. *Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.*

The original Hearne draft of 18 May 1935 provided that (1) all citizens of Saorstát Eireann and (2) any persons on whom citizenship was conferred by law were to be the citizens of the new state.[112] This formula was changed in October 1936. First, a draft provided that, in addition to the

[108] UCDA: P150/2374.
[109] 15 March 1937 (UCDA: P150/2401).
[110] UCDA: P150/2415 (emphasis added).
[111] UCDA: P150/2427.
[112] 18 May 1935 (UCDA: P150/2370).

above two grounds, nationality belonged to '[a]ll persons born outside Ireland of an Irish-born father'.[113] This was changed for the draft of 13 October to persons born outside Ireland of 'Irish parentage or descent as defined or limited by law'.[114] The draft of 13 October also stipulated that:

> Irish nationality shall not be conferred by naturalization upon any person who disbelieves in or is opposed to organized government or is a member of or affiliated with any society or organization entertaining or teaching disbelief in or opposition to organized government.

This disqualification did not survive the cabinet discussions and by 22 October the draft article contained only the other three grounds of qualification.[115] The difficulties with the formulation 'born in Ireland' were twofold. First, the Constitution at this point did not actually contain a definition of 'Ireland'. Second, assuming that Ireland referred to the new state, citizens of Saorstát Eireann would be disqualified, as the state would come into existence only on the passing into law of the Constitution.

The X draft of 28 February 1937, therefore, attempted to remedy the second of these problems by qualifying the term 'Ireland' with the phrase 'at any time'.[116] The reaction by the civil service to the draft article was quite severe.[117] The department of finance pointed out that the existing law would have to be brought into conformity with the Constitution. The department of justice pointed out that the matter was 'very complicated' and questioned whether 'all persons born in Ireland should thereby become citizens'. The review committee concluded that the article should be amended.[118]

By 1 April 1937, the approach was to divide the provisions dealing with nationality and citizenship into two separate articles. The first, which

[113] 12[?] October 1936 (UCDA: P150/2373).

[114] 13[?] October 1936 (UCDA: P150/2373).

[115] UCDA: P150/2374. Interestingly, the preamble to the article at this point differentiated between citizenship of the state and membership of the nation; it began '[t]he following possess are of Irish nationality and have the rights of citizens of E'.

[116] DDA: AB8/A/51.

[117] NAI: Taois s.9715B.

[118] The memorandum considered that:

> The provisions in the Article as a whole require examination in the light of the existing law dealing with nationality and citizenship. Their implications in relation to other Articles of the Constitution dealing with the rights etc. of citizens … would appear to require special consideration.

occurred in the nation subsection, provided that persons born in Ireland or 'on whom Irish nationality and citizenship are conferred' 'belong to the Irish nation'. The second stated that 'the acquisition and loss of Irish nationality and citizenship' were to be 'determined by law'.[119] Again, the department of finance's comments were not positive. Their submission noted that in the first article, '[i]t is not clear whether it confers and imposes the rights and duties of Irish nationality and citizenship on all such persons. If it does, it may have somewhat inconvenient results; if it does not, it is largely meaningless.'[120] The department noted that the second article 'deals only with future acquisition and loss of nationality and citizenship. It does not say who are to be citizens on the enactment of the Constitution—that point being, presumably, regarded as covered by Article 2.' In response to these criticisms, the draft of 24 April 1937 simply removed the first article.[121] This left the determination of citizenship to be dealt with through the operation of statute law. The published article on 1 May 1937 stated that '[t]he acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.'

This formulation was not to survive the Dáil debates. Three amendments were tabled against the article.[122] The first was by William Norton, leader of the Labour party, and provided for the continuation of citizenship from the 1922 regime. The second, by Mary Redmond, the Fine Gael TD (or deputy of the Lower House) for Waterford, prohibited discrimination on the basis of 'sex, class or [religion]'. This amendment was designed, in part, to meet feminist fears that women could be denied the benefits of citizenship. The third, by Frank MacDermott, dealt with the second section and sought to insert the phrase 'as well as the subordination of class and individual interests to the general welfare'. On 9 June 1937, de Valera tabled the final version of Article 9 in order to allay the fears of those who thought the draft could be used to restrict citizenship rights.[123] It is notable that de Valera, when defending the original position, cited three European constitutions which accorded with the statutory-basis approach—those of Portugal, Belgium and Czechoslovakia.[124]

[119] UCDA: P150/2415. This subdivision continued into the draft of 10 April 1937.
[120] 17 April 1937 (UCDA: P67/184).
[121] UCDA: P150/2427.
[122] DDA: AB 8/A/49.
[123] 68 Dáil Debates (9 June 1937) col. 120.
[124] 67 Dáil Debates (25 May 1937) col. 993. The Portuguese reference was to the 1933 Constitution.

Fidelity to the Nation and Loyalty to the State

The second section was not original by European standards. The Polish Constitution of 1921 had declared in Article 89 that '[l]oyalty to the Polish Republic is the first duty of Polish nationals', while Article 4.1 of the 1920 Constitutional Charter of the Czechoslovak Republic stated: 'The national allegiance of all citizens of the Czechoslovak Republic is one and indivisible.'[125] A similar principle had inspired the 1921 Democratic Programme of the First Dáil: 'We affirm the duty of every man and woman to give allegiance and service to the Commonwealth'.

The first iteration of this section occurred in the X draft of 28 February 1937 and appears to be based on the Polish model: 'Loyalty to the State is the first political duty of all citizens of Eire.'[126] The departments of finance and justice, and Oscar Traynor, the minister for posts and telegraphs, all questioned whether the section was necessary or desirable.[127] The fact that these objections did not result in a re-drafting of the section in the subsequent draft of 1 April 1937 shows how committed de Valera was to the section. It seems plausible that he viewed the provision as partial recompense for the provisions dealing with citizenship disqualification, which he had been defeated on at the cabinet table. It is also plausible that de Valera was influenced by Catholic theology on authority, as represented by McQuaid, who noted subjects ought to give 'loyalty—by recognizing and being subject to rulers' and 'obedience in all that pertains to lawful rule'.[128]

Article 10

1. *All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government, established by this Constitution and all royalties and franchises within that jurisdiction belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body.*
2. *All land and all mines, minerals and waters which belonged to Saorstát Éireann immediately before the coming into operation of this*

[125] Article 4 dealt with citizenship.
[126] DDA: AB8/A/51.
[127] National Archives of Ireland: Taois s.9715B.
[128] UCDA: P150/2395.

Constitution belong to the State to the same extent as they then belonged to Saorstát Éireann.

3. *Provision may be made by law for the management of the property which belongs to the State by virtue of this Article and for the control of the alienation, whether temporary or permanent, of that property.*
4. *Provision may also be made by law for the management of lands, mines, minerals and waters acquired by the State after the coming into operation of this Constitution and for the control of the alienation, whether temporary or permanent, of the land, mines, minerals and waters so acquired.*

The drafting of Article 10 was a source of some concern to the department of finance, which wanted to avoid the deficiencies of Article 11 of the Free State Constitution. This article of the 1922 Constitution stated:

> All the lands and waters, mines and minerals, within the territory of the Irish Free State (Saorstát Eireann) hitherto vested in the State, or any department thereof, or held for the public use or benefit, and also all the natural resources of the same territory (including the air and all forms of potential energy), and also all royalties and franchises within that territory shall, from and after the date of the coming into operation of this Constitution, belong to the Irish Free State (Saorstát Eireann), subject to any trusts, grants, leases or concessions then existing in respect thereof, or any valid private interest therein, and shall be controlled and administered by the Oireachtas, in accordance with such regulations and provisions as shall be from time to time approved by legislation, but the same shall not, nor shall any part thereof, be alienated, but may in the public interest be from time to time granted by way of lease or licence to be worked or enjoyed under the authority and subject to the control of the Oireachtas: Provided that no such lease or licence may be made for a term exceeding ninety-nine years, beginning from the date thereof, and not such lease or licence may be renewable by the terms thereof.[129]

The difficulty with the Free State Constitution was that it vested state control of assets in the Oireachtas, not the executive, and further placed limits on how such assets could be disposed of, if at all. Nicholas Mansergh stated that this article, along with the provisions dealing with education in

[129] See, further, Leo Kohn, *The Constitution of the Irish Free State* (London: George Allen and Unwin, 1932), 172–174.

the 1922 Constitution, was 'alien to individualist democracy'.[130] He isolated four possible readings of the article:

> It might be interpreted as providing a constitutional sanction for nationalization of natural resources; it might be held to assert a very considerable measure of State control over property to imply that the duty of the State is to prevent a use of the property inconsistent with the public interest, or as Deputy Johnson declared, 'property is held in trust for the public welfare.' On the other hand it may be read as a confirmation of the *status quo*.[131]

The confusion which the 1922 article engendered was to give rise to a new article, one which placed far more emphasis on an 'individualistic' conception of state property.

In the aftermath of the cabinet discussions of October 1936, the department of finance drafted a memorandum dated 29 October which dealt specifically with the deficiencies of Article 11 of the 1922 Constitution.[132] The memo dealt with three areas of concern: Oireachtas control, prohibition of alienation, and the restriction of duration of leases and licences. On the first issue, Walter Doolin, assistant secretary of the department of finance, stated that the Oireachtas 'cannot effectively and logically perhaps not even properly take part in administration'. He further pointed to the fact that the 'Oireachtas has plainly agreed to a rapid diminution in the amount of its direct control over the details of administration and has approximated to the logical position in which legislation and executive functions are kept distinct'.[133] Further, the prohibition on alienation of 'royalties and franchises' had a negative effect:

> The prohibition, however, has been and is being disregarded by the Judicial Commissioner, under force of necessity, in Land Commission transactions involving Quit rents and reversionary interests formerly belonging to the Crown; the disregard is very undesirable, as it imperils the tenures of purchasers under the Land Acts.

[130] Nicholas Mansergh, *The Irish Free State—Its Government and Politics* (London: George Allen and Unwin, 1934), 52.

[131] Mansergh, *The Irish Free State—Its Government and Politics*, 53 (footnotes omitted).

[132] UCDA: P67/184. This memorandum was sent to the secretary of the department of the president of the executive council.

[133] He instanced in this regard the relevant legislative provision, for example the Mines and Minerals Act 1931.

A quit rent was a fee paid to release the purchaser from feudal duties. The department of finance proposed an alternative article, which came to form the basis of Article 10 of the 1937 Constitution:

> All the lands and waters, mines and minerals, within the territory of the Irish Free State (Saorstat Eireann) hitherto vested in the State, or any department thereof, or held for the public use or benefit, and also all the natural resources of the same territory (including the air and all forms of potential energy) and also all royalties and franchise within that territory shall, from and after the date of the coming into operation of this Constitution belong to the Irish Free State (Saorstat Eireann) subject to any trusts, grants, leases or concessions then existing in respect thereof, or any valid private interest therein.

In response to difficulties with the drafting of the new Article 10, in April 1937 de Valera sought and received the advice of Matheson, who prepared a new draft.[134] The new draft was based on:

> the theory underlying the old Article 11 and the new Article 10 is that all natural resources should belong to the State and should be exploited for the benefit of the people and not for the private profit of individuals; that theory has no application to land because all land is the subject of private ownership, and in so far as the State owns land it does so in the same way as a private individual. Therefore natural resources and land must be dealt with separately in the Article.[135]

Matheson's approach was to vest all minerals, not just those enjoyed by Saorstát Eireann, in the state and to recognize the then-extant delimitation of private property. He also advocated the abandonment of the

[134] Article 41 of the draft of 11 January 1937 stated:

> The property hereinafter referred to, namely, all the lands and waters, mines and minerals, natural resources, royalties and franchises which, at the date of the coming into operation of this Constitution, belong to Saorstát Eireann shall, from and after the said date, belong to E. subject to any trusts, grants, leases or concessions then existing in respect thereof or any valid private interest therein, and shall be controlled and administered by the Minister in charge of the department of finance, so, however, that no part of the said property shall be alienated save with the consent of Dáil Éireann.

UCDA: P150/2387.

[135] 1 March 1937 (UCDA: P150/2397).

principle of the parliamentary administration of natural resources.[136] His proposed draft was as follows:

> All mines, mineral, and other natural resources (including the air and all forms of potential energy) within the national territory [jurisdict of the Gov + Parlt] set up by this Constitution and all royalties and franchises within that jurisdiction belong to Eire subject to all estates and interests therein lawfully vested in private persons immediately before the coming into operation of this Constitution. All land and all inland waters which belonged to Saorstat Eireann immediately before the coming into operation of this Constitution belong to Eire to the same extent as they then belonged to Saorstat Eireann. Provision shall be made by law for the management of the property vested in Eire by this Article and for the control of the alienation, whether temporary or permanent, of the property. Provision shall also be made by law for the management of land and inland waters acquired by Eire after the coming into operation of this Constitution and for the control of the alienation, whether temporary or permanent, of the land and inland waters so acquired.[137]

Interestingly, the draft of 1 April 1937 contained references to the future acquisition of 'land and waters acquired by Éire after the coming into operation of this Constitution', which obviously integrated Article 10 with Article 2.[138] By 24 April, however, the article was present in its final form.[139]

Article 11

All revenues of the State from whatever source arising shall, subject to such exception as may be provided by law, form one fund, and shall be appropri-

[136] 1 March 1937 (UCDA: P150/2397).
[137] Square brackets present in original draft.
[138] UCDA: P150/2415. Article 10.4 stated in full:

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

[139] UCDA: P150/2427. The only difference was that the draft version refers to 'Éire' where the final version refers to the 'State'. This was necessitated by the amendments consequent on the amendment of Article 4.

ated for the purposes and in the manner and subject to the charges and liabilities determined and imposed by law.

Article 11 was taken (with only syntactical modification) from Article 61 of the 1922 Constitution, which stated:

> All revenues of the Irish Free State (Saorstát Eireann) from whatever source arising, shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes of the Irish Free State (Saorstát Eireann) in the manner and subject to the charges and liabilities imposed by law.

The article first appeared in the draft of 11 January 1937.[140] At that time it was included in the section which established the office of the comptroller and auditor-general. The word 'determined' was not included until the final draft of 30 April.[141]

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[140] 11 January 1937 (UCDA: P150/2387).

[141] 30 April 1937 (UCDA: P150/2429).

CHAPTER 4

The Head of State

The governor-general had been viewed as a sign of imperial authority in the Irish Free State. Attempts to abolish the office had failed in 1932, but the abdication crisis in 1936 provided de Valera with the opportunity to remove the office from the constitution. It had been clear for some time that the intention was to replace the governor-general with a president. The question of what role and powers the president would have were, however, unclear. The president could, for example, be constructed on the lines of the American president, as head of the executive branch. The drafting process of the Irish presidency, however, discloses that the basis of the office was to be the 'suspensory veto'. This idea, imported from continental constitutions, essentially provided the president with powers to suspend an action from taking effect until another body determined its suitability. The presidential articles also disclose the hitherto unappreciated key role that political actors such as the cabinet played in crafting the 1937 Constitution.

The President

The 1922 Constitution provided for the office of the governor-general, in whom the executive authority of the Free State was vested,[1] and who assented to legislation in the name of the king.[2] The Fianna Fáil party objected to the

[1] Article 51 of the 1922 Constitution.
[2] Article 41.

D. K. Coffey, *Drafting the Irish Constitution, 1935–1937*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76246-3_4

retention of the office of the governor-general while in opposition and attempted to abolish the office when in power. Their attempts were frustrated in 1932 and 1934.[3] The office was eliminated from the 1922 Constitution by the Constitution (Amendment No. 27) Act 1936.[4]

The office of the president of Ireland was notably different from that of the governor-general. The president was to be directly elected. Executive power under the 1937 Constitution was vested in the government, as opposed to the situation under the 1922 Constitution where it was vested in the king and exercisable, subject to constitutional convention, by the governor-general.[5] Although the office of the governor-general did, in some respects, influence the drafting of some provisions of the presidency under the 1937 Constitution, the drafters were more heavily influenced by continental constitutions than by the British system.

Plans for the presidency were being made from very early in the drafting process. The Hearne draft of 18 May 1935 contained an Article 4, which provided for the establishment of a presidency.[6] The exact details of the institution, however, varied considerably through the drafting process. The degree of attention that the office attracted in each draft varied. During some phases of the drafting process, little or no changes were made, whereas other drafts, even late in the drafting process, produced some innovative amendments of the article.[7]

Article 12

1. *There shall be a President of Ireland (Uachtarán na hÉireann), hereinafter called the President, who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law.*

There are three components to this article. First, it establishes the office of the president. Second, it provides that the president takes precedence over all other persons. Third, it provides for the performance of the office of president.

[3] *Constitutionalism in Ireland 1932–1938*, Chaps. 1 and 2.

[4] *Constitutionalism in Ireland*, Chap. 3.

[5] Article 28 of the 1937 Constitution.

[6] University College Dublin Archives (hereafter UCDA): P150/2370. The article will be examined in relation to the relevant subsections.

[7] The fourth draft of 3 February 1937, UCDA: P150/2387, contained no changes from the third draft of 11 January 1937, *ibid.*

The Hearne draft of 18 May 1935 did not contain an article which specifically established the office of president; it simply provided for responsible government: 'The powers and duties conferred and imposed on the President by this Constitution or by any Act of the Oireachtas shall not be exercisable and performable by him save only upon the advice of the Council of Ministers.'[8] This created a problem in that there was no constitutional establishment of the office; this oversight could have left the office open to statutory infringement or abolition. The subsequent draft of 6 August 1936 remedied this. It provided: 'The office of the President of Eire (or in Irish 'Uachtaran Eireann') is hereby created.'[9]

The draft of 19 October 1936 contained a version closer to the final draft: 'The office of President of E. is hereby created. The President of E. (hereinafter called "the President") shall exercise and perform the powers and functions conferred on the President by this Constitution or by Organic Laws made thereunder.'[10] Organic laws were provided for in Article 47 of that draft. They were specific laws for implementing the Constitution.[11] The concept of organic laws came from the French Constitution of the Third Republic of 1875. A general explanation of organic laws was to be found in the *Select Constitutions of the World*:

> 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

[8] UCDA: P150/2370.
[9] 6 August 1936 (UCDA: P150/2370).
[10] UCDA: P150/2385.
[11] Article 47 stated:

1. Organic laws may be enacted by the Oireachtas to regulate any matter or thing relating to the exercise of the powers of the government of E., legislative, executive and judicial, the regulation of which by Organic Laws is required or authorized by this Constitution.
2. Every Organic Law Bill shall be entitled 'An Organic Law' in the long and short titles thereof.

> ordinary course of legislation, whereas the Constitutional Laws … require a special procedure.[12]

This idea of organic laws was to survive the revisions made both during and immediately after the cabinet discussions of October 1936 but was ultimately abandoned.

The draft of 19 October 1936 made a general declaration relating to the exercise of the powers of the president. The manner in which such powers were to be exercised was made the subject of another clause. The second section of the 19 October draft declared: 'The President shall take precedence over all other persons in the State.'

During the cabinet debates of October 1936, the phrase '[t]he office of President of E. is hereby created' was eliminated in favour of '[t]here shall be a President of E. (hereinafter called "the President") who shall exercise and perform the powers and functions conferred on the President by this Constitution or by Organic Laws made under this Constitution'.[13] The cabinet interest in the new office can also be seen in other provisions relating to the presidency.

The draft of 1 December 1936 amalgamated the previously distinct sentences—'[t]here shall be a President of E. (hereinafter called "the President") who shall exercise and perform the powers and functions conferred on the President by this Constitution or by Organic Laws made under this Constitution' and '[t]he President shall take precedence over all other persons in the State'—apparently on the basis of the cabinet discussions.[14] The section was subsequently amended to remove the reference to organic laws for the draft of 11 January 1937.[15] The section was amended for the first printed draft of 7 March 1937, allowing the insertion of the phrase 'Uachtarán na hEireann' instead of 'hereinafter called the

[12] *Select Constitutions of the World* (Dublin: Stationery Office, 1922), 393.

[13] 22 October 1936 (UCDA: P150/2374).

[14] UCDA: P150/2378, Section 1 stated:

> There shall be a President of E. (hereinafter called the President) who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by Organic Laws made under this Constitution.

In the draft of 22 October 1936, the phrase 'insert earlier' is appended to the later section dealing with the precedence of the President.

[15] 11 January 1937 (UCDA: P150/2387).

President'.[16] Three grammatical changes were made to the Irish until the final version was produced.[17]

2. 1° *The President shall be elected by direct vote of the people.*

There was no international consensus on the manner by which a president was to be elected. The most anachronistic method of election was the American system of election by electoral college. One method of presidential election, for which there was much European support, was for the parliament to elect the president. For example, Article 39 of the 1921 Constitution of the Polish Republic, Article 60 of the 1920 Austrian Federal Constitutional Law, Article 56 of the 1920 Constitutional Charter of the Czechoslovak Republic and Article 2 of the Constitution of the Third French Republic provided for parliamentary election of their respective presidents. Another method of presidential election was by direct vote. Only two continental constitutions that the drafters would have been aware of had adopted this method—the 1919 Constitution of the German Reich and the 1933 Constitution of the Portuguese Republic. One final method merged direct election and parliamentary election. The Spanish Constitution of 1931 gave an equal number of votes to the parliament and to electors, who would be chosen by direct vote.

As can be seen, direct election of a president was not the European norm in the 1930s. The most common European practice was for the parliament to elect the president. Nonetheless, the first draft of 18 May 1935 stated: 'The President of Saorstát Eireann […] shall be elected by the people of Saorstát Eireann.'[18] The draft of 6 August 1936 stipulated: 'The President shall be elected by the people of Eire in the manner provided by law.'[19] This would have allowed for different forms of elections, for example a run-off election, to be established by law.[20]

[16] 7 March 1937 (UCDA: P150/2399).

[17] The first grammatical change was the elimination of 'na' so the title read 'Uachtarán hEireann' on 10 April 1937; see UCDA: P150/2417. The second occurred on 24 April 1937 when the phrase was changed to read 'Uachtarán Éireann'; see UCDA: P150/2427. The final change was made for the final private draft of 26 April 1936, when it was amended to the final form; see UCDA: P150/2428.

[18] 18 May 1935 (UCDA: P150/2370).

[19] 6 August 1936 (UCDA: P150/2370).

[20] These were held in Finland at the time, see Agnes Headlam-Morley, *The New Democratic Constitutions of Europe: A Comparative Study of Post-War European Constitutions with*

This procedure was amended again in October 1936. The draft of 12 October provided that the first president was to be elected for a term of one year by the Dáil.[21] Every subsequent election was to be 'elected by direct vote of the people'. By 19 October 1936, however, the final wording was in place and was not removed from subsequent drafts.[22]

2° *Every citizen who has the right to vote at an election for members of Dáil Éireann shall have the right to vote at an election for President.*

This subsection was a late addition in the drafting process; it appeared in its first form in the first printed draft of 7 March 1937.[23] Previous drafts had assumed that presidential elections would be regulated by either organic laws or by statute law. This eventually became Article 12.5. The first printed draft extended the presidential franchise to '[e]very citizen who has completed the age of twenty-one years' and who complied with the relevant electoral law. It was not until the 10 April draft that this provision was changed to that in final version.[24]

3° *The voting shall be by secret ballot and on the system of proportional representation by means of the single transferable vote.*

This subsection first appeared in the draft of 1 December 1936, which stated: 'voting shall be by secret ballot and in accordance with the system of proportional representation known as the single transferable vote.'[25] The significance of the timing is that this was the first draft produced after the cabinet discussions which occurred in October 1936. Although there is no direct physical evidence to link the innovation with the cabinet meetings, it seems reasonable to attribute the change to these discussions. The only change which occurred between the 1 December draft and the final version, which appeared first in the draft of 7 March 1937,[26] was the restructuring undertaken by the first X draft of 28 February.[27] The X drafts restructured the draft Constitution, including Articles 12.2, which it divided into three separate subsections. Previously, Article 12.2 had consisted of one long clause. There was no substantive modification.

Special Reference to Germany, Czechoslovakia, Poland, Finland, the Kingdom of the Serbs, Croats & Slovenes and the Baltic States (Oxford: Oxford University Press, 1928), 180.

[21] 12[?] October 1936 (UCDA: P150/2373).

[22] UCDA: P150/2385.

[23] 7 March 1937 (UCDA: P150/2399).

[24] 10 April 1937 (UCDA: P140/2417).

[25] 1 December 1936 (UCDA: P150/2378).

[26] 7 March 1937 (UCDA: P150/2399).

[27] 28 February 1937 (UCDA: P150/2387).

3. 1° *The President shall hold office for seven years from the date upon which he enters upon his office, unless before the expiration of that period he dies, or resigns, or is removed from office, or becomes permanently incapacitated, such incapacity being established to the satisfaction of the Supreme Court consisting of not less than five judges.*

Seven years from the date upon which he enters upon his office

The idea that the Presidency would continue for seven years was originally found in the Hearne draft of 18 May 1935, which stated: 'The President shall hold office for seven years.'[28] The length of tenure of the president was never challenged in subsequent drafts. The final wording relevant to date, 'from the date upon which he enters upon his office', was included in the draft of 19 October 1937.[29]

In the Dáil, de Valera explained the term as follows:

> The President's term of office, seven years, was chosen because in a matter of that sort frequent elections are inadvisable. That has been noted by several States on the Continent, a number of which have also chosen seven years as the period of office of the President. We are following possibly the majority in choosing that period. It is not too long, and at the same time it is sufficiently long, I think, to avoid the inconveniences of frequent elections.[30]

The Portuguese Constitution of 1933,[31] the Austrian Constitution of 1934,[32] the Polish Constitution of 1935,[33] the Polish Constitution of 1921,[34] the 1920 Constitutional Charter of the Czechoslovak Republic,[35] the 1919 Constitution of the German Reich[36] and the Constitution of the Third French Republic[37] all provided for a term of seven years. The attrac-

[28] UCDA: P150/2370.
[29] UCDA: P150/2385.
[30] 67 Dáil Debates 39 (11 May 1937).
[31] Article 72.2 stated: 'The President shall be elected for 7 years.'
[32] Article 73.5 stated: 'The Federal President shall hold his office for seven years.'
[33] Article 20.1 stated: 'The term of office of the President of the Republic shall be 7 years from the day on which he took over his duties.'
[34] Article 39 stated: 'The President of the Republic is elected for seven years.'
[35] Article 58.2 stated: 'The term of office of the President shall be seven years.'
[36] Article 43 stated: 'The President of the Reich holds office for seven years.'
[37] Article 3 of the Constitutional Law on the Organization of the Public Powers of 1875 provided: 'He shall be elected for seven years.'

tion seems obvious—the head of state was to provide the stability necessary to a democracy that was provided in the person of the monarch in a monarchy. The relatively long tenure provided the most apt method of dealing with this problem while still being consistent with the basic tenets of democratic governance.

In the committee stage of the Dáil debates, Frank MacDermott moved an amendment to reduce the term of office to six years.[38] De Valera pointed out the prevalence of the term limit and, as MacDermott could not secure support, the amendment was withdrawn.[39]

Unless before the expiration of that period he dies, or resigns, or is removed from office, or becomes permanently incapacitated, such incapacity being established to the satisfaction of the Supreme Court consisting of not less than five judges.

There are two distinct elements to be considered in relation to this clause. First, the draft deals with the circumstances under which the president's tenure can end before his seven year term has been fulfilled. Second, it deals with the procedure whereby 'permanent incapacity' is to be ascertained. The draft of 18 May 1935 did envisage the possibility that the president could 'die,' 'resign' or 'becom[e] ill or incapacitated for more than six months'.[40] The draft of 12 October 1936 provided for the 'removal from office of the President or of his death, resignation, or incapacity to discharge the functions of his office'.[41] This formula provided four means by which a president could fail to discharge his full term of office: removal from office; death; resignation; and incapacity. This 12 October draft differed from the Hearne draft in two ways. First, it did not specifically provide for illness on the part of the president. Second, it made specific reference to removal from office. One problem with the draft, however, was that it did not establish who should determine whether the president was incapacitated or not. The draft of 13 October modified the incapacity ground as it provided only for 'permanent' incapacity. The 19 October draft stated the president would hold office for seven years '(unless he previously dies, resigns, becomes permanently incapacitated, or

[38] 67 Dáil Debates (25 May 1937) col. 1070 Amendment No. 14.

[39] De Valera stated that he thought 'the period set down is a very common term for a Presidency. If you are going to have election by the people, the term of seven years is not too long. It is the term in the case of a number of Presidents in other countries, and consequently it seems to be a reasonable term.' 67 Dáil Debates (25 May 1937) cols. 1070–1071.

[40] 18 May 1935 (UCDA: P150/237)0.

[41] 12[?] October 1936 (UCDA: P150/2373).

is removed from office)'.[42] The question as to how to determine the incapacity or otherwise of the president was evidently considered during the cabinet discussions on the Constitution, as the draft of 22 October 1936 stipulated: 'the mental incapacity of the President shall be certified by the Council of State after having received the report of not less than three competent medical experts'.[43] This provision was abandoned for the draft of 1 December 1936.[44]

It was not until 10 April 1937 that this subsection was amended, and then only to remove the brackets.[45] On the advice of the department of finance,[46] the phrase 'unless he previously dies' was replaced, though not with their proffered alternative wording,[47] to read 'unless before the expiration of that period' in the draft of 24 April 1937.[48]

The problem of who was to determine when the president was permanently incapacitated had not been solved by the time that the draft Constitution was made public. In the draft of 24 April 1937, the responsibility had fallen on the council of state, and this was to remain the case until the Dáil debates.[49] This provision mirrored Article 80.1 of the 1933 Portuguese Constitution.[50] At the report stage, de Valera tabled an amendment to provide for the examination to be undertaken by the judges of the Supreme Court.[51] Dealing with the issue of locus standi, he said that while anyone could bring a motion, he believed the onus would fall naturally on the government.[52]

2° *A person who holds, or who has held, office as President, shall be eligible for re-election to that office once, but only once.*

[42] UCDA: P150/2385.

[43] 22 October 1936 (UCDA: P150/2374).

[44] 1 December 1936 (UCDA: P150/2378).

[45] 10 April 1937 (UCDA: P150/2417).

[46] 17 April 1937 (UCDA: P67/184).

[47] Finance suggested that 'unless within that period he dies' should be substituted for 'unless he previously dies'.

[48] UCDA: P150/2427.

[49] UCDA: P150/2427. This provision was to be found, at that time, in what was to become Article 12.7.

[50] Article 80.1 stated: 'The President's permanent physical disability must be recognized by the Council of State summoned for the purpose by the President of the Council of Ministers who, if the disability is confirmed, shall publish an announcement of the presidential vacancy in the *Diário do Govêrno*.'

[51] 68 Dáil Debates (9 June 1937) col. 124 Amendment No. 7.

[52] 68 Dáil Debates (9 June 1937) col. 124 Amendment No. 7.

This provision was initially included with the previous subsection, which dealt with the election of the president. The draft of 6 August 1936 provided that the president 'shall be eligible for re-election'.[53] This formula was to continue until publication. At the Dáil committee stage, John A. Costello moved an amendment to attempt to remove the above clause.[54] He believed that the president should not 'be subjected, in any way, to political influences or should have to look to the political effect of any of his official acts on his electorate when he comes up for re-election at the end of this term', a situation which he saw as inevitable if the possibility of re-election was open.[55] William Norton supported the amendment.[56] De Valera responded: '[the people] will judge his actions during his first period of office by his conduct in that office and, consequently, if a man has proved satisfactory, I see no reason why he should not be allowed to go forward again for re-election.'[57] Although Costello's amendment failed, the debate provided an opportunity for Frank MacDermott,[58] who proposed the introduction of the phrase 'once, but only once'.[59] De Valera was initially reluctant, stating that he did 'not think it really matters. My feeling about this is that we ought not to put in any restrictions of this kind'.[60] Nonetheless, he accepted the amendment, which provided the final wording.

3° An election for the office of President shall be held not later than, and not earlier than the sixtieth day before, the date of the expiration of the term of office of every President, but in the event of the removal from office of the President or of his death, resignation, or permanent incapacity established as aforesaid (whether occurring before or after he enters upon his office), an election for the office of President shall be held within sixty days after such event.

This subsection was most likely an amalgamation of Articles 72.2 and 80 of the Portuguese Constitution of 1933. The former stated '[t]he election shall take place on the Sunday nearest to the 60th day before the end of each presidential term,' while the latter stated:

[53] 6 Aug 1936 (UCDA: P150/2370).
[54] 67 Dáil Debates (25 May 1937) col. 1071 Amendment No. 15.
[55] 67 Dáil Debates (25 May 1937) cols. 1072–1073.
[56] 67 Dáil Debates (25 May 1937) cols. 1074–1075.
[57] 67 Dáil Debates (26 May 1937) col. 1085.
[58] Amendment no. 16, 67 Dáil Debates (25 May 1937) col. 1096.
[59] 67 Dáil Debates (25 May 1937) cols. 1090–1091.
[60] 67 Dáil Debates (25 May 1937) col. 1096.

> Should the Presidency of the Republic fall vacant owing to the death, resignation or permanent physical incapacity of the President, or his absence in a foreign country without the assent of the National Assembly and the Government, the new President shall be elected within a period not exceeding 60 days.

Other constitutions which provided a specific time limit for subsequent election of the president, the 1920 Constitutional Charter of the Czechoslovak Republic[61] and the 1921 Constitution of the Polish Republic,[62] provided different time limits.

The subsection may be broken down into two parts—the first deals with an election where the term of office has been fulfilled, the second deals with an election where the president has not served his full term.

An election for the office of president shall be held not later than, and not earlier than the sixtieth day before, the date of the expiration of the term of office of every president

Some elements of this were implicitly present in the draft of 19 October 1936. This provided that the date when the president was to take office was to be 'not later than two calendar months from the date of his election'.[63] This meant that an election could not be held earlier than two months, or approximately 60 days, before the expiration of the term of office of the previous president. The time limit was changed to 60 days in the draft of 11 January,[64] and reduced to 30 days in the draft of 13 February.[65]

The printed draft of 15 March 1937 contained the first draft of the final subsection: 'His successor shall enter upon his office on the day following the expiration of this period of seven years and elections for the office of President shall be held not more than sixty and not less than thirty days before its expiration.'[66] Under this section, an election for the presidency was to be held between 30 and 60 days before the expiration of the term

[61] Article 58.3 stated: 'The election of the President shall take place within the four weeks prior to the expiration of the term of office of the existing President.'

[62] Article 39 provided: 'The President of the Republic summons the National Assembly during the three months preceding the expiration of his term of office. If the National Assembly has not been summoned thirty days before the expiration of the presidential term of office, the Diet and Senate meet together as of full right as the National Assembly on the initiative and under the presidency of the Chairman of the Diet.'

[63] 19[?] October 1936 (UCDA: P150/2385).

[64] 11 January 1937 (UCDA: P150/2387).

[65] 13 February 1937 (UCDA: P150/2390).

[66] 15 March 1937 (UCDA: P150/2401).

of the sitting president. However, under the same draft, the new president was to take office 'on a date to be fixed by law not later than thirty days from the date of his election'.[67] Thus, the election was to be between 30 and 60 days before the end of term of the sitting president, while the new president was to take office not later than 30 days from the date of his election.

This wording created two risks. The first was the early election problem. This would allow for the possibility of abridging the term of office of the sitting president. If an election was held sixty days before the end of term of the sitting president then it would be impossible for the new president to take office 'not later than thirty days from the date of his election', unless such president cut short the term of his predecessor.

The second was the late election problem: a late election created the risk of a presidential vacuum. An election held 'not less than thirty days' before the expiration would presumably require at least one day for a candidate to be deemed elected. This candidate would then take office 'not later than thirty days from the date of his election', which was the day following the expiration of the sitting president's full term. The department of local government and public health drew attention to the fact that if presidential elections could be challenged then it might not be possible to determine the winner before the new period of office started.[68] This potentially tortured process was eliminated in the subsequent printed draft of 1 April 1937, with the removal of the 30-day limit between election and taking office.[69]

The entire subsection was revisited in light of objections to the 15 March 1937 version.[70] The complicating clause prescribing the time for the taking up of office was removed. The draft of 24 April 1937 stated: 'An election for the office of President shall be held not more than sixty days before the expiration of the term of office of every President.'[71] This formula was to remain untouched.

In the event of the removal from office of the president or of his death, resignation, or permanent incapacity established as aforesaid (whether occur-

[67] 15 March 1937 (UCDA: P150/2401).
[68] 22 March 1937 (National Archives of Ireland (hereafter NAI): Taois s.9715B).
[69] 1 April 1937 (UCDA: P150/2415).
[70] See NAI: Taois s.9715B, UCDA: P150/2416.
[71] 24 April 1937 (UCDA: P150/2427).

ring before or after he enters upon his office), an election for the office of president shall be held within sixty days after such event.

This section dates from the 18 May 1935 draft in which Hearne provided: 'Should the President die or resign during his term of office the election of a new President shall be held not later than two months from the date of such death or resignation.'[72] This formula was changed in October 1936. The draft of 12 October provided that in the event of the president's term being interrupted due to death, incapacity, resignation or removal from office, the powers of the president should devolve upon an 'acting president' nominated for the purpose by the Dáil.[73] It also stated: 'The period of office of a Vice-President elected by Dáil Éireann in any such event as aforesaid shall be determined by Organic Laws.' De Valera made a handwritten note that he wanted an outline of this proposed law.[74] The provision of an acting president was abandoned in the draft of 19 October 1936, which provided:

> In the event of the removal from office of the President or of his death, resignation or permanent incapacity to discharge the functions of the office an election to fill the office shall be held within two calendar months after such events as aforesaid.[75]

This formula was subsequently amended in the 13 February 1937 draft to a term of 60 days, presumably to ensure more continuity in the term.[76] George Gavan Duffy suggested merging these provisions with those regulating the term of office of the president.[77] Independently of Gavan Duffy, the department of finance offered similar advice on 17 April.[78] This advice was followed in the printed draft of 24 April 1937.[79] It was stated in that draft, however, that his permanent incapacity must be 'established to the satisfaction of the Council of State'. This form of words was to survive until the Dáil debates.

[72] 18 May 1935 (UCDA: P150/2370). The election was also stated to be held in accordance with the electoral laws then in force.
[73] 12[?] October 1936 (UCDA: P150/2373).
[74] Ibid.
[75] 19[?] October 1936 (UCDA: P150/2385).
[76] UCDA: P150/2390.
[77] UCDA: P150/2416.
[78] UCDA: P67/184.
[79] UCDA: P150/2427.

On 26 May and 28 May 1937, the provisions relating to incapacity were criticised by Patrick McGilligan,[80] who was scathing when considering whether the council of state would prove effective in such circumstances: 'That is the constitutional bulwark for the people against abuse by the President of the powers given to him under the Constitution. Just look at the Council of State, and see what constitutional bulwark it is.'[81]

As a result of this criticism, de Valera removed the provisions relating to the council of state.[82] Instead, as noted above under Article 12.3.1°, the incapacity was to be determined by members of the Supreme Court.

4. 1° *Every citizen who has reached his thirty-fifth year of age is eligible for election to the office of President.*

This subsection provides an instance where the initial Hearne draft ended up becoming the final version. The draft of 18 May 1935 states that '[e]very citizen of Saorstát Eireann who has completed his thirty-fifth year is eligible for the office of President'.[83] This age limit was the most common in all constitutions then extant. The Portuguese Constitution of 1933,[84] the 1934 Federal Constitution of Austria,[85] the 1920 Federal Constitutional Law of Austria,[86] the 1920 Constitutional Charter of the Czechoslovak Republic,[87] the 1919 Constitution of the German Reich[88] and the 1917 Political Constitution of the United States of Mexico all required that the president be at least 35 years old.[89] The origin of this provision seems to have been the US Constitution, which provided that

[80] See 67 Dáil Debates (26 May 1937) col. 1230 and 67 Dáil Debates (28 May 1937) cols. 1263–1264.

[81] 67 Dáil Debates (28 May 1937) col. 1263.

[82] 68 Dáil Debates (9 June 1937) col. 127.

[83] UCDA: P150/2370.

[84] Article 73 stated: 'Only a Portuguese citizen, over 35 years of age … may be elected President of the Republic.'

[85] Article 73.2 stated: 'In the three names the Federal Assembly can only include citizens who have passed the age of 35.'

[86] Article 60.3 stated: 'Only persons who are entitled to vote for the National Council and who have passed their thirty-fifth year on the 1st of January in the year of the election, may be elected as President of the Federation.'

[87] Article 56.2 stated: 'Any citizen of the Czechoslovak Republic may be elected as President who is eligible for the Chamber of Deputies and has reached the age of 35 years.'

[88] Article 41 provided: 'Every German citizen who has completed his thirty-fifth year is eligible.'

[89] Article 82.2 stated: 'He shall be over thirty-five years of age at the time of election.'

'neither shall any person be eligible to that office [of the president] who shall not have attained the age of thirty-five years'.

This was evidently not satisfactory because by 14 October 1936 the eligibility criteria had expanded to '[e]very person possessing Irish nationality who has completed his thirty-fifth year [and] who has resided for a specified period in E_'.[90] This provision was something of an anomaly by European standards, where there was generally a restriction to those who could vote but no residency requirement. The October draft seems to have been based on the US Constitution, which provided that 'neither shall any person be eligible to [the Presidency] who shall not have … been fourteen years a resident within the United States'. In the drafting of the Irish Constitution, this was shortened to ten years.[91] The draft of 1 December 1936 introduced a further eligibility criterion: the candidate could not be 'placed under disability or incapacity by law'.[92] The draft of 13 February 1937 added a disqualifying factor by inserting the phrase 'by this Constitution or' before 'by law'.[93] At this point, therefore, there were five qualifications. The candidate had to:

1. Possess Irish nationality,
2. Have 'ordinarily reside[d]' in Ireland during the ten years preceding nomination,
3. Not have been placed under disability or incapacity by the Constitution,
4. Not have been placed under disability or incapacity by the law, and
5. Have 'completed' his thirty-fifth year.

The draft of 28 February 1937 replaced the phrase 'person possessing Irish nationality' with 'citizen'. This was because one could possess Irish nationality by virtue of Article 1, for example by residing in Northern Ireland, but not be an Irish citizen.[94] These qualifications remained for the printed drafts which were circulated for comments. Robert Barton, a signatory of the Anglo-Irish Articles of Agreement for a Treaty who later

[90] UCDA: P150/2373. At this point, the assent of 20 members of the Dáil was also an eligibility criterion.

[91] 19[?] October 1936 (UCDA: P150/2385). This applied to the date of nomination, not potential election.

[92] 1 December 1936 (UCDA: P150/2378).

[93] 13 February 1937 (UCDA: P150/2390).

[94] See also Article 9.

opted to support the anti-treaty side of the split in Sinn Féin and was subsequently director of *The Irish Press*, noted that the '[r]esidence qualification would rule out, for example, an Irish representative abroad who might be the most suitable person for the office'.[95] The department of the president of the executive council also drew attention to the fact the residency requirement might be satisfied by being 'ordinarily resident' for any amount of time in the ten years preceding nomination, rather than residence for the full ten years.[96] These points resulted in the subsequent removal of the residency requirement in the draft dated 10 April 1937.[97] Arthur Matheson also drew attention to the fact that under the draft Constitution a presidential nominee had to have 'completed' his thirty-fifth year, but other age limits under that draft Constitution, for example being able to vote in a referendum, were expressed as 'reached', that is, 'every citizen who has reached the age of twenty-one years'.[98] This created an anomaly where a presidential nominee had to be one year older than under the corresponding age limit rules in other Articles. Matheson recommended that it be made uniform and the presidential age limit was changed to 'reached' in the draft of 26 April 1937.[99] The draft of 30 April 1937 removed the disqualification on the basis of constitutional impediment, ground (3) above, from the eligibility criteria.[100]

At the Dáil committee stage, James Fitzgerald-Kenny proposed an omnibus amendment to bar certain classes of people from holding the office of president.[101] De Valera argued that such people would not receive

[95] UCDA: P150/2416.

[96] NAI: Taois s.9715B.

[97] 10 April 1937 (UCDA: P150/2417).

[98] NAI: Taois s.9715B.

[99] 26 April 1937 (UCDA: P150/2428).

[100] 30 April 1937 (UCDA: P150/2429). The first draft of 19 October 1936 stated: 'A member of the Oireachtas shall not be entitled to be a candidate for the office of President in respect of the same election' (UCDA: P150/2385). Also, the department of finance in their second commentary on the Constitution of 17 April 1937 had proposed a provision whereby an impeached president could not become a candidate upon their own nomination; see UCDA: P67/184. The provision stated: 'Retiring Presidents or former Presidents other than one who had been removed from office under Section 9 of the Article or who had become permanently incapable to discharge the functions of his office may become candidates on their own nomination.' Neither of these constitutional provisions survived the drafting process.

[101] 67 Dáil Debates (26 May 1937) cols. 1096–1097 Amendment No. 17 which stated:

Each of the following persons shall be disqualified from being elected to or holding or retaining the office of President:

the necessary support to be nominated, and then to be elected.[102] At the report stage, de Valera, perhaps mindful of the possibility of Fitzgerald-Kenny's defeated amendment being enacted legislatively, tabled an amendment which deleted any possibility of being excluded by disability or incapacity by law. He noted: 'The position is that if you leave these words in there without any qualification it would be open to the Legislature practically to exclude individuals or a class of individuals by legislation.'[103]

2° *Every candidate for election, not a former or retiring President, must be nominated either by:*

(i) not less than twenty persons, each of whom is at the time a member of one of the Houses of the Oireachtas, or

(ii) by the Councils of not less than four administrative Counties (including County Boroughs) as defined by law.

The draft of 12 October 1936 provided that a candidate was to be 'nominated by not less than fifteen members of Dáil Éireann' in order to be eligible to stand for the presidency.[104] The draft of 19 October 1936 changed the requirement to 20 members of the Oireachtas.[105] This eligi-

(a) a person who is undergoing sentence of imprisonment with hard labour for any period exceeding six months or of penal servitude for any term imposed by a court of competent jurisdiction,
(b) an imbecile and any person of unsound mind,
(c) an undischarged bankrupt, under an adjudication by a court of competent jurisdiction,
(d) a person who is by law for the time being in force in relation to corrupt practices and other offences at elections incapacitated from being a member of Dáil Éireann by reason of his having been found guilty by a court of competent jurisdiction of some such practice or offence,
(e) a member of the Defence Forces on full pay,
(f) a member of any police force on full pay,
(g) a person employed in the Civil Service.

[102] 67 Dáil Debates (26 May 1937) cols. 1097–1098, 1102. At 1103 de Valera stated:

> Either we are going to have democracy or we are not. The whole position in this Constitution is that the people can judge when a person is put before them whether that particular individual is, in their opinion, the most suitable. Once you have the supreme authority in that matter consolidated, as it is directly by this method, I do not think you want to put in any qualifications whatever.

He went on to state he was prepared to remove the age qualification 'if I can get any support from other members of the House'.

[103] 68 Dáil Debates (9 June 1937) 128 Amendment No. 9.

[104] 12[?] October 1936 (UCDA: P150/2373).

[105] 19[?] October 1936 (UCDA: P150/2385).

bility criterion was transformed into a nomination clause in the draft of 22 October 1936, which stated: 'Every candidate for election (not a former or retiring Pres.) must be nominated by not less than twenty persons, each of whom is at the time a member of one of the Houses of the Oireachtas.'[106] This formula was amended in the draft of 13 February 1937 to 30 members,[107] but this was reversed in the draft of 28 February 1937.[108]

The addition of the second potential route of election was not added until the draft of 13 February 1937, which provided that one could be nominated by '(b) the councils of not less than five counties ("including county Boroughs") in E'.[109] This was superseded by the draft of 28 February 1937, which provided for 'the councils of not less than four counties, including county Boroughs, in Eire'.[110] The final change was made in the printed draft of 1 April 1937, which inserted the word 'administrative' and substituted the phrase 'in Éire' for 'as defined by law'.[111] The latter amendment makes two primary changes. First, the councils recognised are contingent on legislation, which allows for greater flexibility in defining the councils.[112] The second is that there is no longer any geographical limitation on the nominating councils. It is arguable that this may have enabled the Oireachtas to include councils in Northern Ireland as legitimate nominating bodies for the purposes of the subsection, although this may no longer be a constitutionally harmonious view, given the 1998 amendments to Articles 2 and 3.

In the report stage, de Valera tabled, but ultimately did not move, an amendment to read 'either of the Houses of the Oireachtas' as he believed the use of the word 'one' made it look as if the nominators all had to be from the same house.[113]

3° *No person and no such Council shall be entitled to subscribe to the nomination of more than one candidate in respect of the same election.*

[106] UCDA: P150/2374.

[107] UCDA: P150/2390.

[108] 28 February 1937 (UCDA: P150/2387).

[109] 13 February 1937 (UCDA: P150/2390).

[110] UCDA: P150/2387. The words 'council', 'counties' and 'county' were capitalised in the second X draft.

[111] UCDA: P150/2415.

[112] It is arguable, of course, that such flexibility would have been implied under the old formula.

[113] 68 Dáil Debates (9 June 1937) col. 130 Amendment No 10. De Valera opened with the phrase: 'I doubt very much if the wording of amendment No. 10 is sufficient.'

The genesis of this provision may be traced to the cabinet discussions of October 1936, where the draft of 22 October stated: 'No person shall be entitled to participate in the nomination or more than one candidate in respect of the same election.'[114] This provision, which applied to the only method of nomination foreseen at that point in the drafting process, was superseded by the introduction of council nomination in the draft of 13 February 1937, which provided: 'No person and no council of a county shall be entitled to participate in the nomination of more than one candidate in respect of the same election.'[115] The draft of 28 February 1937 slightly amended the subsection by providing that no 'such council or county borough' would be entitled to 'subscribe' to the nomination of more than one candidate.[116] The final amendment, the removal of the phrase 'County Boroughs', occurred in the draft of 7 March 1937.[117] This amendment was presumably made because the previous subsection defined councils as including county boroughs.

4° *Former or retiring Presidents may become candidates on their own nomination.*

This provision was inserted during the cabinet discussions in October 1936. The first drafts had no commensurate provision. The draft dated 22 October 1936 contained the first use of this section: 'Former or retiring Presidents may become candidates on their own nomination.'[118] The purpose seems clear both from the timing and use of the phrase 'former or retiring Presidents': the provision was inserted to prevent the president relying on the support of the houses of parliament since the president was meant to act, in certain circumstances, as a suspensory force on the popular branches of government. The department of finance questioned this automatic ability to self-nominate, noting on 17 April 1937:

> Section 10 provides for the holding of a new election in the event of the removal of a President from office on impeachment or of his permanent incapacity to discharge the functions of his office. Should, therefore, the right of such a former President to nominate himself remain unqualified in the draft Subsection? The chances are, admittedly, entirely against such an

[114] UCDA: P150/2374.
[115] 13 February 1937 (UCDA: P150/2390).
[116] 28 February 1937 (UCDA: P150/2387).
[117] 7 March 1937 (UCDA: P150/2399).
[118] 22 October 1936 (UCDA: P150/2374).

> emergency arising—but million to one chances are coming to pass regularly in every Dublin Sweepstake.[119]

Despite this objection, the subsection remained.

5° *Where only one candidate is nominated for the office of President it shall not be necessary to proceed to a ballot for his election.*

This provision was inserted late in the drafting process. Its first appearance, using the form of words subsequently adopted, was in the printed draft of 7 March 1937.[120] The department of finance, in their notes of 17 April 1937, pointed out that:

> Proportional representation can only apply where more than two candidates for the Presidency are nominated. Subsection 4.5° provides specifically for the eventuality of there being only one candidate nominated. Should there not be provision for the occasion when only two candidates have been nominated?[121]

This point was not adopted.

5. *Subject to the provisions of this Article, elections for the office of President shall be regulated by law.*

The explanatory draft of 14 October 1936 stated that 'elections to office of President [are] to be regulated by Organic Laws'.[122] This provision was modified somewhat by 19 October 1936 to read: 'Elections to the office of President by direct vote of the people shall, subject to the provisions of Section 4 of this Article, be regulated by Organic Laws.'[123] As noted earlier, the provisions relating to Organic Laws were gradually removed from drafts of the Constitution.[124] The basic tenor of this provision relating to statutory control of presidential elections underwent only syntactical modification until the final version adopted in the draft of 30 April 1937.[125]

[119] UCDA: P67/184.
[120] 7 March 1937 (UCDA: P150/2415).
[121] UCDA: P67/184.
[122] 14 October 1936 (UCDA: P150/2373).
[123] 19[?] October 1936 (UCDA: P150/2385).
[124] 11 January 1937 (UCDA: P150/2387).
[125] 30 April 1937 (UCDA: P150/2429).

6. 1° *The President shall not be a member of either House of the Oireachtas.*

This sentiment is to be found in the first Hearne draft of 18 May 1935, which provided that the president 'shall not be a member of the Chamber of Deputies established by this Constitution (hereinafter referred to as "Dáil Éireann")'.[126] At that time, the Government was engaged in the abolition of the Senate, which did not take effect until 1936.[127] The 19 October 1936 draft provided that the president 'shall not be a member of either House of the Oireachtas'.[128] Previous drafts had not established whether an upper house was to be established under the new Constitution; therefore, no provision was included in them barring Senators from the presidency. This section was originally coupled with Article 12.6.3° but these were separated in the draft of 11 January 1937.[129]

2° *If a member of either House of the Oireachtas be elected President, he shall be deemed to have vacated his seat in that House.*

Article 73 of the Portuguese Constitution provided: 'Should the individual elected be a member of the National Assembly, he shall lose his mandate.' The Portuguese equivalent was slightly confused as it did not stipulate which mandate, whether the presidency or membership of the national assembly, would be lost.[130] The Irish counterpart has no such ambivalence.

Although the original draft of 18 May 1935 contained a provision barring the president from being a member of the council of deputies, it provided no machinery to deal with this contingency. It was not until the first full draft produced in the aftermath of the cabinet discussions, that of 1 December 1936, that the phrase first appeared: 'In the event of a member of either House of the Oireachtas being elected President he shall resign his seat in that House.'[131] The version of the 1 December draft in the de Valera papers is actually Hearne's copy and this clause is marked '[n]ot in President's 2nd Draft'. This highlights the ongoing revisions that occurred even during the process itself, when draft versions of clauses could sometimes be produced on a daily basis. This version was to survive

[126] 18 May 1935 (UCDA: P150/2370).

[127] *Constitutionalism in Ireland*, Chap. 2.

[128] 19[?] Oct 1936 (UCDA: P150/2385).

[129] 11 January 1937 (UCDA: P150/2387).

[130] It seems possible that this may be a problem of translation—the original Portuguese version may not be ambiguous.

[131] 1 December 1936 (UCDA: P150/2378).

until 13 February 1937, when 'resign' was replaced with 'be deemed to have vacated'. The benefit of the change was to make the clause self-executing and therefore avoid any possible conflict in the event of the newly elected president refusing to resign his or her seat. It was not until the first printed draft of 7 March 1937 that the opening '[i]n the event of' was replaced with '[i]f'.[132] This seems to have been a purely stylistic change.

3° *The President shall not hold any other office or position of emolument.*

This provision is similar to Article 11 of the US Constitution.[133] The beginnings of this subsection may be traced to the draft of 19 October 1936, which stated: 'The President […] shall not, save as provided by this Constitution, hold any other office.'[134] This was expanded in the aftermath of the cabinet discussions to read: 'The President […] shall not hold any other office or position of emolument.'[135] Although there are handwritten amendments to this subsection in certain drafts, the formula remained throughout the drafting process.[136]

7. *The first President shall enter upon his office as soon as may be after his election, and every subsequent President shall enter upon his office on the day following the expiration of the term of office of his predecessor or as soon as may be thereafter or, in the event of his predecessor's removal from office, death, resignation, or permanent incapacity established as provided by section 3 hereof, as soon as may be after the election.*

[132] 7 March 1937 (UCDA: P150/2399).

[133] Article II Section 1(8) states: 'The President … shall not receive [during his time in office] any other emolument from the United States, or any of them.' Article 61 of the 1920 Constitution of the Republic of Austria stated: 'The President of the Federation may not during his period of office belong to any public representative body nor follow any other calling.' This seems far less likely this was the model, both because of the lack of the specific term 'emoluments' and because it seems to be aimed primarily at preventing the President from holding other political office.

[134] 19[?] October 1936 (UCDA: P150/2385).

[135] 1 December 1936 (UCDA: P150/2378). The qualification was originally part of a longer clause which incorporated the prohibition on membership of the houses of the Oireachtas now found in Article 12.6.1°; these elements were separated in the draft of 11 January 1937 (UCDA: P150/2387).

[136] The second X draft contains the phrase 'public' in the margin of this subsection; see UCDA: P150/2387. The draft of 15 March 1937 contains the phrase 'public qual' in the margin; see UCDA: P150/2401. Both of these amendments suggest the possibility of the president taking up a private position, perhaps an honorary one. This note was not acted upon.

The draft of 12 October 1936 stated: 'The President shall enter upon his office on a date not later than two calendar months from the date of his election.'[137] This was amended during the cabinet discussions so that the date, within the two-month limit, was to be 'fixed by law'.[138] The time limit was subsequently amended to read 'two calendar months',[139] and finally 'sixty days'.[140] This was subsequently shortened on 13 February 1937 to 'not later than thirty days'.[141] The formula used was, as we have seen, problematic and the subsection disappeared completely from the printed drafts of 1 April 1937.[142] The version which appeared on 24 April 1937 was as follows:

> The first President shall enter upon his office as soon as may be after his election, and every subsequent President shall enter upon his office on the day following the expiration of the term of office of his predecessor or as soon as may be thereafter or, where his predecessor was removed, died, resigned, or became permanently incapacitated, as soon as may be after the election.[143]

The final wording was introduced in the Dáil on 9 June 1937; it was described by de Valera as being 'more or less consequential' on the procedure whereby permanent incapacity was to be determined by the Supreme Court under Article 12.3.1°.[144]

8. *The President shall enter upon his office by taking and subscribing publicly, in the presence of members of both Houses of the Oireachtas, of Judges of the Supreme Court and of the High Court, and other public personages, the following declaration:*

The Hearne draft of 18 May 1935 provided the oath that was to be taken before Dáil Éireann.[145] The draft of 12 October provided that the oath was to be taken before the chief justice and in the presence of the

[137] 12[?] October 1936 (UCDA: P150/2373).
[138] UCDA: P150/2374.
[139] 1 December 1936 (UCDA: P150/2378).
[140] 11 January 1937 (UCDA: P150/2386).
[141] 13 February 1937 (UCDA: P150/2390).
[142] 1 April 1937 (UCDA: P150/2415).
[143] 24 April 1937 (UCDA: P150/2427).
[144] 68 Dáil Debates (9 June 1937) col. 132.
[145] 18 May 1935 (UCDA: P150/2370).

cabinet, judges of the superior courts and members of Dáil Éireann.[146] This was revised for the draft of 19 October 1936, which stated that the presidential inauguration was to be public and 'before the Chief Justice of E'.[147] This provision was amended during the cabinet discussions of October 1936. The draft of 22 October 1936 reinstated the earlier position; it stipulated that the oath had to be taken in the 'presence of members of both Houses of the Oireachtas, of the Supreme and High Courts, and other public personages'.[148] The draft of 28 February 1937 modified the clause so that it involved only such members of the Oireachtas and superior courts 'as desire to be present'.[149] This would avoid a potential diplomatic incident due to individuals refusing to attend. This innovation was reversed in the first printed draft of 7 March 1937.[150] The timing is interesting as the March drafts were subsequently circulated to members of the judiciary. The reversal of this innovation may have been to prevent any slight being perceived by the judicial branch.

> *In the presence of Almighty God I do solemnly and sincerely promise and declare that I will maintain the Constitution of Ireland and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. May God direct and sustain me.*

The draft of 18 May 1935 contained the following oath:

> I swear by Almighty God that I will maintain the Constitution of Saorstát Eireann and uphold its laws and that I will dedicate my powers to the service and welfare of the people of Saorstát Eireann and defend the State against all its enemies whomsoever domestic and external and fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law. So help me God.[151]

This initial version appears to be a blend of the presidential oaths provided for under the Weimar Constitution of 1919 and the Polish Constitution of 1921. The German Constitution was the more direct

[146] 12[?] October 1936 (UCDA: P150/2373).
[147] 19[?] October 1936 (UCDA: P150/2385).
[148] 22 October 1936 (UCDA: P150/2374).
[149] 28 February 1937 (UCDA: P150/2387).
[150] UCDA: P150/2399.
[151] UCDA: P150/2370.

source.[152] The Weimar Constitution did not actually incorporate a religious element into the oath, but stated that '[t]he addition of a religious asseveration is permissible'. In 1925, Paul von Hindenburg was elected President and added the following beginning and ending to his presidential oath: 'I swear by Almighty and Omniscient God … So help me God.'[153] It is unclear whether or not Hearne was aware of this 1925 addition, but the religious element in his 1935 draft is very similar.

This version was amended by the cabinet, which struck out the clause relating to defending the state from its enemies and replaced the final line with: 'God is a witness of this.'[154] The opening use of the word 'swear' was replaced by the phrase 'solemnly declare' in the draft of 13 February.[155] It is unclear whether this was related to the oath controversy under the 1922 Constitution.[156] This wording was further amended by the draft of 28 February, which replaced 'declare' with 'promise' and 'powers' with 'abilities'.[157] The first printed draft of 7 March altered the syntax so the oath began with the phrase, '[i]n the presence of Almighty God'.[158] The draft produced on 1 April settled the formula of the first sentence with the final

[152] Article 42 provided the oath as follows: 'I swear to dedicate my powers to the welfare of the German people, to augment their prosperity, to guard them from injury, to maintain the Constitution and the laws of the Reich, to fulfil my duties conscientiously, and to do justice to every man.'

[153] Hans F. Helmot, *Hindenburg: Das Leben eines Deutschen* (Karlsruhe: Wilhem Schille & Co, 1926), 308.

[154] 22 October 1936 (UCDA: P150/2374). This revision also placed the phrase 'in accordance with the Constitution and the law' in brackets.

[155] 13 February1937 (UCDA: P150/2390).

[156] *Constitutionalism in Ireland*, Chaps. 1 and 2.

[157] 28 February 1937 (UCDA: P150/2387). It read:

> I solemnly promise in the presence of Almighty God that I will maintain the Constitution of Eire and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Eire.

[158] UCDA: P150/2399.

version.[159] 'May God direct and sustain me' was not added until the draft of 24 April.[160]

9. *The President shall not leave the State during his term of office save with the consent of the Government.*

The governor-general of the Free State could not leave the state without the prior consent of the king.[161] Continental constitutions also placed restrictions on the ability of their heads of state to travel; for example, Article 76 of the Portuguese Constitution of 1933 stated: 'The President of the Republic may not go abroad without the assent of the National Assembly and the Government.' Although there was no equivalent provision in the first Hearne draft, by 13 October 1936 the draft Constitution stipulated: 'The President shall not leave E. during his term of office save with the consent of the Council of Ministers.'[162] The draft of 22 October 1936 replaced the abbreviation 'E.' with 'the territory of E.'[163] The draft of 12 October 1936 had claimed the national territory was to be the island of Ireland. It was arguable, therefore, that a president would not need to obtain the consent of the government to travel to Northern Ireland. This formula was therefore abandoned; the draft of 1 December 1936 started that '[t]he President shall not leave E. during his term of office save with the consent of the Council of Ministers'.[164] The word 'Éire' was replaced with the phrase 'the State' on 9 June 1937.[165]

10. 1° *The President may be impeached for stated misbehaviour.*

[159] UCDA: P150/2415. It read:

> In the presence of Almighty God I do solemnly and sincerely promise and declare that I will maintain the Constitution of Éire and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Éire.

[160] 24 April 1937 (UCDA: P150/2427).

[161] Brendan Sexton, *Ireland and the Crown 1922–1936: The Governor-Generalship of the Irish Free State* (Dublin: Irish Academic Press, 1989), 184.

[162] 13[?] October 1936 (UCDA: P150/2373).

[163] 22 October 1936 (UCDA: P150/2374).

[164] 1 December 1936 (UCDA: P150/2378).

[165] 68 Dáil Debates (9 June 1937) col. 133.

The earliest drafts of the Constitution did not provide for the removal or impeachment of the president. The draft of 12 October 1936 stipulated: 'The President shall be removed from office on impeachment by Dáil Éireann for treason, bribery, or other high crimes or misdemeanours and on conviction thereof by two-thirds of the total membership of Dáil Éireann.'[166] This formula was taken from the US Constitution, Article II Section 4 of which provides that '[t]he President […] shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanours'.

The October 1936 wording was amended during the cabinet discussions to include 'violation of the Constitution',[167] but this provision was removed in the draft of 1 December 1936, presumably to avoid the possibility of an overly politicised impeachment process.[168] The entire section dealing with impeachment was revised in the draft of 13 February: 'The President may be impeached […] for treason or other high crimes or misdemeanours.'[169] Subsequently, the word 'treason' was tempered by the phrase 'as defined in this Constitution' in the draft of 15 March.[170] This formula survived the private drafting process before the draft Constitution was made public in May 1937.

The impeachment process was radically revised during the course of the Dáil debates on the Constitution. In the committee stage of those, John A. Costello tabled an amendment to delete Section 10 in its entirety.[171] He questioned the wisdom of the entire mechanism because he believed the president would be able to simply ignore the impeachment process and, if impeached, seek re-election.[172] Costello also questioned what was meant by the phrase 'high crime'.[173] James Fitzgerald-Kenny questioned the procedures which would be followed.[174] While the deputies were agreed that the president was unlikely to commit treason, William Norton posed the possibility that disreputable conduct might not fall within the ambit of the

[166] 12[?] October 1936 (UCDA: P150/2373).
[167] 22 October 1936 (UCDA: P150/2374).
[168] 1 December 1936 (UCDA: P150/2378).
[169] 13 February 1937 (UCDA: P150/2390).
[170] 15 March 1937 (UCDA: P150/2401).
[171] 67 Dáil Debates (26 May 1937) col. 1116 Amendment No. 23.
[172] 67 Dáil Debates (26 May 1937) cols. 1117–1118.
[173] 67 Dáil Debates (26 May 1937) cols. 1117–1118.
[174] 67 Dáil Debates (26 May 1937) cols. 1120–1122.

procedure.[175] The section was contested on these and other grounds, and de Valera agreed to fashion a substitute section for the report stage.[176]

At the report stage de Valera tabled an amendment which contained a version of Section 10 that was very close to the final version.[177] He was subjected to criticism on the basis of Subsection 5, which dealt with the investigation of an impeachment charge. The amendment was withdrawn on the understanding that if Subsection 5 could be dealt with, it would be re-introduced.[178] The section was finally introduced on 10 June 1937.[179]

2° *The charge shall be preferred by either of the Houses of the Oireachtas, subject to and in accordance with the provisions of this section.*

3° *A proposal to either House of the Oireachtas to prefer a charge against the President under this section shall not be entertained unless upon a notice of motion in writing signed by not less than thirty members of that House.*

4° *No such proposal shall be adopted by either of the Houses of the Oireachtas save upon a resolution of that House supported by not less than two-thirds of the total membership thereof.*

The draft of 12 October 1936 stated the president was to be impeached by Dáil Éireann and could only be convicted by two-thirds of the members of the Dáil.[180] The draft of 19 October 1936 provided for impeachment by the Dáil but conviction by two-thirds of the total membership of both houses sitting in joint session. This was changed in the draft of 13 February 1937, where impeachment was to take place by the Seanad, or Senate.[181] While the initial provision did not state a figure, thus implying that a simple majority was sufficient, the draft of 1 April stated that the impeachment was to be by a two-thirds vote of the total membership of the Seanad.[182] The department of finance questioned the arrangements, noting:

> It is open to doubt whether the impeachment should not be taken on the initiative of Dáil Éireann and the tribunal be the Seanad. Presumably impeachment will be in the nature of a safety valve at some time of popular

[175] 67 Dáil Debates (26 May 1937) col. 1127.
[176] 67 Dáil Debates (26 May 1937) col. 1163.
[177] 68 Dáil Debates (9 June 1937) cols. 134–135 Amendment No. 14.
[178] 68 Dáil Debates (9 June 1937) col. 146.
[179] 68 Dáil Debates (10 June 1937) cols. 295–296.
[180] 12[?] October 1936 (UCDA: P150/2373).
[181] 13 February 1937 (UCDA: P150/2390).
[182] 1 April 1937 (UCDA: P150/2415).

> excitement so that the drive for impeachment would more naturally be expressed through the popular assembly; whilst the calm and judicial atmosphere for a tribunal would be more likely to be found in the Seanad than in the Dáil.[183]

This was ignored during the private drafting process. The provision was changed at the report stage to what became the final version. Subsections 3 and 4 were introduced in their final version when the impeachment procedure was revised on 10 June.[184]

5° *When a charge has been preferred by either House of the Oireachtas, the other House shall investigate the charge, or cause the charge to be investigated.*

The 19 October 1936 draft of this subsection did not directly mention investigation of the charge but did state that conviction was to take place 'at a joint session' of both houses.[185] This could appear to imply that both houses were to investigate but the provision is far from clear. Interestingly, the cabinet discussions initially proposed that the Supreme Court was to act as a fact-finder and report to both houses of parliament.[186] This provision was altered only in light of the wholesale revision of the impeachment process, which occurred for the draft of 13 February 1937.[187] Under this system, the Seanad was to impeach, while the charge was to be preferred before the members of the Dáil, who were to 'investigate the charge'.

The version of Subsection 5 prepared for the report stage stated: 'A charge preferred by either House of the Oireachtas under this section shall be investigated by the other House.' In the course of his exposition of this subsection, de Valera revealed that he believed the subsection allowed the House the latitude to determine the method of investigation—it could, in other words, be investigated by a committee.[188] James Fitzgerald-Kenny disputed this assertion. First, he argued that under the principle *delegatus non potest delegare*, the House could not appoint another body to investigate when it had itself been so appointed by the Constitution.[189] Second,

[183] 19 March 1937 (UCDA: P67/184).
[184] 68 Dáil Debates (10 June 1937) cols. 295–296.
[185] UCDA: P150/2385.
[186] 22 October 1936 (UCDA: P150/2374). The draft stated: 'The charges shall be preferred before the Supreme Court, who shall investigate and report upon the facts to the two Houses of the Oireachtas.'
[187] 13 February 1937 (UCDA: P150/2390).
[188] 68 Dáil Debates (9 June 1937) cols. 135, 140.
[189] 68 Dáil Debates (9 June 1937) col. 141.

he claimed that as members had to vote by a two-thirds majority for impeachment under Section 7, they should satisfy themselves as to the evidence in the case.[190]

De Valera withdrew the entire impeachment process as a result of this intervention, but he actually coined the phrase which was to appear in the final version in the house when he noted:

> At one stage, I thought we might put in 'shall cause to be investigated,' but I do not want to limit the power of direction there. I think that if you wanted to remove doubts, you would have to put in both phrases. You would have to say 'investigate or cause to be investigated.'[191]

This phrase was designed to overcome the *delegatus* objection and to allow the house to appoint an external body to investigate the president. The final wording was introduced on 10 June 1937.[192]

6° *The President shall have the right to appear and to be represented at the investigation of the charge*.

The genesis of this subsection is to be found in the re-drafting of 13 February 1937 of the impeachment procedure. This stated: 'The President shall have the right to be represented at such investigation by Dáil Éireann.'[193] This was changed to its final form in the draft of 1 April,[194] seemingly in response to the suggestion of exactly this provision by the department of finance in their memorandum of 19 March.[195]

7° *If, as a result of the investigation, a resolution be passed supported by not less than two-thirds of the total membership of the House of the Oireachtas by which the charge was investigated, or caused to be investigated, declaring that the charge preferred against the President has been sustained and that the misbehaviour, the subject of the charge, was such as to render him unfit to continue in office, such resolution shall operate to remove the President from his office*.

[190] 68 Dáil Debates (9 June 1937) cols. 135–137.

[191] 68 Dáil Debates (9 June 1937) col. 142.

[192] 68 Dáil Debates (10 June 1937) col. 296.

[193] UCDA: P150/2390. The procedure at that time called for the charge to be investigated by the Dáil.

[194] UCDA: P150/2415.

[195] UCDA: P67/184, where they suggested '[p]erhaps the President should be entitled to appear, as well as to be represented'.

The draft of 19 October 1936 provided for impeachment 'by two-thirds of the total membership of both Houses of the Oireachtas at a joint session thereof'.[196] The 22 October draft altered the process. The Supreme Court was to investigate the charge and prepare a report for both Houses of the Oireachtas:

> On receipt of the report the two Houses shall meet and consider it in joint session, and if a resolution of condemnation be passed, supported by two-thirds of the total membership of both Houses of the Oireachtas, the President shall thereupon cease to be President vacate his office and an election for his successor shall be ordered.[197]

This subsection was superseded by the draft of 13 February 1937, which stipulated that the Dáil was to be the sole investigator of the charges. Under those circumstances the following procedure was to be followed:

> If, as a result of such investigation, a resolution be passed supported by not less than three-fourths of the total membership of Dáil Éireann declaring that the charge preferred against the President has been sustained, such resolution shall operate to remove the President from his office.[198]

This super-majority was refined to a two-thirds majority in the draft of 1 April 1937.[199] This provision was to survive the private drafting process. This draft provided only for a resolution to be passed by Dáil Éireann. In the Dáil debates, de Valera proposed an amended version of this article which would allow either house of the Oireachtas to pass such a resolution.[200] This was subsequently amended to allow for a committee to investigate a charge. The final version was included on 10 June 1937.[201]

[196] UCDA: P150/2385.

[197] 22 October 1936 (UCDA: P150/2374). Apparently, the cabinet considered whether the former president should be allowed to go forward on his own nomination in these circumstances; the phrase 'provided that he may go forward for election' appears in handwriting in the margin but is struck through.

[198] 13 February 1937 (UDA: P150/2390). This phrasing was amended slightly by the second X draft, in which the first use of the word 'such' was replaced with 'this'; see UCDA: P150/2387. It was subsequently replaced with 'the' in the first printed draft of 7 March 1937; see UCDA: P150/2399. The second use of the word 'such' was replaced with 'this' in the draft of 7 March 1937.

[199] 1 April 1937 (UCDA: P150/2415).

[200] 68 Dáil Debates (9 June 1937) col. 134.

[201] 68 Dáil Debates (10 June 1937) col. 296

11. 1° *The President shall have an official residence in or near the City of Dublin.*

The draft of 12 October 1936 stipulated: 'The President shall have an official residence.'[202] In the early drafts, this subsection was married to provisions relating to emoluments. The subsection was amended for the draft of 13 February 1937, which stated: 'The President shall have an official residence in or near the City of Dublin.'[203] This provision was modified only in the draft of 28 February 1937, where it was removed from the surrounding clauses.[204]

2° *The President shall receive such emoluments and allowances as may be determined by law.*

The draft of 12 October 1936 provided: 'The President … shall receive such emoluments and allowances as may be determined by law.'[205] The draft of 19 October 1936 provided that the president would also have 'an official staff and secretariat'.[206] In the draft of 13 February 1937, the sentence was amended to: 'The President and his official staff and secretariat shall receive such emoluments and allowances as may be determined by law.'[207] Previously the guarantee had extended only to the president himself. On 19 March, the department of finance noted: 'It is not desirable that the staff and secretariat should be included in this provision as they will, presumably, be members of the Civil Service, Army, etc., whose remuneration will otherwise be determined.'[208] In the draft of 10 April, all mentions of the official staff and secretariat were removed from the Constitution.[209]

3° *The emoluments and allowances of the President shall not be diminished during his term of office.*

This subsection was included in the draft of 19 October 1936 in its final form.[210]

[202] 12[?] October 1936 (UCDA: P150/2373).
[203] 13 February 1937 (UCDA: P150/2390).
[204] 28 February 1937 (UCDA: P150/2387).
[205] UCDA: P150/2373.
[206] 19[?] October 1936 (UCDA: P150/2385).
[207] 13 February 1937 (UCDA: P150/2390).
[208] UCDA: P67/154.
[209] 10 April 1937 (UCDA: P150/2417).
[210] 19[?] October 1936 (UCDA: P150/2385).

The Powers of the President

In the course of debates in the Dáil, de Valera said that the president was there 'to guard the people's rights and mainly to guard the Constitution'.[211] Hogan and Whyte state that despite this claim:

> the Constitution is extremely sparing in its attribution of any independent functions to the office at all. The only possible basis for describing the office as the protector of the Constitution—the infrequently-used machinery of Article 26—is in fact arguably inimical to the upholding of constitutional values, since a Bill, once cleared under the Article 26 procedure and passing into law, can by Article 34.3.3° never again be challenged, even though conditions … may have changed, or the working may have disclosed objectionable results not foreseen at the time of the Article 26 reference.[212]

Presidential powers under the 1937 Constitution are based on a contemporary continental model of a 'suspensive' veto. Under this theory, the president merely has the power to suspend a decision or law from coming into force, pending the definitive settlement of the issue by another body. This general theory underpins the office of the Irish president. Agnes Headlam-Morley put forward the case in favour of the 'suspensive' veto in 1928:

> Experience seems to show that under a democratic constitution it is possible to give to an elected President, who derives his authority from the people and can be removed by them, more real political power than to an hereditary ruler. Moreover, a suspensive veto, which depends upon the ratification of the people or is intended only to bring about the reconsideration of a measure, is really a more effective weapon than an absolute veto, which implies an independent source of authority in the State head. Such a veto can be exercised only in exceptional circumstances; if it falls into disuse, any attempt to revive it would lead to a constitutional crisis.[213]

De Valera's views, therefore, were in line with continental constitutional practice. This same source may have been the inspiration for de Valera's description of the president in the Dáil. Headlam-Morley

[211] 67 Dáil Debates (11 May 1937) col. 51.

[212] Gerard Hogan and Gerry Whyte, *J M Kelly: The Irish Constitution*. 4th ed. (Dublin: Butterworths, 2003), 198 fn 8.

[213] Agnes Headlam-Morley, *The New Democratic Constitutions of Europe* (Oxford: Oxford University Press, 1928), 167.

described the president of the German Reich as 'the head and representative of the united nation, *the guardian of the people's rights*, the centre of the Government, the stable element in the Constitution'.[214] De Valera may have been thinking of Headlam-Morley's comments about the role of the German president when he described the position of the Irish president in the Dáil.

Article 13

1. 1° *The President shall, on the nomination of Dáil Éireann, appoint the Taoiseach, that is, the head of the Government or Prime Minister.*
   2° *The President shall, on the nomination of the Taoiseach with the previous approval of Dáil Éireann, appoint the other members of the Government.*
   3° *The President shall, on the advice of the Taoiseach, accept the resignation or terminate the appointment of any member of the Government.*

Article 53 of the 1922 Constitution originally provided: 'The President of the Council shall be appointed on the nomination of Dáil Éireann […] The other Ministers who are to hold office as members of the Executive Council shall be appointed on the nomination of the President, with the assent of Dáil Éireann.'[215]

The draft of 18 May 1935 provided that the president '(a) shall appoint the Prime Minister on the nomination of Dáil Éireann and (b) shall, on the nomination of the Prime Minister assented to by Dáil Éireann, appoint the other members of the Council of Ministers'.[216] In the draft of 'The Constitution Bill 1936', however, the provision relating to appointment of the prime minister was deleted: 'The President shall, on the nomination of the Prime Minister assented to by Dáil Éireann, appoint the members of the Council of Ministers other than the Prime Minister.'[217] This draft did not

[214] Headlam-Morley, *The New Democratic Constitutions of Europe*, 182 (emphasis added).

[215] On the President of the Executive Council, see J. G. Swift MacNeill, *Studies in the Constitution of the Irish Free State* (Dublin: Talbot Press, 1925), 194–196; Nicholas Mansergh, *The Irish Free State—Its Government and Politics* (London: George Allen and Unwin, 1934), 173; Leo Kohn, *The Constitution of the Irish Free State* (London: George Allen and Unwin, 1932), 279; on ministers, see Swift MacNeill, *Studies in the Constitution of the Irish Free State*, 196; Mansergh, *The Irish Free State—Its Government and Politics,* 176.

[216] 18 May 1935 (UCDA: P150/2370).

[217] 6 August 1936 (UCDA: P150/2370).

stipulate how the prime minister was to be appointed, but it seems reasonable to assume this would have been by the Dáil. This omission was remedied in the draft of 12 October, which provided for the appointment of the prime minister by the president 'on the nomination of Dáil Éireann'.[218] This draft did not state how a cabinet member could be removed from office. The draft of 14 October simply stipulated that the president would have the power to 'remove from office a member of the Council of Ministers on the advice of the Prime Minister'.[219]

The first appearance of a formula close to the current Section 1 took place between 14 October and 19 October 1936. It was drafted in the following terms:

> The President shall, on the nomination of Dáil Éireann, appoint the Prime Minister, and shall, on the nomination of the Prime Minister with the approval of Dáil Éireann, appoint the other members of the Council of Ministers. A member of the Council of Ministers may be removed as such member by the President acting on the advice of the Prime Minister.[220]

This was paralleled by a document entitled 'Summary of Draft Provisions of the Constitution' from the same time; this stated that the president's executive powers and functions included the power 'to appoint and terminate the appointments of Ministers […] in accordance with the Constitution'.[221]

The draft of 19 October ran: 'A member of the Council of Ministers may be removed from office by the President acting on the advice of the Prime Minister.'[222] It is clear from de Valera's handwritten annotations to the draft used at the cabinet discussions of October 1936 that the section was the subject of some scrutiny, which was natural given the fact that the discussants occupied ministerial office. De Valera made a short note which stated: 'wording. Shall relinquish office.'[223] This note apparently referred to the permissive nature of the wording—a cabinet member *may* be removed from office. The draft of 22 October 1936 was revised in line with the mandatory sense: 'The President shall, on the advice of the Prime

[218] 12[?] October 1936 (UCDA: P150/2373).
[219] 14 October 1936 (UCDA: P150/2373).
[220] UCDA: P150/2386.
[221] UCDA: P150/2375 (first summary in folio—it is not possible to ascertain whether the summary or the draft mentioned came first).
[222] 20 October 1936 (UCDA: P150/2374).
[223] 20 October 1936 (UCDA: P150/2374.

Minister, accept the resignation of, or remove from office any member of the Council of Ministers.'[224] This formula was largely preserved, except for changes to the titles of the individuals and to the syntax.[225] The draft of 28 February 1937 contained, discounting minor alterations, the final versions of Subsections 1 and 2.[226]

The third subsection was more problematic. The department of finance raised the concern that 'the introduction of the terms "remove from office" in Subsection 3° might necessitate a description of the steps constituting removal'. They suggested that the last line should incorporate the phrase, '[c]ancel the appointments of any member of the Government'.[227] As a result of this, the phrase 'terminate the appointment of' was settled on in the draft of 1 April 1937.[228]

2. 1° *Dáil Éireann shall be summoned and dissolved by the President on the advice of the Taoiseach.*

Article 24 of the 1922 Constitution stated: 'The Oireachtas shall be summoned and dissolved by the Representative of the Crown in the name of the King, and subject as aforesaid, Dáil Éireann shall fix the date of reassembly of the Oireachtas and the date of the conclusion of the session of each House.'

The draft of 18 May 1935 provided: 'The Oireachtas shall be summoned and dissolved by the President.'[229] This was not the personal, independent power of its later formulation: 'The powers and duties conferred and imposed on the President by this Constitution … shall not be exercisable and performable by him save only upon the advice of the Council of Ministers.' This advice was to be given, in the draft of 12 October 1936, by the prime minister rather than by the council of ministers.[230] With the exception of the order of the words and the title of the head of government,

[224] 22 October 1936 (UCDA: P150/2374).

[225] See, for example, 12 February 1937 (UCDA: P150/2387), 28 February 1937 (UCDA: P150/2387), 7 March 1937 (UCDA: P150/2399), 1 April 1937 (UCDA: P150/2415), and 30 April 1937 (UCDA: P150/2429).

[226] 28 February 1937 (UCDA: P150/2387).

[227] 23 March 1937 (UCDA: P67/164).

[228] 1 April 1937 (UCDA: P150/2415).

[229] UCDA: P150/2370.

[230] 12[?] October 1937 (UCDA: P150/2373).

the sole change was the replacement of 'Oireachtas' with 'Dáil Éireann' in the draft of 15 March 1937.[231]

2° *The President may in his absolute discretion refuse to dissolve Dáil Éireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dáil Éireann.*

Article 53 of the 1922 Constitution provided that 'the Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Éireann'.[232] Mansergh claimed that Article 53 was intended, in part, 'to limit the discretion of the governor-general',[233] who, under other Commonwealth constitutions, had the power to refuse a dissolution.[234] Under the British constitution, a prime minister had an unfettered right to request a dissolution of parliament. According to Mansergh, 'The denial of this right to the Executive Council was intended to diminish this authority over the Assembly.'[235]

The first mention of dissolution in the development of the 1937 Constitution occurred in the draft of 6 August 1936, which included the condition, 'provided however that the Oireachtas shall not be dissolved on the advice of a Council of Ministers which has ceased to retain the support of a majority in Dáil Éireann'.[236] It was not clear, under this draft, who would wield the power of dissolution in the case of a government which had lost the support of the Dáil. According to the dissolution clause itself, the power could not be exercised on the advice of a council of ministers that did not retain the support of a majority in the Dáil. Under a later

[231] UCDA: P150/2401. The department of finance in their first commentary recommended the first and second subsections should be fused into one subsection; see 23 March 1937 (UCDA P67/164).

[232] See Swift MacNeill, *Studies in the Constitution of the Irish Free State*, 198–200; Kohn, *The Constitution of the Irish Free State*, 235–236, 290–298; Mansergh, *The Irish Free State—Its Government and Politics*, 181–188.

[233] Mansergh, *The Irish Free State—Its Government and Politics*, 182. Kohn noted, 'constitutional usage in the Dominions had allowed the governor-general to decline [advice to dissolve] if he felt confident of being able to find advisers capable of forming an alternative Government commanding the support of a majority in the existing House', *The Constitution of the Irish Free State*, 235.

[234] Section 20 of the South Africa Act 1909 stated: 'The governor-general... may in like manner dissolve the Senate and the House of Assembly simultaneously, or the House of Assembly alone, provided that the Senate shall not be dissolved within a period of ten years after the establishment of the Union.'

[235] Mansergh, "*The Irish Free State—Its Government and Politics*," 183.

[236] 6 August 1936 (UCDA: P150/2370).

clause, however, it was made clear that the powers of the president 'shall not be exercisable or performable by him save only upon the advice of the Council of Ministers'.[237] Therefore, it would seem that the power of dissolution could not have been a discretionary power to be wielded by the president, as no such power had existed under the August draft. It would seem, therefore, that under the draft of 6 August 1936, no dissolution could have taken place in the case of a government which had ceased to retain the support of the Dáil.

The draft of 12 October 1936 remedied this problem. It stated: 'The Oireachtas shall be summoned and dissolved by the President on the advice of the Prime Minister.'[238] This provision was, however, excepted from the general necessity for ministerial advice:

> Subject to the provisions of Section 10 of this Article [which dealt with dissolution] the powers and duties conferred and imposed on the President by this Constitution or by any amendment thereof or by any Organic Law made thereunder shall not be exercisable or performable by him save only upon the advice of the Council of Ministers.

Under this formula, a prime minister was to advise the president as to when to summon and dissolve the Dáil. It made no mention of a prime minister who had lost the support of the Dáil, or who may not have had a majority in the first instance. This troubled de Valera, who made a note next to the section: 'but Prime Minister who has been in a minority cabinet'.

This provision was elaborated before the cabinet discussions:

> The Oireachtas shall be summoned and dissolved by the President on the advice of the Prime Minister, provided, however, that the Oireachtas shall not be dissolved on the advice of a Prime Minister who has ceased to retain the support of a majority in Dáil Éireann.[239]

This draft, due to its fragmentary nature, does not contain the general clause requiring the president's actions to be taken on the advice of the cabinet. The draft of 19 October 1936 retained the formula relating to summoning and dissolution.[240] It also stated: 'Save where otherwise provided by this Constitution, the functions conferred on the President by

[237] UCDA: P150/2370.
[238] 12[?] October 1936 (UCDA: P150/2373).
[239] UCDA: P150/2386.
[240] 19[?] October 1936 (UCDA: P150/2385).

this Constitution shall be exercisable by him only on the advice of the Council of Ministers' which made the exercise of presidential functions contingent on the principles of responsible government.

There were two potential problems with this draft. First, it could be said that in the event of a collapse of governmental support, the power to dissolve was vested in the president. The president was generally bound to summon or dissolve on the advice of the prime minister but was free to disregard the advice given in such a situation. Second, it could also be maintained that in such a case there was no power to dissolve the Oireachtas until a new prime minister had been elected. The president could act on the advice of the prime minister but could not act on the advice of a prime minister who had lost the support of the Dáil. In such a situation, it could be argued, the president could not act at all.

It was not until the draft immediately preceding 7 March 1937 that the discretion explicitly shifted to the president, when the subsection became: 'The President may refuse to dissolve the Oireachtas on the advice of a Taoiseach who has ceased to retain the support of a majority in Dáil Éireann.'[241] This was the wording suggested by Matheson in his notes on the literal translation of the Irish draft.[242] The phrase 'in his absolute discretion' was inserted in the draft of 1 April 1937.[243] It was apparently inserted as a result of the revision process undertaken by the constitution drafting group consisting of Moynihan, Hearne, McDunphy and O'Donoghue. They suggested, on 23 March 1937, that the president should consult with the council of state before refusing a dissolution.[244] The page recorded that following decision: 'No. Absolute discretion.' The subsequent draft included the same phrase—'absolute discretion'.

3° *The President may at any time, after consultation with the Council of State, convene a meeting of either or both of the Houses of the Oireachtas.*

This subsection was a late addition to Article 13, appearing for the first time, and with the final wording, in the draft of 1 April 1937.[245] The department of finance suggested that the power was confused. They pointed out that, on the one hand, such a power was to be exercised

[241] UCDA: P150/2387.

[242] UCDA: P150/2397. The literal translation of the Irish text of February 1937 (UCDA: P150/2392) stated: 'the President shall not be obliged to dissolve the Oireachtas on the advice of a Prime Minister who has lost the support of a majority of Dáil Éireann.'

[243] 1 April 1937 (UCDA: P150/2415).

[244] 23 March 1937 (NAI: Taois s.9715A).

[245] 1 April 1937 (UCDA: P150/2415).

'presumably … only on the advice of the Government'.[246] On the other, they noted that the reference to the council of state suggested that such governmental advice could be disregarded.

The objection—that it was unclear where ultimate power rested—did not result in any change.

3. 1° *Every Bill passed or deemed to have been passed by both Houses of the Oireachtas shall require the signature of the President for its enactment into law.*
   2° *The President shall promulgate every law made by the Oireachtas.*

Article 41 of the 1922 Constitution stated:

> So soon as a Bill shall have been passed or deemed to have been passed by both Houses, the Executive Council shall present the same to the Representative of the Crown for the signification by him, in the King's name, of the King's assent, and such Representative may withhold the King's assent or reserve the Bill for the signification of the King's pleasure: Provided that the Representative of the Crown shall in the withholding of such assent to or the reservation of any Bill, act in accordance with the law, practice, and constitutional usage governing the like withholding of assent or reservation in the Dominion of Canada.

The first draft of 18 May 1935 provided that the 'President shall in accordance with this Constitution assent to and sign Bills passed by Dáil Éireann and presented to him for his assent and signature hereunder'.[247] This obviously removed the discretionary powers available to the governor-general under the 1922 Constitution, although it should be noted that these powers had, by constitutional convention, come to be exercised only on the advice of the Dominion government concerned by 1929.[248]

The draft of 6 August 1936 provided: 'The President shall promulgate laws passed or deemed to have been passed by both Houses of the Oireachtas.'[249] The draft of 12 October stated: 'The President shall promulgate laws passed by Dáil Éireann.'[250] At this time, the drafters appar-

[246] 17 April 1937 (UCDA: P67/164).
[247] 18 May 1935 (UCDA: P150/2370).
[248] *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929* [Cmd. 3479], 12–15.
[249] 6 August 1936 (UCDA: P150/2370).
[250] 12[?] October 1936 (UCDA: P150/2373).

ently wanted to prevent the possibility of conflict between the president and the Dáil since the draft stated: 'Every law shall be so promulgated not later than three days after the day on which it shall have been passed or deemed to have been passed as aforesaid.' The subsequent draft of 13 October curtailed the president's actions further and complicated the process. In addition to the three-day deadline, it stipulated: 'Every such law [promulgated by the president] shall, before being promulgated, be signed by the Prime Minster and by the Ceann Comhairle of Dáil Éireann.'[251]

This provision was quickly abandoned. The draft between 14 and 19 October 1936 provided: 'The President shall promulgate the laws of E. in the manner hereinafter mentioned.'[252] It retained a deadline, although lengthened to seven days, but this was deleted in the draft of 19 October.[253] Save for a slight modification for the draft of 11 January 1937,[254] it was not until 12 February 1937 that the wording of the second subsection began to crystallise—this draft stated that the president 'shall promulgate laws made by the Oireachtas'.[255] The drafts did not expressly say what was meant by the word 'promulgate'. An October 1936 draft, however, stated: 'Laws shall be promulgated in the following terms: "The Oireachtas has enacted the following law."'[256]

The wording of the first subsection appears first in the draft immediately preceding 7 March 1937 with a declaration: 'Every Bill passed or deemed to have been passed by both Houses of the Oireachtas shall require the signature of the president for the purpose of its enactment into law.'[257] The words 'the purpose of' were deleted in the draft of 7 March.[258]

[251] 13[?] October 1936 (UCDA: P150/2373).

[252] UCDA: P150/2386. The method described was an embryonic version of what was to become Article 25.

[253] See 19[?] October 1936 (UCDA: P150/2385): 'The President shall promulgate laws in the manner provided by Article ___ of this Constitution.'

[254] 11 January 1937 (UCDA: P150/2387): 'The President shall promulgate laws in the manner and otherwise in accordance with this Constitution.'

[255] 12 February 1937 (UCDA: P150/2390).

[256] UCDA: P150/2386. It appears, therefore, that 'promulgate' referred to publication. Article 3 of the French 1875 Constitutional Law on the Organization of the Public Powers stated: '[the President of the Republic] shall promulgate the laws when they have been voted by the two Chambers.' See B. Shiva Rao, *Select Constitutions of the World* (Madras: Law Journal Press, 1934), 464.

[257] UCDA: P150/2387.

[258] 7 March 1937 (UCDA: P150/2399).

The draft of 24 April 1937 introduced the word 'every' into the second subsection.[259]

4. *The supreme command of the Defence Forces is hereby vested in the President.*
5. 1° *The exercise of the supreme command of the Defence Forces shall be regulated by law.*
   2° *All commissioned officers of the Defence Forces shall hold their commissions from the President.*

The draft of 18 May 1935 contained a provision which stated: 'The supreme command of the defence forces of Saorstát Eireann is hereby vested in the President, who shall exercise the same in accordance with the law. All commissioned officers of the defence forces shall hold their commissions from him.'[260] This was changed between 14 and 19 October 1936 to '[t]he exercise by him of the supreme command of the Defence Forces shall be regulated by Organic Laws'.[261] Barring minor changes, the two sections were complete.[262]

The department of finance noted that the sections represented a move away from the situation as it existed in the Irish Free State, where supreme command was vested in the cabinet.[263] However, while noting the need for fresh legislation on foot of the Constitution, the department paid heed to the 'ample precedents' in other countries[264] 'for vesting the supreme command in the person who is recognised as head of the State and holds

[259] 24 April 1937 (UCDA: P150/2427).

[260] 18 May 1935 (UCDA: P150/2370).

[261] UCDA: P150/2386. The name given at this stage was 'Defence Forces of E__.'

[262] For example, the second subsection read 'the exercise of the command of the Defence Forces' before 7 March 1937 (UCDA: P150/2387). The inclusion of the word 'supreme' in this regard did not occur until 1 April 1937 (UCDA: P150/2415). It was not until 26 April that the name of the state was removed from the section (UCDA: P150/2428).

[263] This was governed by s. 5 of the Defence Forces (Temporary Provisions) Act 1923, which stated:

> The command in chief of and all executive and administrative powers in relation to the Forces including the power to delegate authority to such persons as may be thought fit shall be vested in the Executive Council and exercised through and in the name of the Minister who shall not however allocate to himself any executive military command and who may not be a member of the Forces on full pay.

[264] They listed the USA, France, Germany, Poland, Italy and Great Britain.

precedence over all other persons in the State' and stated that they had no objection to the new situation.[265]

6. *The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities.*

This section may be divided into two parts: the first vests the powers of pardon, commutation and remission in the president; the second provides for the extension of the powers of commutation and remission to other bodies.

The draft of 18 May 1935 declared that the 'right of pardon, and power to remit or commute sentences imposed, and to remit the legal consequences of verdicts given, by any courts exercising criminal jurisdiction are hereby vested in the President'.[266] This was not altered until 12 February 1937, when the phrase 'are hereby vested in' was replaced with 'shall be exercised by'.[267]

Conor Maguire, president of the high court, commented that the use of the phrase 'legal consequences of verdicts' seemed inappropriate as 'verdict' usually referred to the finding of a jury. He noted: 'In minor courts there is no verdict in the above sense.'[268] Thus, it might be held that the power did not extend to minor offences. The department of the president of the executive council also drew attention to the fact that the wording in March 1937 meant that the powers were to be exercised by the president but were not vested in him.[269] As a result of this, on 1 April 1937, the formula of words used in the final draft began to take shape, stating: 'The right of pardon and power to commute sentences imposed by any courts exercising criminal jurisdiction are hereby vested in the President.'[270]

The second clause, 'but such power of commutation or remission may also be conferred by law on other authorities', owes its existence to sustained argument by the civil service. In their first commentary, the

[265] 23 March 1937 (UCDA: P67/164).
[266] 18 May 1935 (UCDA: P150/2370).
[267] 12 February 1937 (UCDA: P150/2390).
[268] 23 March 1937 (UCDA: P150/2416).
[269] 23 March 1937 (NAI: Taois s.9715A).
[270] 1 April 1937 (UCDA: P150/2415).

department of finance noted that the article did not save the powers of the minister for justice or revenue commissioners, stating that they believed: 'These powers, so far as the Revenue Commissioners, at any rate, are concerned, should be maintained. They are of importance from an administrative point of view, but not sufficiently important to call for the intervention of the President.'[271] No action was taken on foot of this and in their second commentary the department maintained their objection:

> It should be made quite clear in the Constitution that the powers of the President do not take away the existing powers vested in the Revenue Commissioners. In Revenue cases, the Courts are sometimes regarded as exercising criminal jurisdiction and sometimes, merely civil jurisdiction.[272]

The department of justice also recorded their opposition to the restriction of the power to pardon or remit to the president alone:

> If the President alone can pardon or remit, and there is no power of delegation, the position will be impossible.
>
> At least 20 minor cases, now dealt with by the M[inister of] Justice at his own discretion, pass through Justice each day. If all these have to go to the President, through the Govt., the position can be imagined.[273]

These entreaties cumulated on 26 April with a second clause. This stated that 'such power of commutation may, except in capital cases, also be conferred by law on other authorities'.[274]

> 7. 1° *The President may, after consultation with the Council of State, communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance.*
> 2° *The President may, after consultation with the Council of State, address a message to the Nation at any time on any such matter.*
> 3° *Every such message or address must, however, have received the approval of the Government.*

[271] 23 March 1937 (UCDA: P67/164).
[272] 17 April 1937 (UCDA: P67/164).
[273] 23 March 1937 (NAI: Taois s.9715A).
[274] UCDA: P150/2427.

The draft of 13 October 1936 provided:

> Upon the re-assembly of the Oireachtas after a dissolution thereof and on such other occasions as he may think it right so to do, the President may communicate with Dáil Éireann by message or address on such matters of national or public importance as, after consultation with the Council of State, to him shall seem meet.[275]

Similarly, the draft of 14 October 1936 provided that the president should have the power to 'address the Dáil on stated occasions'.[276] This disappeared from the next draft[277] but was again present in the draft of 19 October 1936.[278] The proposal allowed the president to deliver a speech on his own initiative. The possibility of conflict between the president's views and those of the government led to a significant change during the cabinet discussions of October 1936. The cabinet introduced a requirement that the power should be exercised 'after consultation with the Council of State and with the consent of the Council of Ministers'.[279] De Valera made a handwritten note that the president need not read a speech to which he objected as he was not a 'puppet of the Exec[utive]'.[280] The second subsection appeared in the aftermath of the cabinet discussions, on 18 November 1936, as follows: 'The President may address the Nation at any time on any such matter and after such consultation as aforesaid.'[281]

The draft that emerged from the cabinet discussions contained all of the operative elements, the power to address the Oireachtas and the nation, subject to cabinet control, of the final draft. This draft did not

[275] 13[?] October 1936 (UCDA: P150/2373).
[276] 14 October 1936 (UCDA: P150/2373).
[277] UCDA: P150/2386.
[278] 19[?] October 1936 (UCDA: P150/2385).
[279] UCDA: P150/2374. The provision in full read (italics indicate changed provisions):

> The President may, upon the re-assembly of the Oireachtas after the dissolution and on such other occasions as he may consider it *proper*, communicate with the Houses of the Oireachtas by message or address on matters of national or public importance as, after consultation with the Council of State *and with the consent of the Council of Ministers* to him shall seem meet.

[280] UCDA: P150/2374, handwritten annotation to draft.
[281] 18 November 1936 (UCDA: P150/2370). The syntax of the first subsection is rearranged in this draft too but with no substantive changes.

appear, however, until 1 April 1937.[282] The changes, however, were purely syntactical, rather than substantive.

> 8. 1° *The President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions.*
> 2° *The behaviour of the President may, however, be brought under review in either of the Houses of the Oireachtas for the purposes of section 10 of Article 12 of this Constitution, or by any court, tribunal or body appointed or designated by either of the Houses of the Oireachtas for the investigation of a charge under section 10 of the said Article.*

It is useful to divide the analysis of this section into two headings: oversight of presidential action by the courts, and presidential oversight by the Oireachtas.

Oversight of Presidential Action by the Courts

The genesis of Article 13.8.1° may be found in the draft of 12 October 1936, which stated: 'The President shall not be held answerable in any court of law or equity for the exercise of his presidential functions.'[283] There was a handwritten annotation to the section in that draft which noted 'impeachment'.[284]

This immunity of the president from suit was strengthened in a later draft of October 1936, which stated: 'No action at law or in equity or other legal proceeding shall lie against the President in his private capacity during his tenure of office.'[285] This draft protected the private actions of the president. The legal responsibility of the president was clarified in the draft of 13 February 1937, which widened the immunity: 'No action at law or in equity or other legal proceeding shall lie against the President

[282] 1 April 1937 (UCDA: P150/2415).
[283] 12[?] October 1936 (UCDA: P150/2373). This draft also provided for the impeachment of the president.
[284] 12[?] October 1936 (UCDA: P150/2373).
[285] UCDA: P150/2386.

during his tenure of office.'[286] The draft of 28 February stated that it applied to 'civil or criminal' proceedings.[287]

The department of finance pointed out that this wording arguably allowed for judicial review of presidential actions after he had finished his term of office.[288] This comment seems to have been disregarded and the department of finance re-iterated their objections to the wording in April 1937.[289] Despite these objections, the draft produced for the Dáil maintained the February wording: 'No action at law or in equity or other legal proceeding shall lie against the President.' But the departmental argument seems to have eventually been persuasive. The February subsection was removed on 28 May as part of the review of the impeachment proceedings.[290] A narrower provision for presidential immunity from judicial proceedings was effected by adding the words 'or to any court' to the previously formulated provision relating to oversight by the Oireachtas.[291] We shall turn to that provision next.

Presidential Oversight by the Oireachtas

The draft of 18 November 1936 linked the impeachment proceedings with the issue of Oireachtas review of the president's actions: 'Save on a motion for his impeachment, the President shall not be held answerable in either House of the Oireachtas for the exercise of the functions of his office or for any act done or purporting to be done by him in pursuance thereof.'[292]

The same draft revisited the Oireachtas' scrutiny of presidential actions:

> Save on a motion for his impeachment, the President shall not be held answerable to either House of the Oireachtas for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in pursuance thereof.[293]

[286] 13 February 1937 (UCDA: P150/2390).
[287] 28 February 1937 (UCDA: P150/2387).
[288] 23 March 1937 (UCDA: P67/184).
[289] 17 April 1937 (UCDA: P67/184).
[290] 67 Dáil Debates (28 May 1937) col. 1288.
[291] 68 Dáil Debates (9 Jun 1937) col. 146.
[292] UCDA: P150/2370.
[293] UCDA: P150/2370.

This provision extended the president's immunity from oversight from the Oireachtas to acts 'purporting to be done' by him in pursuance of his position as president. The president could, under the terms of that draft, be impeached for 'treason or other high crimes or misdemeanours'. Therefore, the personal actions of the president, and not simply his actions as president, could be investigated by the Oireachtas. The explicit link between this section and impeachment was subsequently deleted,[294] but was reinstated in the draft of 15 March 1937, which included a further subsection:

> In the event, however, of the impeachment of the President under section 11 of Article 11 hereof his conduct of the office of President may be brought under review in Dáil Éireann in so far only as is, in the opinion of the Chairman of Dáil Éireann, necessary for the proper investigation of the charge.[295]

This formula survived the private drafting process. At the end of that process, Article 13.8.1° provided for the general immunity from Oireachtas oversight in terms that were to be enacted.

Article 13.8.2° was substantially revised as a result of the introduction of the new impeachment procedure during the Dáil debates. Under this impeachment procedure, a body appointed by the Dáil rather than the whole Dáil could investigate the charge.[296] Under those circumstances, the chairman of the Dáil might not be involved in the procedure at all and it was therefore necessary to amend Article 13.8.2°. The new subsection was introduced on 10 June 1937.[297]

> 9. *The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.*

[294] 28 February 1937 (UCDA: P150/2387).
[295] 15 March 1937 (UCDA: P150/2401).
[296] See further discussion on Article 12.10.5°.
[297] 68 Dáil Debates (10 June 1937) col. 297.

The Hearne draft of 18 May 1935 stated: 'The powers and duties conferred and imposed on the President by this Constitution or by any Act of the Oireachtas shall not be exercisable and performable by him save only upon the advice of the Council of Ministers.'[298] The purpose was to tie the presidency into the conventions of responsible government. The deficiency in this formula was that it did not provide any scope for independent decision-making by the president, which would have been necessary under the European suspensory veto scheme. The draft of 6 August 1936 did not remedy this deficiency. In fact, it contained two subsections that re-stated the words of the draft of 18 May 1935.[299] The first draft which changed this provision was that of 12 October 1936. This draft, interestingly, crafted an exception only for the right of the prime minister to request a dissolution:

> Subject to the provisions of Section 10 [under which the Prime Minister advised the President as to the dissolution of the Dáil] of this Article the powers and duties conferred and imposed on the President by this Constitution or by any amendment thereof or by any Organic Law made thereunder shall not be exercisable or performable by him save only upon the advice of the Council of Ministers.[300]

The subsequent draft of 13 October, however, provided scope for independent presidential action. It declared that the sections relating to the dissolution of the Dáil, addressing the Dáil, referendums and the suspension of the Constitution did not require the advice of the government.[301] By contrast with the draft of the previous week, the draft of 19 October did not detail the provisions under which the president could act on his own initiative. Instead, it stated: 'Save where otherwise provided by this Constitution, the functions conferred on the President by this Constitution shall be exercisable by him only on the advice of the Council of Ministers.'[302] The acts of the president were, according to a note made by de Valera, to

[298] 18 May 1935 (UCDA: P150/2370).

[299] UCDA: P150/2370. One version included the powers and duties imposed by 'any [constitutional] amendment' in addition to the other grounds.

[300] 12[?] October 1936 (UCDA: P150/2373).

[301] 13[?] October 1936 (ibid.).

[302] 19[?] October 1936 (UCDA: P150/2385).

'be counter-signet of the Chief Minister or App[ropriate] Min[ister] of state'.[303]

This formula survived with no substantive amendment until April 1937. The draft of 24 April stated:

> The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, on receipt of any other communication from any other person or body.[304]

This draft was less rigid than the previous version and allowed for a body outside the cabinet to advise the president. In the Dáil, William Norton pointed out that this provision could be exploited to invest the president with powers outside governmental control. The section created an exception to the need for governmental advice merely where such advice was 'provided'. Article 13 also vested the supreme command of the defence forces in the president. This power of 'command' was to be regulated by law. Norton pointed out that such a law could vest the operational control of the defence forces in the president by law—this would bring it within the ambit of Article 13.9 and put it outside governmental control.[305] De Valera, persuaded by Norton's argument, amended the section to provide that no exception from ministerial advice was to be allowed except where explicitly provided 'by this Constitution'.[306]

10. *Subject to this Constitution, additional powers and functions may be conferred on the President by law.*
11. *No power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of the Government.*

The Hearne draft of 18 May 1935 stated: 'The existing statutory powers and duties of the governor-general shall cease to be exercisable and performable by the governor-general and shall be exercised and performed by

[303] November/December 1936 (UCDA: P150/3680).
[304] 24 April 1937 (UCDA: P150/2327).
[305] 67 Dáil Debates (28 May 1937) cols. 1256–1257.
[306] 68 Dáil Debates (9 Jun 1937) col. 146.

the President in accordance with this Constitution.'[307] This provision did not appear in later drafts, despite the fact that a number of drafts pre-dated the abolition of the office of governor-general in December 1936. This was most likely a political calculation: it would have been impolitic to mention the governor-general in the new Constitution.

The draft of 6 August 1936 stipulated that the president 'shall exercise and perform the powers and duties conferred and imposed on him by … any law enacted' under the Constitution.[308] These powers could be exercised only on the advice of the cabinet. The draft of 12 October 1936 stated: 'Additional powers and duties may be conferred and imposed on the President by Organic Laws.'[309] Again, such powers were exercisable only upon the advice of the government. A subsequent draft provided: 'Additional powers and functions may be conferred on the President by Organic Laws, and the same shall be exercised by him in accordance with such laws.'[310] This draft was the first to omit any reference to advice by the government in relation to the additional powers. This iteration allowed more latitude to the Oireachtas to confer powers on the president which would not necessarily be subject to cabinet control.

The draft of 11 January 1937 stated: 'Additional powers and functions may be conferred on the President by law. All such powers, rights, functions and duties shall be exercised and performed by him in accordance with law.'[311] The first line simply provided that additional 'powers and functions' could be conferred on the president by law. It said nothing about 'rights' being capable of being conferred by law. Nonetheless, the next sentence provided 'all such […] rights' were to be performed in accordance with law. The problem was that there were no 'such […] rights'. This was remedied in the draft of 13 February 1937, which stated that '[s]ubject to this Constitution additional powers and functions may be conferred on the President by law. All such powers and functions shall be exercised and performed by him in accordance with law.'[312] This formula provided the final text of the first subsection. The second subsection, however, was substantially amended in the draft of 15 March 1937.

[307] UCDA: P150/2370.
[308] 6 August 1936 (UCDA: P150/2370).
[309] 12[?] October 1936 (UCDA: P150/2373).
[310] UCDA: P150/2386.
[311] 11 January 1937 (UCDA: P150/2387).
[312] 13 February 1937 (UCDA: P150/2390).

Drafts prepared before 15 March 1937 allowed legislation to stipulate how statutorily conferred presidential powers were to be exercised. The draft of 15 March stated: 'No such power or function shall be exercisable or performable by him save only on the advice of the Government formally conveyed to him by the Taoiseach, or after consultation with the Council of State, as may be determined by law.'[313] The draft of 1 April removed the need for formal conveyance of governmental advice.[314] The former Senator James Douglas wrote to de Valera and objected to the possibility of conferring additional powers on the president as it was 'too drastic a power to give a Parliamentary majority' and suggested such a law should only come into force 60 days after the subsequent general election.[315] He suggested, alternatively, that such a law should be passed only on the advice of the executive. These measures were necessary, he felt, to 'prevent dictatorial powers being given without the consent of the people'. This suggestion was not acted upon but it should have given the drafters notice as to how this section would be viewed: as a harbinger of dictatorship.

Most of the Dáil debates on this section were coloured with the suspicion that de Valera intended to grant dictatorial powers to the president. This suspicion was based more on a visceral distrust of de Valera rather than on the text of the Constitution itself. In November 1936, months before the text of the Constitution was published, Professor John O'Sullivan stated that the president would 'have certain powers apparently to override the wishes of [the] Parliament and [the] Government'.[316] This apprehension seemed to be confirmed by the publication of Article 13.10. John A. Costello stated:

> The further provisions enabling a law to be passed giving additional powers to the President can only be viewed with disquiet. Such provisions might easily be used to create a virtual dictatorship by a Government in collaboration with the President.[317]

[313] 15 March 1937 (UCDA: P150/2401).

[314] UCDA: P150/2415.

[315] UCDA: P150/2416.

[316] *Irish Press* 16 November 1936. This speech prompted a rebuke from the editorial pages of *The Irish Press* in the same issue. They argued that it was 'a gross misuse of the words to say that a person acting [as a buffer between the people and the Executive in time of crisis] would be a dictator'.

[317] *Irish Independent* 6 May 1937.

The point being made was that statutory powers could be vested in the president which would not be subject to oversight by the Dáil. This overlooked the fact that the Oireachtas possessed the residual power to revoke any such statutory powers. In the Dáil, James Dillon, Cecil Lavery and William Davin all questioned the provisions whereby additional statutory powers could be conferred on the president which could be exercised without the advice of the government.[318] The sustained criticism of this section led de Valera to delete the section and introduce the final wording in the report stage.[319] This ensured that any powers conferred on the president were exercisable only on the advice of the government.

Powers Not Conferred

Earlier drafts of the Constitution invested the president with substantial powers which did not survive the drafting process. These powers are of historical interest, as they provide an indication of the original role envisaged for the president. They also demonstrate how the cabinet discussions in October 1936 substantially re-shaped the institution.

Suspension of Constitutional Guarantees

The draft of 14 October, apparently modelled on the Portuguese constitution, stated that the president would have the power to 'suspend certain provisions of the Constitution (with approval of Dáil Éireann) either generally or in respect of a specified district or districts in case of grave disorder'.[320] This was modified in the draft of 19 October into a formula governing the issuance of an order specifying either throughout the state or in certain specified regions that a state of public emergency existed or was threatened 'and that the ordinary laws and the civil courts are not adequate for the preservation of public order'.[321] This proclamation could be made either by the Dáil, if it was sitting, or by the council of ministers,

[318] 67 Dáil Debates (11 May 1937) cols. 51, 134–135, 140.

[319] 67 Dáil Debates (28 May 1937) col. 1297.

[320] 14 October 1937 (UCDA: P150/2373). Article 91(8) of the 1933 Portuguese Constitution declared the right of the national assembly: 'To declare a state of siege, with total or partial suspension of constitutional guarantees, in one or more places in the national territory, in the case of actual or imminent aggression by foreign forces, or when public order and safety are seriously disturbed or threatened.'

[321] 19[?] October 1936 (UCDA: P150/2385).

if the Dáil was not. In the latter case, the president was responsible for immediately summoning the Dáil and laying the proclamation before them. If the Dáil was satisfied with the proclamation[322] then the president was to suspend the constitutional guarantees relating to freedom of expression, freedom of peaceable assembly, freedom of association, personal liberty, habeas corpus and the dwelling of the individual within the terms of the proclamation.[323] The provision was apparently inspired by Article 48 of the 1919 Constitution of the Germany, which provided for similar powers for the German President. It is notable that each of these rights corresponds to the provisions of Article 40 of the Constitution, but not to the fundamental rights which were underpinned by natural law. This hints that the suspension of rights under the Constitution was not intended to extend to the provisions of, for example, Article 43 dealing with private property.[324] This is particularly noteworthy as, while the proposed suspensions under the Irish draft corresponded to the German suspensory powers, they differed in that the German powers specifically extended to the private property guarantee under the provisions of the German Constitution.[325] In contrast, the Irish suspension would not extent to private property. Conor Maguire commented the provision seemed 'needlessly full. It is hardly necessary to specify the functions conferred on the president.'[326] This power was a relatively late deletion and survived until the draft of 1 April 1937.[327]

Head of National Government

The draft of 19 October provided that the president could 'at the request of the Council of Ministers and with the concurrence of Dáil Éireann, become Chairman of a national Government during a period of national

[322] If it was not confirmed by the Dáil within seven days then it lapsed.

[323] The suspension Article in the October 1936 draft, Article 44, actually refers to Sections 4, 5 and 6 of Article 31, but as 31 deals with referenda we may assume it is a typo and the actual Article is 32.

[324] See further Donal Coffey, "Article 28.3.3, the natural law and the judiciary: Three easy pieces" *Irish Law Times* 22, no. 20 (2004): 310–314.

[325] Article 153 of the 1919 German Constitution provided for this protection. This should not be confused with the inviolability of the dwelling, which was also guaranteed under Article 115 and which was also capable of suspension.

[326] 23 March 1937 (UCDA: P150/2416).

[327] UCDA: P150/2415.

crisis or emergency whether internal or international'.[328] This provision was struck out during the cabinet discussions[329] and replaced with one declaring the president 'shall be notified immediately of all decisions of the Council of Ministers, and shall be apprised in advance of impending Government decisions on all matters of importance'.[330] This apparently came under further criticism as the draft of 18 November contained no hint of either power.[331] If either of these two formulae had been adopted, it would have resulted in a greater role for the president than under the final version.

Both these instances indicate further powers that could have been granted to the president under the Constitution. It is notable that both would have given the president the scope for significant independent action; this would have been inconsistent with the theory of suspensive veto, which underpinned the other provisions relating to the president. It is telling that neither survived the drafting process.

Article 14

1. *In the event of the absence of the President, or his temporary incapacity, or his permanent incapacity established as provided by section 3 of Article 12 hereof, or in the event of his death, resignation, removal from office, or failure to exercise and perform the powers and functions of his office or any of them, or at any time at which the office of President may be vacant, the powers and functions conferred on the President by or under this Constitution shall be exercised and performed by a Commission constituted as provided in section 2 of this Article.*
2. 1° *The Commission shall consist of the following persons, namely, the Chief Justice, the Chairman of Dáil Éireann (An Ceann Comhairle), and the Chairman of Seanad Éireann.*
   2° *The President of the High Court shall act as a member of the Commission in the place of the Chief Justice on any occasion on which the office of Chief Justice is vacant or on which the Chief Justice is unable to act.*

[328] 19[?] October 1936 (UCDA: P150/2385). This power is also mentioned in the first and fourth summaries contained in UCDA: P150/2375.

[329] UCDA: P150/2374.

[330] 22 October 1936 (UCDA: P150/2374).

[331] 18 November 1937 (UCDA: P150/2370).

3° *The Deputy Chairman of Dáil Éireann shall act as a member of the Commission in the place of the Chairman of Dáil Éireann on any occasion on which the office of Chairman of Dáil Éireann is vacant or on which the said Chairman is unable to act.*
4° *The Deputy Chairman of Seanad Éireann shall act as a member of the Commission in the place of the Chairman of Seanad Éireann on any occasion on which the office of Chairman of Seanad Éireann is vacant or on which the said Chairman is unable to act.*

3. *The Commission may act by any two of their number and may act notwithstanding a vacancy in their membership.*
4. *The Council of State may by a majority of its members make such provision as to them may seem meet for the exercise and performance of the powers and functions conferred on the President by or under this Constitution in any contingency which is not provided for by the foregoing provisions of this Article.*
5. 1° *The provisions of this Constitution which relate to the exercise and performance by the President of the powers and functions conferred on him by or under this Constitution shall subject to the subsequent provisions of this section apply to the exercise and performance of the said powers and functions under this Article.*
   2° *In the event of the failure of the President to exercise or perform any power or function which the President is by or under this Constitution required to exercise or perform within a specified time, the said power or function shall be exercised or performed under this Article, as soon as may be after the expiration of the time so specified.*

The first mention of the presidential commission—a successor to the lords justices who acted in the absence of the lord lieutenant—occurred in the draft of 13 October.[332] This provided that '[i]n the event of the temporary incapacity or absence from E__ of the President, the functions of the office of President shall be discharged by a Commission which shall consist of three members of the Council of State nominated by the President for that purpose'.[333]

The first attempt to cast this as an article occurred in the draft of 19 October 1936:

[332] E.R. Turner, "The Lords Justices of England," *The English Historical Review* 29 (1914): 455 deals with the functions of the lords justices in Ireland.
[333] 13[?] October 1936 (UCDA: P150/2373).

> As soon as may be after the appointments required by section 4 of ARTICLE THIRTEEN hereof to be made by the President shall have been made by him … the President shall nominate three members of the Council of State to exercise and perform the powers and function of the President under this Constitution during his temporary absence from E. or during his temporary incapacity.[334]

Obviously, the discretion afforded to the president under this draft article was quite wide and a subsequent article provided that in the event of his failure 'to make the appointments and nominations required by the preceding Articles of this Part of the Constitution to be made by him, the same shall be made by a majority of the ex-officio members of the Council of State then available'. The section underwent rapid revision and by the cabinet meeting of 20 October read:

> In the event of the temporary incapacity or absence from E[ire] of the President, the functions of the office of President shall be discharged by a Commission which shall consist of such two or more members of the Council of State as, after consultation with the said Council, the President shall appoint for that purpose.[335]

This provision, under which the president was to nominate the commission, was apparently the cause of some anxiety at the cabinet table; de Valera noted 'who is to judge?' and 'suppose he was unconscious' on his draft. These anxieties were reflected in a new draft of 22 October whereby the president was to appoint 'immediately upon entering upon office' a commission to assume presidential powers 'in the case of resignation, death, temporary incapacity or absence of the President from the territory of E. or his removal from office, and pending the election of his successor'.[336] On 1 December 1936, it was provided 'in the event of temporary incapacity or absence from E.', the powers of the presidency would devolve upon the commission.[337]

This was changed in the draft of 11 January 1937, which contained two different sections dealing with presidential commissions. The first dealt

[334] 19[?] October 1936 (UCDA: P150/2385). Article 13.4 provided for the president to nominate three members to the council of state.

[335] 20 October 1937 (UCDA: P150/2374).

[336] 22 October 1936 (UCDA: P150/2374). There was a similar provision as above in the case of the president not appointing the commission members.

[337] 1 December 1936 (UCDA: P150/2378).

with a temporary absence of the president from the jurisdiction and provided that the commission was to be composed of three members of the council of state appointed by the president for that purpose.[338] The second was to govern the period when the president was due to enter office, the death of the president, the president's permanent incapacitation established to the satisfaction of the council of state, or the removal of the president from office; here the commission was to consist of three members of the council of state appointed by the council for that purpose. The presidential commission was modified late in the drafting process. The draft of 24 April 1937 removed this link between the council of state and the presidential commission.[339] This draft introduced the notable features of the presidential commission: the composition of the commission; the circumstances in which it would act; and the alternate members of the commission.[340]

These provisions of the draft Constitution were the subject of a number of amendments in the Dáil. First, the article was amended to incorporate the fact that under Article 12.3.1°, presidential incapacity was to be determined by the Supreme Court.[341] Second, the phrase 'powers and functions of the President under this Constitution' was replaced with 'the powers and functions conferred on the President by or under this Constitution'.[342] Third, Article 14 was amended to provide that the commission could act notwithstanding a vacancy in the membership of the commission.[343] Finally, one criticism levelled against the president in the Dáil was that he could simply refuse to carry out his duties. It was pointed out that there was no provision in the Constitution which could force the president to act. As a result of this criticism, de Valera introduced Article 14.5.2° in order to provide that the presidential commission would act in circumstances of inactivity.[344]

[338] 11 January 1937 (UCDA: P150/2387).
[339] 24 April 1937 (UCDA: P150/2427).
[340] 24 April 1937 (UCDA: P150/2427).
[341] 68 Dáil Debates (9 June 1937) col. 147.
[342] 68 Dáil Debates (9 June 1937) col. 147.
[343] 68 Dáil Debates (9 June 1937) col. 147.
[344] 68 Dáil Debates (9 June 1937) col. 148.

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CHAPTER 5

Institutional Structure

The presidency was the single biggest institutional change between the 1937 Constitution and the 1922 Constitution of the Irish Free State. There remained a number of key institutional questions that had to be determined in the drafting process. These concerned issues that had plagued the Free State for over a decade. How did the state fit into the international legal order and the transnational legal order of the Commonwealth? Was the state to be unicameral or to have an upper house? If it was to have an upper house, on what basis should it be constructed? Should the president have an advisory council? Finally, how would the popular branches of government interact with the judiciary in the new state? Was judicial review of legislation, for example, a good idea, and if so, what body should carry it out?

Seanad Éireann

The Senate has not attracted significant judicial or academic consideration.[1] This lack of consideration belies the historical importance of the Senate. It was one of only two institutions of state, along with the

[1] See, for example, Gerard Hogan and Gerry Whyte, *J. M. Kelly: The Irish Constitution* (Dublin: LexisNexis Butterworths, 2003), 350–356. This edition is substantially similar to the second edition published in 1980; J.M. Kelly, *The Irish Constitution* (Dublin: Jurist Publishing, 1980), 97–100. The new edition contains two new sections on the second

D. K. Coffey, *Drafting the Irish Constitution, 1935–1937*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76246-3_5

presidency, which was constituted anew under the 1937 Constitution. The drafting followed two distinct stages. The earliest drafts provided for a legislature composed of a president and a lower house. It was not until the report of the second house commission in 1936 that the decision was made to continue with the institution of a second house.[2] The majority of decisions relating to the Senate were left until the cabinet discussions in October 1936, and the first substantive draft of what was to become Article 18 occurred in November 1936.[3] The articles were left essentially untouched until February 1937, when, as the drafters attempted to complete the draft for the printers, they were substantially revised.[4]

The draft of 18 May 1935 did not provide for a second house.[5] At that point, as we have seen, de Valera was embroiled in an attempt to abolish the Senate.[6] On 9 June 1936, the executive council appointed a commission to examine what functions and powers should be invested in a second house, if such a house were to be established.[7] The establishment of this commission was reflected in the drafting process. The draft of 6 August 1936 noted: 'Provisions relating to a Second House (Comhairle na hEireann), if any, will be embodied in an appropriate state should it be decided, following the report of the Senate Commission, to reconstitute the Oireachtas on the bicameral principle).'[8] The subsequent draft of 20 August envisaged that the composition of the second house would be decided by organic laws rather than the Constitution itself.[9] The powers and functions of the second house would, however, be regulated by the Constitution.[10] The second house of the Oireachtas commission reported

house, an expanded section on university representation, a reference to a 1999 case and, most interestingly, a section which questions the utility of the Senate as an institution.

[2] *Report of the Second House of the Oireachtas Commission* (Dublin: Stationery Office, 1936).

[3] 18 November 1937 (University College Dublin Archives (hereafter UCDA): P150/2370).

[4] Save for the removal of the provisions dealing with organic laws, see further Article 12.

[5] UCDA: P150/2370.

[6] See *Constitutionalism in Ireland, 1932–1938*, Chap. 2.

[7] *Report of the Second House of the Oireachtas Commission*, 4.

[8] 6 August 1936 (UCDA: P150/2370).

[9] 'Organic laws may provide for the creation, constitution and, subject to the provisions of this Article, the powers and functions of a Second House of the Oireachtas.' 20 August 1936 (UCDA: P150/2370).

[10] 'Note 1. Insert provision defining powers and functions of any Second House created by organic law.' Ibid.

on 30 September 1936 but drafts in early October 1936 continued to provide for the possibility of a second house, which indicates that no definitive decision had been made on the matter at that time.[11]

De Valera's official biography indicates that he paid particular importance to the views of Seán MacEntee and Seán Moynihan with regard to the desirability of a second house.[12] Moynihan's role is particularly interesting. He had been appointed to the second house of the Oireachtas commission and signed the minority report of the commission. The Irish version of de Valera's biography indicates that Moynihan provided de Valera with an advance list of the occupations which should be given special Senate representation.[13]

The first draft which definitely provided for the establishment of a second house was produced in advance of the cabinet discussions of October 1936. The Senate is another example, along with the presidency, where one can gauge the influence that the Fianna Fáil cabinet had on the institutions of state formed under the 1937 Constitution.

Article 18

1. *Seanad Éireann shall be composed of sixty members, of whom eleven shall be nominated members and forty-nine shall be elected members.*

The first draft of this section on 19 October 1936 provided that the number of senators was to be 45.[14] This was in line with the report of the second house commission.[15] Furthermore, the first draft stated: 'Provision as to the method or methods of selection of members of [the] S[enate]. (Decision to be taken).' This decision was apparently taken at the cabinet discussions of October 1936. The draft prepared thereafter, in November 1936, provided for a Senate of 50 members, eight to be nominated and 42 to be elected.[16] This formula was not altered until February 1937, when the Senate was to be composed of 55 members, ten to be nominated and

[11] UCDA: P150/2373.

[12] Earl of Longford and Thomas O'Neill, *Eamon de Valera* (Dublin: Hutchinson and Co, 1970), 291.

[13] Thomas Ó Neill and Padraig Ó Fiannachta, *De Valera* (Dublin: Chió Morainn, 1970), 326.

[14] 19[?] October 1936 (UCDA: P150/2385).

[15] *Report of the Second House of the Oireachtas*, 9.

[16] 18 November 1936 (UCDA: P150/2370).

45 to be elected.[17] The composition of the Senate was one which considerably exercised the executive council. Maurice Moynihan's diary reveals that the executive council discussed the Senate on 5 February.[18] De Valera's notebook reveals a number of drafts with various formulations for the Senate and a final note '[a]pp[rove]d 5.3.37'.[19] This approved formula—60 members in total, 11 nominated and 49 elected— became the final one, and was included in the draft of 7 March 1937.[20]

What accounts for the rising number of senators during the drafting process, particularly given that Fianna Fáil had campaigned on the elimination of waste and was in the process of reducing the number of deputies?[21] The elected percentage decreased from 84% to 82%, which is a negligible difference. Two possibilities suggest themselves. The first possibility was that the Senate would provide a safety net for those members who had failed to secure election to the reduced Dáil. A second is that the numbers went up in order to dilute the vote of the university constituencies. The National University of Ireland and Dublin University were to be entitled to elect three senators each under the draft of 18 November 1936.[22] In 1932, when university seats were included in the Dáil, the university seats had returned two Fianna Fáil deputies and four deputies who were opposed to Fianna Fáil's policies. If Fianna Fáil assumed these results would be replicated in the next university election, the increase in numbers may have been an attempt by the party to dilute the two-deputy 'loss' that Fianna Fáil would suffer.

2. *A person to be eligible for membership of Seanad Éireann must be eligible to become a member of Dáil Éireann.*

The draft of 19 October 1936 stated: 'Every person of Irish nationality who has reached the age of thirty-five years and who is not placed under disability or incapacity by law shall be eligible for membership of [the] S[enate].'[23] The age qualification was included in the report of the second

[17] 13 February 1937 (UCDA: P150/2390). These numbers tally with a note made by de Valera in his notebook on 5 February 1937 (UCDA: P150/2379).

[18] UCDA: P122/76.

[19] UCDA: P150/2379.

[20] 7 March 1937 (UCDA: P150/2399).

[21] The Dáil was to be reduced from 153 members to 138 members by s. 9 of the Electoral (Revision of Constituencies) Act 1935.

[22] 18 November 1936 (UCDA: P150/2370).

[23] 19[?] October 1936 (UCDA: P150/2385).

house commission.[24] It was, however, somewhat of an anomaly in international terms, although the Danish constitution provided for a similar requirement.[25] It also introduced a different requirement for membership of the Dáil and the Senate. This age qualification was omitted as a result of the cabinet meetings in October 1936.[26] In November 1936, the formula stated: 'Every person without distinction of sex who is of Irish nationality and is eligible to be a member of Dáil Éireann shall be eligible to be a member of Seanad Eireann.'[27] This was changed in February 1937 to the current formula.[28]

3. *The nominated members of Seanad Éireann shall be nominated, with their prior consent, by the Taoiseach.*

The first draft of this section stated, '[t]he nominated members of Seanad Eireann shall be nominated by the Prime Minister on behalf of the Council of Ministers'.[29] The reference to the council of ministers was removed in the draft of 13 February 1937.[30] This left the nominating power solely within the gift of the Taoiseach. The department of the president of the executive council identified two problems with this formula. (1) Could a person nominated to be a senator refuse the nomination? (2) Could a Taoiseach increase his majority in the Dáil by appointing members of the opposition to the Senate?[31] The phrase 'with their prior consent' was included in the draft of 1 April and remedied both of these issues.[32]

4. *1° The elected members of Seanad Éireann shall be elected as follows:—*

(i) Three shall be elected by the National University of Ireland.
(ii) Three shall be elected by the University of Dublin.
(iii) Forty-three shall be elected from panels of candidates constituted as hereinafter provided.

[24] *Report of the Second House of the Oireachtas*, 9.
[25] Article 35 of the Constitution of the Kingdom of Denmark 1915. Under this constitution, a prospective senator needed to have 'completed' their 35th year—they would need be at least 36.
[26] One of the drafts used at the cabinet meetings includes a note 'omit age'; see UCDA: P150/2374 draft headed 'Draft used at Cabinet discussions Oct. 20, 21, 22.'
[27] 18 November 1936 (UCDA: P150/2370).
[28] 13 February 1937 (UCDA: P150/2390).
[29] 18 November 1936 (UCDA: P150/2370).
[30] 13 February 1937 (UCDA: P150/2390).
[31] NAI: Taois s.9715B.
[32] 1 April 1937 (UCDA: P150/2415).

The draft of 19 October 1936 first guaranteed the existence of the Senate but left the question of the methods of selection open.[33] The 18 November 1936 draft, composed after the cabinet discussions, proposed a total membership of 50.[34] Eight of these members were to be nominated and 42 elected. Three members were to be elected by the National University of Ireland, 'including the recognised college of that university', three by the University of Dublin, and the remaining 36 from panels, which we will deal with more fully in section 7.[35] The composition of the section varied only in February 1937, when the two university seats were run together in the one subsection, although both were to retain three seats, and the reference to the 'Recognised College' was deleted.[36] The number of panel seats increased in line with the increases in the numbers of total seats in the Senate. One interesting development occurred in the draft of 2 March 1937, where pencil amendments indicated that the total number of seats in the Senate were to increase from 55 to 60.[37] Despite this increase, the pencil marks indicate also that the number of Senate seats to be elected from the universities were to decrease to two each. The two seats which were removed from the university franchise under this formula were to be re-allocated to the panel seats. These amendments were not followed in the first printed draft of 7 March.[38] They indicate, however, that the issue of university seats was a matter of some concern and provide some inferential support for the possibility outlined in relation to Section 1, that the increase in the number of senators may be explained by reference to the university seats.

This section was not greeted uncritically. Alfred O'Rahilly, who had been a member of the second house commission and was registrar of University College Cork,[39] claimed that the university seats were not sought for and '[n]either past experience nor the vocational ideal can

[33] 19[?] October 1936 (UCDA: P150/2385).

[34] 18 November 1936 (UCDA: P150/2370).

[35] At this point in time the draft referred to the establishment of the electorate of the universities by organic laws; see discussion above on Article 12.5.

[36] 13 February 1937 (UCDA: P150/2390).

[37] 2 March 1937 (UCDA: P150/2387).

[38] 7 March 1937 (UCDA: P150/2399).

[39] He would later become President of University College Cork.

justify any exceptional treatment of Universities'.[40] Furthermore, O'Rahilly believed the inclusion of the National University of Ireland as an electoral body was designed to prevent University College Cork from establishing an independent university, which he described as 'our future ideal', and stated the 'University Chancellor'—de Valera[41]—had placed 'a practically insurmountable obstacle' in their way.[42]

5. *Every election of the elected members of Seanad Éireann shall be held on the system of proportional representation by means of the single transferable vote, and by secret postal ballot.*

This section was included in the 18 November 1936 draft immediately after the cabinet discussions and the only change thereafter was in its placement within the article.[43]

6. *The members of Seanad Éireann to be elected by the Universities shall be elected on a franchise and in the manner to be provided by law.*

The first draft of this section may be found in the 18 November draft, which stated:

> Elections of the members of Seanad Eireann to be elected under the foregoing Articles shall, subject to the provisions of the said Articles, be regulated by Organic Laws, and subject as aforesaid provision may be made by such Laws for the following matters, that is to say:-
>
> […]
>
> the determination of the electorate of the National University of Ireland and of the electorate of Dublin University for the purpose of the election of the members of Seanad Eireann to be elected for those Universities respectively.[44]

[40] Alfred O'Rahilly, *Thoughts on the Constitution* (Dublin: Browne and Nolan, 1937), 40.
[41] He was chancellor of the National University of Ireland between 1921 and 1975.
[42] O'Rahilly, *Thoughts on the Constitution*, 41.
[43] 18 November 1936 (UCDA: P150/2370).
[44] 18 November 1936 (UCDA: P150/2370).

This section was replaced in February 1937 with a more elegant version: 'Subject to the provisions of the foregoing ARTICLES, elections of the elected members of Seanad Eireann (including the filling of casual vacancies) shall be regulated by law.'[45] This was further simplified in the second X draft to: 'The franchises on which the University members are to be elected shall be defined by law.'[46]

This formulation was subsequently changed to the new model, one less elegant but more precise, in two stages. First, the section was changed to the following: 'The members of Seanad Eireann to be elected by the Universities shall be elected by the electorate and in the manner provided by law.'[47] This provided for legislative competence over both the electors and the manner of the election. Previous drafts referred simply to the 'franchise', that is, they provided only for regulation of the electors and not the manner of election.[48] The draft of 1 April 1937 provided for the re-introduction of the phrase 'franchise'; this was the version that was adopted.[49] This final version was close to the wording of Article 27 of the 1922 Constitution, which stated:

> Each University in the Irish Free State (Saorstát Eireann), which was in existence at the date of the coming into operation of this Constitution, shall be entitled to elect three representatives to Dáil Éireann *upon a franchise and in a manner to be prescribed by law*.[50]

7. 1° *Before each general election of the members of Seanad Éireann to be elected from panels of candidates, five panels of candidates shall be formed in the manner provided by law containing respectively the names of persons having knowledge and practical experience of the following interests and services, namely:*

(i) *National Language and Culture, Literature, Art, Education and such professional interests as may be defined by law for the purpose of this panel;*

[45] 13 February 1937 (UCDA: P150/2390).
[46] 1 March 1937 (UCDA: P150/2387).
[47] 7 March 1937 (UCDA: P150/2399).
[48] See, for example, 13 February 1937 (UCDA: P150/2390).
[49] 1 April 1937 (UCDA: P150/2415).
[50] Emphasis added.

(ii) *Agriculture and allied interests, and Fisheries;*
(iii) *Labour, whether organised or unorganised;*
(iv) *Industry and Commerce, including banking, finance, accountancy, engineering and architecture;*
(v) *Public Administration and social services, including voluntary social activities.*

The idea for panel representation had been presented in the majority report of the 1936 commission on a second house of the Oireachtas. This recommended panels to cover matters such as:

> National Language and Culture, the Arts, Agriculture (in all its forms) and Fisheries, Industry and Commerce, Finance, Health and Social Welfare, Foreign Affairs, Education, Law, Labour, Public Administration (including Town and Country Planning).[51]

The minority report, in contrast, provided a detailed breakdown of four panels: Farming and Fisheries, Labour, Industry and Commerce, and Education and the Learned Professions.[52] The minority report emphasised vocational representation. This therefore recommended that nominating bodies be allowed to directly elect members to the Senate and enumerated the various nominating bodies under the various panels.[53]

The November draft contained the first list of panels to be formed under the Constitution. These were:

(a) persons having practical knowledge and experience of public administration,
(b) persons engaged in the agricultural industry in E. as farmers of land,
(c) persons engaged in industry or commerce in E. or the business of banking or finance or engaged in the profession of engineering or architecture or accountancy,
(d) persons who earn their livelihood as workers in industrial or agricultural employment or by any form of manual or clerical labour in E.,

[51] *Report of the Second House of the Oireachtas*, 11.
[52] *Report of the Second House of the Oireachtas*, 31–32.
[53] These bodies were already in existence and did not require legislative establishment.

(e) persons engaged in the profession of teaching in any primary or secondary or technical school or engaged in the practice of law or medicine (including dentistry, veterinary surgery, or pharmaceutical chemistry) in E.[54]

The cabinet at this point in time was composed of, inter alia, a solicitor, two engineers, a doctor and two teachers.[55] As may be seen, all of these professions were guaranteed representation under the first list. These professions were to retain representation throughout the drafting process. In the corporative chambers established in European constitutions in the interwar period, there is no precise link, although both the Austrian and Portuguese constitutions did contain lists of areas of corporative concern.[56]

The list appeared to be substantially revised in the February draft, where the list was as follows:

> Education and the learned professions (including any other professional interest specified by law); Farming (including livestock breeding) and Fisheries; Industry and Commerce (including banking, finance, engineering, architecture and accountancy); Labour whether organized or unorganized, and Public Administration (including local government and social services).[57]

The list follows the categories in the minority report, with one notable addition—public administration. In the November draft, public administration is the first panel in the list, which possibly indicates it was the first panel agreed on by the cabinet, and it was only in February that it was moved to the bottom of the list.

These categories were laid out as a list in the X2 draft, where 'National Culture' was included under panel (a).[58] 'Language' was added in the 7 March draft.[59] In the draft of 1 April, 'farming' was replaced with the term 'Agriculture and allied interests' in panel (c) and the reference to local

[54] 18 November 1937 (UCDA: P150/2370).

[55] P.J. Ruttledge (solicitor), Gerald Boland (engineer), Seán MacEntee (engineer), James Ryan (doctor), de Valera (teacher) and Thomas Derrig (teacher).

[56] See Article 48 of the Constitution of the Federal State of Austria 1934 and Article 102 of the 1933 Portuguese Constitution.

[57] 13 February 1937 (UCDA: P150/2390).

[58] 1 March 1937 (UCDA: P150/2387).

[59] 7 March 1937 (UCDA: P150/2399).

government in panel (e) was removed.[60] George Gavan Duffy suggested that local government should make a specific reference to planning as this would be of increased importance in the future, but the drafters pursued the course of removing local government altogether.[61] The 1 April draft also replaced the phrase 'any other professional interests' in panel (a) with 'such professions'. This was presumably done in order to prevent panel (a) becoming a category under which any aggrieved profession which did not fit within the other categories could be listed. The words 'Literature' and 'Art' were included in panel (a) as a result of an amendment tabled by Frank MacDermott in the Dáil on the grounds that 'Culture' may not include them.[62]

To Be Elected

Colum Gavan Duffy, the son of George Gavan Duffy, commented in 1947: 'The Panel system per se … is in line with the most advanced constitutional thought in Europe, and if a satisfactory Seanad electorate could be devised, should produce admirable results in the future.'[63] The draft Constitution contained a number of provisions for the election of the Senate which do not survive in the final version. The November draft contained sections stating: (i) that no candidate could stand on more than one panel; (ii) that the nomination and selection from a panel was to be determined by organic laws; (iii) that the jurisdiction of Éire was to form one electoral area; and (iv) it set out how the 'College of Electors' was to function.[64] The scheme was that laid out in the majority report of the commission on the second house of the Oireachtas.[65] Every candidate at the general election immediately preceding the Senate election who polled over 1000 first preference votes was to be entitled to one vote for every 1000 first preference votes (or fraction exceeding 500 votes). Thus, a person with 1561 first preference votes would be entitled to two votes.

This scheme was the subject of some revision; the nomination and selection provisions and the prohibition on a candidate standing on one

[60] 1 April 1937 (UCDA: P150/2415).
[61] UCDA: P150/2416.
[62] 67 Dáil Debates (1 Jun 1937) cols. 1460–1461.
[63] Colum Gavan Duffy, *The Senate in the Irish Constitution of 1937* (Unpublished MA Thesis, University College Dublin, 1947), 66.
[64] 18 November 1936 (UCDA: P150/2370).
[65] *Report of the Second House of the Oireachtas*, 11.

panel were eliminated in the February draft.[66] This draft also reduced the threshold for gaining the franchise to 500 votes, that is, a person with 561 votes was to be entitled to one vote. A qualifying phrase was introduced in the draft of 1 April: an elector was to be in compliance with the law relating to the elections of members of the Senate and was not to be disqualified by law.[67] The procedure for allocating Senate electoral votes was revisited in the draft of 10 April 1937. One had to gain 500 first preference votes in a general election in order to become a Senate elector.[68] However, the draft did not provide for how Senate votes were to be allocated to each elector; the number of votes was to be determined by statutory law.

During the Dáil debates on the Constitution, Thomas O'Higgins moved an amendment on behalf of John A. Costello and Patrick McGilligan which retained Sections 1–4(ii) and deleted the remainder of the article, adding that such matters were to be determined by law.[69] This would leave the majority of the Senate to law; for example, there would have been no provisions relating to panels or to when an election of the Senate was to take place. De Valera opposed the scheme on the grounds that Senate elections would become too elastic if the amendment were passed.[70] However, at the report stage de Valera indicated he was prepared to leave the nature of the electorate and the panel system to the ordinary law.[71] The voting qualifications were therefore removed.

2° *Not more than eleven and, subject to the provisions of Article 19 hereof, not less than five members of Seanad Éireann shall be elected from any one panel.*

Section 2 of this Article was introduced in its first iteration in the Dáil as an amendment by de Valera.[72] The point of the amendment was to prevent one panel from overshadowing the others; it granted 25 seats to nominees from one panel, while still allowing a degree of elasticity in the

[66] 13 February 1937 (UCDA: P150/2390).
[67] 1 April 1937 (UCDA: P150/2415).
[68] 10 April 1937 (UCDA: P150/2417).
[69] 67 Dáil Debates (1 June 1937) cols. 1398–1399.
[70] 67 Dáil Debates (1 June 1937) col. 1399.
[71] 68 Dáil Debates (9 June 1937) cols. 154–155.
[72] 67 Dáil Debates (1 June 1937) col. 1461.

numbers to be nominated. This was also in line with a suggestion by the former Senator James Douglas that numbers should be specified in order to prevent a party which did not expect to retain a majority in the Dáil from altering the panels in order to retain a majority in the Senate.[73]

8. *A general election for Seanad Éireann shall take place not later than ninety days after a dissolution of Dáil Éireann, and the first meeting of Seanad Éireann after the general election shall take place on a day to be fixed by the President on the advice of the Taoiseach.*
9. *Every member of Seanad Éireann shall, unless he dies, resigns, or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Éireann next held after his election or nomination.*

It is useful to consider Sections 8 and 9 together. The November draft simply contained a section which was the forerunner of Section 9:

> Every member of Seanad Eireann, unless he previously dies, resigns or becomes disqualified, shall hold office from the date of his nomination or election (as the case may be) until the dissolution of the Oireachtas next occurring after such nomination or such election and no longer.[74]

This provision provided that a senator could not hold office after the dissolution of the Dáil, but no equivalent provision necessitating the calling of a Senate election existed at this point. Seán MacEntee, the minister for finance, drafted a memorandum in early November in which he called for the linking of Dáil and Senate dissolutions to be abandoned.[75] He conceived of the Senate as a possible constitutional curb on the government. For this reason, he suggested that the Senate should have a fixed term of four or three and a half years. This would allow for the composition of the bodies to differ. He further suggested in the memo that members of local governments should form part of the electorate so as to create a more responsive political system. The composition of the Senate might change according to government setbacks in the local elections:

[73] UCDA: P150/2416.
[74] 18 November 1936 (UCDA: P150/2370).
[75] 13 November 1936 (UCDA: P67/185).

> the people would be entitled at the earliest opportunity to reinforce any curb which the Constitution provided for such a contingency. One outcome of such a situation would be that the Second House might with greater authority ask for a referendum on important issues.

This would allow the Senate to act as a 'brake' on the Dáil as it would be able to rely upon an independent mandate from that enjoyed by the lower house. This suggestion was not acted upon in the November draft and does not appear at any stage in the drafting process.

It was not until February 1937 that this section was tackled once more, and the result was as follows:

> Every member of Seanad Eireann, unless he previously dies, resigns or becomes disqualified, shall hold office from the date of his nomination or election *as such member* (as the case may be) until the *expiration of a period of sixty days after the date of the general election of Dáil Éireann* next occurring after such nomination or such election and no longer.[76]

This entire section was bracketed and there was a note in the margin stating 'not final', which indicates the drafting of the section was ongoing.[77] The draft is significant because it marks the first time that a senator would hold office after a dissolution of the Oireachtas. The entire section was revisited in the draft of 1 March.[78] There were a number of noteworthy features of the new draft.

First, the Senate was to be dissolved on a dissolution of the Dáil and an election for the Senate was to be held, at an unspecified date. Senators

[76] 13 February 1937 (UCDA: P150/2390) (italics indicate changes).

[77] UCDA: P150/2387. This draft is the same as that contained in P150/2390 but as the 2390 draft is dated I have preferred to use that draft when possible. In this instance, the handwritten amendment is on the 2387 draft.

[78] 1 March 1937 (UCDA: P150/2387). The new section stated:

1. Upon a dissolution of the Oireachtas, Seanad Eireann shall be dissolved as well as Dail Eireann, and a general election for Seanad Eireann shall take place.
2. Every member of Seanad Eireann holding office at the date of a dissolution of the Oireachtas shall, notwithstanding the dissolution, unless he previously dies, resigns or becomes disqualified, continue to hold office until

   (a) the expiration of a period of sixty days after the date of the general election of Dáil Éireann consequent upon dissolution, or
   (b) the general election for Seanad Eireann consequent upon the dissolution shall have been held, whichever shall be the earlier.

remained senators until this election or until 60 days had passed after the Dáil election subject to a senator's death or the other disqualifications laid out above. It was a confusing draft. Why did the second period not cease to run if a Senate election was held between the Dáil election and the end of the 60 days? Further, why was it provided specifically that there was to be a Senate election in the event of dissolution, but no mention was made of such in the event of a re-dissolution of the Dáil before the Senate election could be carried out?

The parliamentary draftsman, Arthur Matheson, questioned what was to be done with the pending election of the Senate if the Dáil were re-dissolved.[79] He suggested the Dáil should not be allowed to re-dissolve until after the Senate election. The next draft of the section incorporated these changes and stated: 'The Oireachtas shall not be dissolved between the date of the re-assembly of Dáil Éireann after a dissolution and the polling day of the general election for Seanad Eireann consequent upon such dissolution.'[80] The problem, of course, was that such a limitation would limit the Taoiseach's ability to dissolve the Dáil, which was fettered only by the president under Article 13.2.2°. The entire article was re-cast in the draft of 15 March as follows:

1. A general election for Seanad Eireann shall take place not later than ninety days after the dissolution of Dáil Éireann.
2. Every member of Seanad Eireann shall, unless he previously dies, resigns, or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Eireann next held after his election or nomination.
3. Dáil Éireann shall not be dissolved between the date of its re-assembly after a dissolution and the polling day of the general election for Seanad Eireann consequent on such dissolution.[81]

3. In the event, however, of a dissolution of the Oireachtas occurring before the general election for Seanad Eireann consequent upon a previous dissolution shall have taken place, every member of Seanad Eireann then holding office shall, unless he previously dies, resigns or becomes disqualified, continue to hold office until the expiration of a period of sixty days after the date of the general election for members of Dail Eireann consequent upon such dissolution.

[79] 2 March 1937 (UCDA: P150/2387).

[80] 3 March 1937 (UCDA: P150/2387). This draft also increased the time after a Dáil election in which senators would hold office from 60 to 90 days.

[81] 15 March 1937 (UCDA: P150/2401).

This section was revisited by the drafting committee, which pointed out that the object of Section 3 was 'not clear'; the section was therefore deleted, but the committee was to 'consult Matheson'.[82] The section was re-drafted for the draft of 1 April, where both sections appeared in their final form.[83] The final version not only removed the limitation on Dáil dissolution, but also stated that the date of the Senate election was to be stipulated 'by the President on the advice of the Taoiseach'.

10. 1° *Subject to the foregoing provisions of this Article elections of the elected members of Seanad Éireann shall be regulated by law.*
2° *Casual vacancies in the number of the nominated members of Seanad Éireann shall be filled by nomination by the Taoiseach with the prior consent of persons so nominated.*
3° *Casual vacancies in the number of the elected members of Seanad Éireann shall be filled in the manner provided by law.*

The first time this section appeared was in the November draft, which stated:

> Elections of the members of Seanad Eireann to be elected under the foregoing Articles shall, subject to the provisions of the said Articles, be regulated by Organic Laws, and subject as aforesaid provision may be made by such Laws for the following matters, that is to say:-
> […]
> the filling of casual vacancies in the membership of Seanad Eireann.[84]

This wording was replaced in the 13 February draft, which contained all the substantive content of the final version although the first and final subsections were run together.[85] Although the draft said that vacancies in

[82] NAI: Taois s.9715B.
[83] 1 April 1937 (UCDA: P150/2415).
[84] 18 November 1936 (UCDA: P150/2370).
[85] 13 February 1937 (UCDA: P150/2390). The draft stated:

> Subject to the provisions of the foregoing ARTICLES, elections of the elected members of Seanad Eireann (including the filling of casual vacancies) shall be regulated by law. Casual vacancies in the number of the nominated members of Seanad Eireann shall be filled by nomination.

nominated members were to be filled 'by nomination', it did not say who was to do the nominating; this point was raised by George Gavan Duffy in his comments on the literal translation of the Irish draft.[86] The draft of 2 March 1937 separated the first and final subsections and included a clause stating that nomination was to be 'by the Taoiseach'.[87] The phrase 'with the prior consent of persons so nominated' was first included in the draft of 10 April.[88]

Article 19

Provision may be made by law for the direct election by any functional or vocational group or association or council of so many members of Seanad Éireann as may be fixed by such law in substitution for an equal number of the members to be elected from the corresponding panels of candidates constituted under Article 18 of this Constitution.

Article 45 of the 1922 Constitution provided:

> The Oireachtas may provide for the establishment of Functional or Vocational Councils representing branches of the social and economic life of the Nation. A law establishing any such Council shall determine its powers, rights and duties, and its relation to the government of the Irish Free State (Saorstát Eireann).

There were two noteworthy differences between the 1922 article and Article 19. The first is that whereas the 1922 article stated that the Oireachtas might provide for the 'establishment' of such councils, the 1937 article simply provided that 'provision may be made for direct election by any functional or vocational group or association or council', including, by implication, any pre-existing body. This obviated the need for legislative establishment. The second is that Article 19 explicitly provided for the possibility of functional councils directly electing members to the second house; this was merely implicit in the 1922 Constitution. This difference was evident in the November 1936 draft which first laid out the

[86] UCDA: P150/2397.
[87] 1 March 1937 (UCDA: P150/2387).
[88] 10 April 1937 (UCDA: P150/2417).

Senate provisions.[89] The 1922 article was the obvious inspiration, however, as the first draft incorporated phrases, such as 'social and economic life of the Nation', which appeared in the 1922 Constitution. The first draft was quite inelegant and was therefore modified in February 1937.[90] The sole substantive amendment, rather than one which clarified the language, was the omission of the phrase 'social and economic life of the Nation'. This was presumably changed in order to avoid any possible words of limitation which could be invoked in a future controversy over whether a particular council was involved in the 'social and economic life of the Nation'.[91]

It was not until 15 March that the draft provided for the 'establishment *or recognition*' of functional councils.[92] It seems likely the new phrase was included in order to allow the voluntary, as opposed to statutorily mandated, formation of such councils to be incorporated under Article 19. The beginning of the article was rephrased in the draft of 1 April to remove the phrase 'establishment or recognition' and the word 'council' was replaced with the phrase 'group or association':

[89] 18 November 1936 (UCDA: P150/2370). The Article read as follows:

> In the event of the establishment under this Constitution of Functional and Vocational Councils representing branches of the social and economic life of the Nation provision may be made by Organic Laws for direct election by such Councils of so many members of Seanad Eireann (in lieu of all or any of the members to be elected from panels constituted under Article THIRTEEN hereof) as may be determined in that behalf by Organic Laws.

[90] 13 February 1937 (UCDA: P150/2390):

> In the event of the establishment under this Constitution of *any* Functional *or* Vocational Councils provision may be made by law for the direct election by such Council of so many members of Seanad Eireann *as may be determined by such law in substitution for an equal number of the members of Seanad Eireann* to be elected from panels *of candidates* constituted under Article THIRTEEN *of this Constitution*. (italics indicate changes)

[91] An example of this would have been something like the Royal Irish Academy, which would not fall comfortably within the purview of either 'social' or 'economic' life as it was more concerned with scholarship. It would not have been necessary for the argument to be conclusive, merely that it would lead to political controversy.

[92] 15 March 1937 (UCDA: P150/2401). Emphasis added.

> *Provision may be made by law for the direct election by any* functional or vocational *group or association* of so many members of Seanad Eireann as may be fixed by such law in substitution for an equal number of the members to be elected from panels of candidates constituted under Article *18 of this Constitution*.[93]

This change was consistent with the likely emphasis on voluntary vocational groups. The use of the phrase 'recognition' in the previous draft is replaced by an emphasis on vocational 'groups or associations'. The new draft removed the reference to establishment by the Oireachtas of vocational councils entirely. This would not prevent the Oireachtas from legislating to establish such councils, but the introduction of the passive voice removed the primary responsibility for their establishment from the Oireachtas. The final change made before the draft was published was the re-introduction of the words 'or council' in the draft of 10 April, at which stage it read:

> Provision may be made by law for the direct election by any functional or vocational group or association of so many members of Seanad Eireann as may be fixed by such law in substitution for an equal number of the members to be elected from panels of candidates constituted under Article 18 of this Constitution.[94]

In the Dáil, de Valera introduced an amendment which stipulated that elections were to be from 'the corresponding' panels of candidates in order to ensure that a vocational organisation that fitted within the ambit of one panel would not be granted members at the expense of another panel—for example, the Irish Congress of Trade Unions would not be granted a seat at the expense of the agricultural panel.[95]

How committed was de Valera to vocationalism? In April 1935, Kathleen O'Connell responded to a letter by George Gavan Duffy about the corporative chamber in Portugal, and noted: '[de Valera] desires me to say that at one time he was considering the possibility of a Vocational Council, but the difficulty is that here we have very few vocational organisations'.[96] His scepticism about the system of vocational organisation may

[93] 1 April 1937 (UCDA: P150/2415). Italics indicate changes from previous draft.
[94] 10 April 1937 (UCDA: P150/2417).
[95] 68 Dáil Debates (9 June 1937) col. 159.
[96] 15 April 1935 (UCDA: P152/39).

have allowed de Valera to promise vocational election while believing that it would never happen voluntarily.[97] O'Rahilly considered Article 19 and stated: '[provision] may be made, but is it likely? Are the Government and Party likely to abandon the power of election and patronage which the delightfully elastic method of Senate-election puts into their hands?'[98] This comment may have seemed unduly cynical in 1937 but history has vindicated it. Moreover, the provisions relating to the Senate demonstrate again how the input of the cabinet, in October 1936 and February 1937, substantively shaped the drafting of this article.

International Relations

Article 1 of the 1922 Constitution had declared: 'The Irish Free State … is a co-equal member of the Community of Nations forming the British Commonwealth of Nations.' There was no equivalent provision in Article 29 of the 1937 Constitution, which dealt with international affairs. The relationship of the new state with the Commonwealth was still, however, the most important consideration in the early stages of the drafting process.

It is worth bearing in mind that in the 1930s the primary focus of international law was on the relationship between states rather than the relationship between states and individuals. This may be seen in the leading opinion of the permanent court of international justice of the time: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will.'[99] This approach was mirrored in the drafting of Article 29 of the Constitution.

The drafting of this article followed two distinct phases. The first, which lasted until the abdication crisis in December 1936,[100] was primarily concerned with the Commonwealth. Hearne drafted versions of an organic law dealing with issues arising from Commonwealth membership.[101]

[97] O'Rahilly complained in 1936 of the failure of successive governments to establish a council of education. See Alfred O'Rahilly, "The Constitution and the Senate," *Studies* 25 (1936): 8.

[98] O'Rahilly, *Thoughts on the Constitution*, 42.

[99] *The Case of the S.S. 'Lotus'* PCIJ, Ser A, No 10, 1927, 18.

[100] See *Constitutionalism in Ireland, 1932–1938*, Chap. 3.

[101] Broderick overlooks the earlier drafting of this clauses. See Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* (Newbridge: Irish Academic Press, 2017), 198–199.

These drafts were superseded by the abdication crisis, and the second phase commenced after the resolution of abdication legislation.

Pre-December 1936

The earliest drafts of the Constitution did not deal with the issue of international relations in much detail; this was to be the subject of a detailed organic law. The earliest draft which deals with the subject in October 1936 stated:

> The relations of the State with other States, and the extent of its co-operation with any other State or any league or group of states are hereby declared to be matters of vital concern to the Irish Nation and within the exclusive competence of the Sovereign Irish People to decide as they think right in the general national interest, and in the interests of harmonious international relationships and the peace and welfare of the world.[102]

It is unclear what influenced this initial draft—most constitutions at the time simply provided for the competence of an organ of government in relation to foreign affairs. This statement did not make specific reference to the Commonwealth but, as we shall see, the relationship with the Commonwealth remained the dominant concern in Ireland's international affairs. The statement is also more consistent with the focus of the final draft on the country's relations with other states. Two summaries prepared in October 1936, slightly later than the above excerpt, made no mention of international affairs generally but did make specific reference to the fact that a law was to be enacted declaring that as long as the state was a member of the Commonwealth, 'certain functions heretofore exercised by the constitutional monarchy in the domain of external affairs will continue to be exercised, but only on the advice of the Government'.[103] The draft of 19 October stated there was to be the following declaration:

(a) the relations of the State with other States and
(b) the extent of its co-operation with any other State or any league or group of States are matters of vital concern to the Irish Nation and within the exclusive competence of the Sovereign Irish People

[102] 13[?] October 1936 (UCDA: P150/2373).
[103] UCDA: P150/2375 summaries entitled 'Summary of Main Provisions of the Constitution' and 'The general scheme of the Constitution is as follows.'

> to decide as they think right in the national interest and in the interests of harmonious and pacific international relationships.[104]

This was the extent of the drafting before 1937. The focus of the draft article shifted to the rights of the state, as opposed to the nation, in February 1937.[105] The approach to the problem of international affairs shifted dramatically as a result of the abdication crisis in December 1936, which settled the issue of the relationship of the state with the Commonwealth.

It is useful to consider the draft organic law before proceeding to an examination of the article. There are two drafts of this in the de Valera papers from 31 August and 6 September 1936; the first was to be called the 'Foreign Relations Organic Law 1937' and the second the 'Foreign Relations Act 1936'.[106]

The 'Foreign Relations Organic Law 1937' draft contained three substantive sections. The first provided that treaties could be concluded only on the advice of the council of ministers, that international treaties had to be laid before the Dáil unless they were of a technical or administrative character, and that all treaties which imposed a charge on the public fund had to approved by the Dáil before they could become binding.

The second section provided that diplomatic and consular agents of the state were to be appointed by or on the advice of the council of ministers. The final section provided for the exercise of the executive power of the state within the Commonwealth.

The draft entitled 'Foreign Relations Act 1936' contained two notable changes from the earlier draft. First, there was a section which stated that war could be declared only by the Dáil, although the council of ministers could meet the threat of invasion.[107] Second, the draft listed the four areas in which the state could adopt Commonwealth procedures:

> Treaties and conventions in the Heads of States form,
> Full powers and instruments of ratification relating to such treaties and conventions,

[104] 19[?] October 1936 (UCDA: P150/2385).

[105] See further *infra*.

[106] 6 August 1936 (UCDA: P150/2370). The latter version is headed with the date 6 August 1936 but ends with the date 6 September 1936. See the appendix on draft dating for why I prefer the second date.

[107] This mirrored Article 49 of the 1922 Constitution.

Letters of credence or recall of envoys extraordinary and ministers plenipotentiary,

Consular commissions and exequaturs.[108]

These drafts became obsolete with the advent of the abdication crisis and the passage of the Executive Authority (External Relations) Act 1936,[109] Section 1 of which provided for the appointment of diplomatic and consular representatives of the state on the advice of the government.[110] Section 2 provided that treaties were to be made only on the advice of the government.[111] The Act also provided that while the state was associated with the Commonwealth it could use the king for the purposes of the first two sections.[112] The Act dealt with some, but not all—for example, declarations of war—of the issues contained in the draft organic laws. The other matters were to re-surface in the constitutional text.

Article 29

1. *Eire affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.*

This section was a late addition to the article. It was included, and then in its final version, only on 10 April 1937.[113]

2. *Eire affirms its adherence to the principle of pacific settlement of international disputes by international arbitration and judicial determination.*

The first iteration of this section is to be found in the draft of 13 February 1937, which stated: 'E. affirms its adherence to the principle of the peaceful settlement of international disputes by international arbitration or judicial determination.'[114] Broderick traces its influence to the Covenant of the League of Nations and the Kellogg-Briand Pact, but the closer link

[108] UCDA: P150/2370.
[109] See *Constitutionalism in Ireland, 1932–1938*, Chap. 3.
[110] Section 1.
[111] Section 2.
[112] Section 3.
[113] 10 April 1937 (UCDA: P150/2417).
[114] 13 February 1937 (UCDA: P150/2390).

is with the treaty entitled 'Pacific Settlement of International Disputes' which the Free State had acceded to on 26 September 1931.[115] This treaty specifically for 'judicial settlement' and 'arbitration'.

The section was amended in the draft of 2 March to refer to judicial 'decision'.[116] In his commentary on the draft Constitution, Conor Maguire, president of the High Court, stated that the use of the phrase 'judicial decision' seemed to indicate a court with the power to impose sanctions and noted: 'No such Court exists at the moment nor is it likely to exist in the future.'[117] The section was subsequently amended for the draft of 10 April to read 'judicial determination'.[118]

3. *Eire accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.*

The draft of 13 February 1937 contained the first iteration of this section: 'E. affirms its acceptance of agreed principles of international law as the rule of conduct between E. and all other States.'[119] The inspiration for this subsection was probably the recitation in the 1919 Covenant of the League of Nations of the aspiration to promote 'the firm establishment of the understandings of international law as the actual rule of conduct among Governments'. The initial draft of the section suffered from two deficiencies. First, it referred to 'the rule of conduct' which seemed to mean that there was only a single rule that governed conduct in such circumstances. This wording was awkward and was corrected in the draft of 2 March.[120] Second, Conor Maguire drew attention to the problems associated with the phrase 'agreed principles of international law'.[121] The problems were partly philosophical—Maguire questioned whether something could be referred to as 'law' in the absence of sanctions—and partly practical—Maguire questioned who 'agreed' to the principles in question. Requiring positive 'agreement' set too high a standard of legal recognition. The philosophical objection was ignored but the practical objection heeded.[122] The draft of 10 April was

[115] *League of Nations Treaty Series* vol. XCII (1929–1930), 345–363.
[116] 2[?] March 1937 (UCDA: P150/2387).
[117] 23 March 1937 (UCDA: P150/2416).
[118] 10 April 1937 (UCDA: P150/2417). This draft also replaced 'peaceful' with 'pacific'.
[119] 13 February 1937 (UCDA: P150/2390).
[120] 2[?] March 1937 (UCDA: P150/2387).
[121] 23 March 1937 (UCDA: P150/2416).
[122] This approach did not completely eliminate the problem. The constitution review group asked in 1996 'how does one determine whether a particular principle *is* a "generally

amended to refer to 'generally recognised principles' instead of 'generally agreed principles'. This was in line with continental constitutions.[123]

> 4. (1) *The executive power of Eire in or in connection with its external relations shall in accordance with Article 28 of the Constitution be exercised by or on the authority of the Government.*
> (2) *For the purpose of the exercise of any executive function of Eire in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which Eire is or becomes associated for the purpose of international co-operation in matters of common concern.*

The 13 October 1936 draft prepared stated:

> The relations of the State with other States, and the extent of its co-operation with any other State or any league or group of states are hereby declared to be matters of vital concern to the Irish Nation and within the exclusive competence of the Sovereign Irish People to decide as they think right in the general national interest, and in the interests of harmonious international relationships and the peace and welfare of the world.[124]

It focused on the manner in which the Irish nation and people, as opposed to the Irish state, were to operate in the international field.

The draft of 13 February 1937 brought greater technical precision, identifying the institution charged with conducting foreign relations and the manner in which they were to be carried out:

> The executive power of E. in or in connection with the external relations of E. shall be exercised by or on the authority of the Government.
>
> The Government may take such measures as they may consider necessary or desirable to promote friendly co-operation between E. and any group or league of nations with which E. is or becomes associated for the purpose of international co-operation in matters of common concern.

recognised principle of international law"?'

[123] See, for example, Article 4 of the 1919 Constitution of the German Reich, and Article 8 of the 1934 Constitution of the Federal State of Austria.

[124] 13[?] October 1936 (UCDA: P150/2373).

> Provision may from time to time be made by law for giving effect to any such measures as aforesaid including provision authorising the Government (subject to any conditions specified in such law) to avail, for the purpose of the exercise of any executive function of E. in or in connection with its external relations, of any organ, instrumentality, or method of procedure used or adopted for the like purpose by the members of any such group or league of nations as aforesaid.[125]

This was a more obvious precursor than the earlier drafts to the final version. It emphasised the role of the state, it provided for the exercise of executive power through the government, and it provided for international 'organs' to be used in certain circumstances. The wording was reworded but not substantively changed in the draft of 10 April 1937.[126] This was the final draft which appeared.

> 5. (1) *Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.*
> (2) *The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.*
> (3) *This section shall not apply to agreements or conventions of a technical and administrative character.*

As we have seen, the earliest formulations of this section occurred in draft organic laws prepared in August and September 1936. Both contained provisions which incorporated the substance of the section.[127] These were tied, at this time, to the provision that the executive power was to be exercised on the advice of the government.[128]

[125] 13 February 1937 (UCDA: P150/2390).
[126] 10 April 1937 (UCDA: P150/2417):

> *For the purpose of the exercise of any executive function of Éire in or in connection with its external relations,* the Government *may, subject to such conditions (if any) as may be determined by law,* avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations *with which Éire is or becomes associated for the purpose of international co-operation in matters of common concern.* (italics indicate changes)

[127] UCDA: P150/2370.
[128] They were contained in the same section in the drafts.

The earliest draft of the Constitution which contained the provisions is the draft of 13 February 1937, which stated:

> E. shall not become a party to any international agreement unless the terms thereof shall have previously been approved by Dáil Éireann.
>
> This provision shall not apply to conventions of a technical and administrative character.[129]

The provision relating to charges on public funds was included in the subsequent X2 draft, where it was included as a separate subsection.[130] The draft of 2 March changed the requirements for international agreements from approval by the Dáil to simply laying the agreement before it. This, of course, allowed the government far greater latitude in the exercise of executive power. But it was not enough for the department of finance, which criticised the draft of 15 March on the grounds that the state was a member of a number of international organisations as a result of agreements which had not been laid before the Dáil.[131] The department was also worried the provisions as drafted might 'cramp the style of Departments' in international negotiations.

The subsections dealing with 'charges' and 'technical agreements' remained separate at this time, which led to a potential problem. All international agreements save those of a technical or administrative nature had to be laid before the Dáil. An international agreement which involved a charge on the public funds, however, had to be approved by the Dáil. Thus, a technical agreement that involved a charge upon the public fund would not have to be laid before the Dáil under one subsection but would have to be approved by the Dáil under another. This problem seems to have been recognised in the aftermath of the 15 March draft, which contains a handwritten annotation to the public fund subsection which stated 'adding savg clause'.[132] The draft of 1 April resolved the conflict by providing that international agreements of a technical character would not have to be laid before the Dáil even where they imposed a charge on funds.[133]

[129] 13 February 1937 (UCDA: P150/2390).

[130] 1[?] March 1937 (UCDA: P150/2387). It stipulated that the state 'shall not be bound by any international agreement involving a charge upon public funds unless the terms thereof shall have been approved by Dáil Éireann'.

[131] 19 March 1937 (UCDA: P67/184).

[132] 15 March 1937 (UCDA: P150/2401).

[133] 1 April 1937 (UCDA: P150/2415).

6. *No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.*

This section was a late addition to the Article. It seems to have been included at the prompting of George Gavan Duffy. He wrote a proposed draft under the heading 'Exclusion of treaties from jurisdiction of courts of law' which stated that '[n]o international agreement to which the State shall become a party shall (unless and so far as may be otherwise provided by law) be construed as conferring rights cognizable by any court'.[134]

Its inclusion was first indicated in a handwritten note on 1 April 1937 which indicated that a new subsection was to be included to deal with 'treaties'.[135] The subsequent draft of 10 April contained the first iteration of the subsection and differed from the final version only in the use of the word 'Éire' instead of 'the State'.[136] The wording was not that advanced by Gavan Duffy but the effect was the same: it prevented an individual relying upon an international agreement by the state unless implementing legislation had made it justiciable. Gavan Duffy, however, evidently had a far more radical proposal in mind than he had first indicated. In a subsequent commentary, he stated: 'Not only treaties, but statutes giving effect thereto, should be withdrawn from the Courts, e.g. The 1921 Treaty and the Constitution Act, 1922.'[137] Gavan Duffy's proposal would have removed the 1922 Constitution from the purview of the courts structure. He may have proposed this in order to avoid the possibility of a court determining that the 1937 Constitution violated the terms of the 1921 treaty. However, the implications of his proposal would have been far-reaching. If the courts could not adjudicate on international treaties or the on legislation enacted to implement them, then those treaties could theoretically have been used to abrogate other parts of the Constitution. Courts would not, under Gavan Duffy's proposal, have the power to determine whether such treaties were in breach of the state's constitutional obligations. The proposal was designed to prevent a challenge to the legitimacy of the state but it risked undermining judicial review in that new state. The proposal was not adopted.

[134] UCDA: P150/2416. This memorandum is undated.
[135] 1 April 1937 (UCDA: P150/2415). The note comprised only this word.
[136] 10 April 1937 (UCDA: P150/2417).
[137] 11 April 1937 (ibid).

Council of State

Article 31

1. *There shall be a Council of State to aid and counsel the President on all matters on which the President may consult the said Council in relation to the exercise and performance by him of such of his powers and functions as are by this Constitution expressed to be exercisable and performable after consultation with the Council of State, and to exercise such other functions as are conferred on the said Council by this Constitution.*

The August 1936 drafts of the Constitution did not contain any provision for a council of state.[138] The powers of the president were to be exercised on the advice of the government; there was no provision for independent action of the president in these drafts. This changed in the draft of 14 October 1936, which provided:

> Functions to be exercisable generally only on the advice of the Council of Ministers, but the functions of summoning and dissolving Parliament to be exercised only on the advice of the Prime Minister, and functions in respect of which he acts on his own responsibility to be exercised only after consultation with the Council of State, e.g., (a) the terms of a message or address to Parliament, or (b) his decision in relation to the question as to whether a referendum should take place on a particular measure.[139]

Two further articles noted that a council of state was to be established and the functions of the council were to be defined in the Constitution.[140] The draft did not, however, stipulate what those functions were to be. The Portuguese constitution of 1933 also provided for a council of state to advise the president, but these were in relation to powers that the Irish president did not possess.[141]

[138] See 6 and 20 August 1936 (UCDA: P150/2370).

[139] 14 October 1936 (UCDA: P150/2373).

[140] 14 October 1936 (UCDA: P150/2373).

[141] Articles 83 and 84 of the Portuguese constitution of 1933. Other constitutions also provided for Councils of State, but they were not as closely linked to the presidency as the Portuguese.

The draft of 19 October provided for the establishment of a council of state:

> There shall be a Council (herein generally referred to as 'the Council of State') to aid and counsel the President on all matters on which the President may consult the said Council in relation to the exercise and performance by him of such of his powers and functions as are by this Constitution declared to be exercisable and performable after consultation with the Council of State.[142]

This first draft contained most of the main elements that were contained in the final draft. The one exception to this was the reference to 'such other functions as are conferred on the said Council by this Constitution'. This was only included in the draft of 10 April 1937.[143]

2. *The Council of State shall consist of the following members:*

   (i) *As ex-officio members: the Taoiseach, the Tánaiste, the Chief Justice, the President of the High Court, the Chairman of Dáil Éireann, the Chairman of Seanad Éireann, and the Attorney General.*
   (ii) *Every person able and willing to act as a member of the Council of State who shall have held the office of President, or the office of Taoiseach, or the office of Chief Justice, or the office of President of the Executive Council of Saorstát Éireann.*
   (iii) *Such other persons, if any, as may be appointed by the President under this Article to be members of the Council of State.*

The draft of 19 October 1936 provided that the Taoiseach, the Tánaiste (the deputy prime minister), the chief justice, the president of the High Court, the chairman of Dáil Éireann, the chairman of Seanad Éireann and the attorney general were to be ex-officio members of the council of state. It also differed in this from the Portuguese council of state. In addition, it stated that '[e]very person who shall have held the office of President' would be an ex-officio member. This draft provided that the president could appoint at 'his absolute discretion' as 'he may consider it advisable' any former prime minister or president of the executive

[142] 19[?] October 1936 (UCDA: P150/2385).
[143] 10 April 1937 (UCDA: P150/2417).

council, or chief justice of Éire or the Free State. This provision was permissive: it allowed the president to appoint such members, but it made such membership dependent on the favour of the president. This could have given rise to unfortunate political situations, such as if a president refused to appoint a former prime minister from another party to the council of state. A subsequent draft altered this provision; this provided for the ex-officio membership of former presidents and former presidents of the executive council and did not require the assent of the current president.[144] The draft of 11 January 1937 included former chief justices of Éire as ex-officio members.[145] Part (iii) of this section was included in the draft of 15 March 1937.[146] That draft also provided for ex-officio membership for the comptroller and auditor-general. The drafting committee questioned the inclusion of the comptroller and auditor-general as a member on the grounds that the experience and functions of his office would not enable him to give useful contributions to the work of the council of state.[147] The office was omitted from the draft of 1 April.[148] This section was present in its final form in the draft of 24 April 1937.[149]

3. *The President may at any time and from time to time by warrant under his hand and Seal appoint such other persons as, in his absolute discretion, he may think fit, to be members of the Council of State, but not more than seven persons so appointed shall be members of the Council of State at the same time.*

The draft of 19 October 1936 stipulated: 'Three members of the Council of State shall be appointed by the President as soon as may be after the date on which he enters upon his office.'[150] This was a mandatory provision; these three members were to be so appointed by the president. The appointment was to be 'by warrant issued under the hand and Seal of the President'. The October draft also vested in the president the power

[144] UCDA: P150/2371.
[145] 11 January 1937 (UCDA: P150/2387).
[146] 15 March 1937 (UCDA: P150/2401).
[147] National Archives of Ireland (hereafter NAI): Taois s9715B.
[148] 1 April 1937 (UCDA: P150/2415).
[149] 24 April 1937 (UCDA: P150/2427).
[150] 19[?] October 1936 (UCDA: P150/2385).

to replace those members appointed by him 'caused by the death, resignation or permanent incapacity' of such members. The provision was mandatory because the composition of the Presidential Commission, which would 'exercise and perform the powers and functions of the president under this Constitution during his temporary absence from E. or during his temporary incapacity', was to be determined after the appointment of the presidential members of the council of state. The 19 October draft provided that the Commission was to be nominated 'as soon as may be *after* the appointments' of the three members of the council of state.[151] If the president did not appoint the members, they were to be appointed by a majority of the ex-officio members.

The draft of 11 January 1937 changed the activities of the council of state in two ways. First, it removed the necessity for the president to appoint members before the Presidential Commission could be established. Second, it made the power of presidential appointment permissive rather than obligatory:

> The President may at any time or from time to time by warrant under his hand and seal appoint other persons as, in his absolute discretion, he may think fit, to be members of the Council of State, so, however, that not more than five persons so appointed may be members of the Council of State at the same time.[152]

> 4. *Every member of the Council of State shall at the first meeting thereof which he attends as a member take and subscribe a declaration in the following form*:
> *'In the presence of Almighty God I, do solemnly and sincerely promise and declare that I will faithfully and conscientiously fulfil my duties as a member of the Council of State.'*

This provision was first introduced in the draft of 2 March 1937 which stated:

> Every member of the Council of State shall at the first meeting thereof which he attends as a member take and subscribe an oath in the following form:-

[151] Emphasis added.
[152] 11 January 1937 (UCDA: P150/2387).

> 'In the presence of Almighty God I promise that I will fulfil my duties as a member of the Council of State faithfully and conscientiously in accordance with the Constitution.'[153]

The formula was changed to 'promise and declare' for the draft of 15 March.[154] This was further amended, apparently to bring it in line with the presidential oath, for the draft of 1 April.[155] It was finalised for the draft of 24 April 1937.[156]

5. *Every member of the Council of State appointed by the President, unless he dies, resigns, becomes permanently incapacitated, or is removed from office, shall hold office until the successor of the President by whom he was appointed shall have entered upon his office.*

The draft of 19 October provided that the three members appointed by the president 'shall, unless he previously dies, resigns or becomes permanently incapacitated, hold office for so long ad [*sic*] the President by whom he is appointed holds office as President'.[157] There was no provision for removal from office under this formula. This draft also provided for the possibility of presidential appointment, at the absolute discretion of the president, of former holders of the office of 'President of the Executive Council of Saorstát Eireann, the office of Prime Minister, the office of Chief Justice of Saorstát Eireann, and the office of Chief Justice of E[ire]'.[158] Those officers were not subject to this limitation. Instead, such an officer was to hold office 'by such tenure as shall be specified in the warrant of his appointment'. The fact that such a warrant could be granted only at the 'absolute discretion' of the president, and that the warrant was to be 'issued under the hand and Seal of the President' must also have meant that the presidential warrant was to specify the tenure of such officers. This meant the president enjoyed greater latitude in relation to those discretionary appointed officers than he enjoyed in relation to the three mandated appointments. This draft also stated: 'The Council of State in

[153] 2[?] March 1937 (UCDA: P150/2387).
[154] 15 March 1937 (UCDA: P150/2401).
[155] 1 April 1937 (UCDA: P150/2415).
[156] 24 April 1937 (UCDA: P150/2427).
[157] 19[?] October 1936 (UCDA: P150/2385).
[158] 19[?] October 1936 (UCDA: P150/2385).

existence at the date on which the President ceases to hold office shall continue to exercise its functions until a new President takes office.'

Subsequent drafts provided for the automatic membership of former Taoisigh. The tenure of appointed members, in contrast, was provided in the following terms:

> Every member of the Council of State so appointed, unless he previously dies, resigns, becomes permanently incapacitated, or is removed from office, shall hold office for so long as the President by whom he is appointed holds office as President.[159]

This draft also provided for the continuation of the council of state until a new president took office. This distinguished between appointed and ex-officio members of the council of state. The appointed members held office only while the president by whom they were appointed was still in office. The ex-officio members, in contrast, held office until a new president took office. This formula was rectified for the draft of 11 January, which provided that appointed members 'shall hold office until the successor of the President by whom he was appointed shall have entered upon his office'.

6. *Any member of the Council of State appointed by the President may resign from office by placing his resignation in the hands of the President.*

Early drafts of this article had envisaged the possibility of resignation by members of the council of state. They did not, however, stipulate how this resignation was to be effected. The provision dated back to February 1937. There is a handwritten note on the draft of 4 February 1937 which stated that '[a]ny member of the Council of State appointed by the President may resign by placing his resignation in the hands of the President'.[160] This was incorporated into the draft of 15 February 1937.[161]

[159] UCDA: P150/2371.
[160] 4 February 1937 (UCDA: P150/2387).
[161] 15 February 1937 (DDA: AB8/A/V/53).

7. *The President may, for reasons which to him seem sufficient, by an order under his hand and Seal, terminate the appointment of any member of the Council of State appointed by him.*

The draft of 19 October 1936 did not provide any means by which the president could terminate the appointment of members of the council of state.[162] A subsequent draft, however, provided: 'The President may, for reasons which to him seem sufficient, by an order under his hand and seal, remove from office any member of the Council of State appointed by him.'[163] The term 'remove from office' was replaced with 'terminate' in the final draft of 30 April.[164]

8. *Meetings of the Council of State may be convened by the President at such times and places as he shall determine.*

The draft of 19 October provided: 'Meetings of the Council of State may be convened by the President at such times and places as he may determine either generally or with regard to any particular meeting thereof.'[165] This rather tortured phrasing was replaced with the final version for the draft of 15 March 1937.[166]

Article 32

The President shall not exercise or perform any of the powers or functions which are by this Constitution expressed to be exercisable or performable by him after consultation with the Council of State unless, and on every occasion before so doing, he shall have convened a meeting of the Council of State and the members present at such meeting shall have been heard by him.

The draft of 19 October 1936 provided:

> The President shall not exercise of perform any of the powers or functions which are by this Constitution declared to be exercisable and performable by him after consultation with the Council of State unless, before so doing,

[162] 19[?] October 1936 (UCDA: P150/2385).
[163] UCDA: P150/2371.
[164] 30 April 1937 (UCDA: P150/2429).
[165] 19[?] October 1936 (UCDA: P150/2385).
[166] 15 March 1937 (UCDA: P150/2401).

> the President shall have convened a meeting of the Council of State and the members of the Council of State present at such meeting shall have been heard by him in the matter.

This provision, by implication, provided that the president would consult the council of state before each exercise of such powers or functions. This was explicitly provided in subsequent drafts.[167] The drafting of the council of state provisions offer an insight into the basic structure of constitutional drafting in the Irish context: international ideas were gradually honed to suit Irish circumstances. The idea of a council of state to advise the president built on the Portuguese example, but recognised that the Irish president was designed on the basis of the suspensive veto and therefore that changes had to be made to incorporate this design, both in terms of personnel and interaction between the president and the council of state.

Judicial Review

Article 34.3.2°

Save as otherwise provided by this article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other article of this Constitution other than the High Court or the Supreme Court.

Article 34.4.4°

No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.

In 1934, the constitution committee stated their belief that there should be some court which had the power to review the constitutionality of laws.[168] They stated they had been unable to reach agreement on

[167] UCDA: P150/2371.
[168] NAI: Taois s.2979.

whether the power should be vested: (a) in the Supreme Court alone; (b) in a special constitutional court 'designated for that purpose, e.g. a combination of the Supreme and High Courts'; or (c) in the High Court with the right to appeal to the Supreme Court. They were also unable to agree on whether a time limit should be set within which the constitutionality of a law could be judicially determined.

The Hearne draft of 18 May 1935 contained a provision which vested the power of judicial review in the High Court with leave to appeal to the Supreme Court:

> The exclusive original jurisdiction heretofore vested in the High Court to determine the validity of any law having regard to the provisions of the Constitution hereby repealed is hereby terminated. The said Court shall have exclusive original jurisdiction to determine the validity of any law having regard to the provisions of this Constitution. Every decision of the High Court on the question of the validity of any law shall be subject to the like appeal as that to which, at the date of the coming into operation of this Constitution, a decision of the said Court on the question of the validity of any law having regard to the provisions of the Constitution hereby repealed was subject.[169]

Hearne's proposal was more conservative than the other proposals considered by the 1934 constitution committee. It was a continuation of the system of judicial review established under Articles 65 and 66 of the 1922 Constitution. In *Constitutionalism in Ireland 1932–1938*, I consider whether de Valera or Hearne was responsible for the idea of a constitutional court.[170] I ultimately conclude that the evidence is weak but favours de Valera slightly given that he commissioned a review of how constitutional courts worked and had suspicions about the operation of the courts.

A draft exists from early October 1937 which relates to the mechanics of the constitutional court.[171] This draft stated: 'The High Court shall not have jurisdiction to entertain or determine the question of the validity of any law.' A handwritten note indicated that the High Court was, however,

[169] 18 May 1935 (UCDA: P150/2370).
[170] See *Constitutionalism in Ireland, 1932–1938*, Chap. 4.
[171] 12[?] October 1936 (UCDA: P150/2373).

to be able to refer a case to the constitutional court.[172] The decision of the Supreme Court was to be 'in all cases final and conclusive'. Another handwritten note indicated that this was not to extend to constitutional cases.[173] Finally, the draft provided for the establishment of the constitutional court:

> The Constitutional Court shall have exclusive jurisdiction to determine the question of the validity of any law having regard to the provisions of this Constitution. The decision of the Constitutional Court on every such question shall be final and conclusive.
>
> The Constitutional Court shall consist of seven members who shall be appointed as follows:-
>
> The Chairman and two other members shall be appointed by the President.
> Two members shall be appointed by the judges of the Supreme Court.
> Two members shall be appointed by the judges of the High Court.

The composition as printed meant that three nominees would be political, although the president was to be above politics, and four would be legal. This was evidently unsatisfactory as the majority of handwritten notes in the margin next to this section relate to the proposed composition of the court. For example, one note indicates '4 jud 1 AG 2 Dáil 2 persons by G. E.' The notes are faint and often illegible but the following were considered for inclusion under one scheme or another: the chief justice (who was to preside), the president of the High Court, the ceann comhairle (or chairperson of the Lower House), the cathoaoirleach of the Senate (or chairperson of the Upper House) and the attorney general. A further note asked whether the presidential nominees were to be appointed for 'each year or each case'. A final note questioned whether there should be remuneration for presidential nominees. The difficulties associated with the composition of the constitutional court appear to have been decisive and subsequent drafts do not mention it.[174] The idea of a constitutional court underwent a brief revival in January 1937 but was never fully re-introduced.[175]

[172] There are two notes: 'but may refer question to Constitn Court' and 'state case'.

[173] The note states 'not involving val. of a law'.

[174] See, for example, 13[?] October 1936 (UCDA: P150/2373) and 19[?] October 1936 (UCDA: P150/2385).

[175] 2 January 1937 (UCDA: P150/2387).

High Court or Supreme Court?

The draft of 13 October 1936 vested the power of judicial review in the High Court, with leave to appeal to the Supreme Court.[176] This remained the position throughout the remainder of October 1936. The summaries of the Constitution stated: 'High Court to have original jurisdiction to pronounce on the question of the validity of laws having regard to the Constitution. Appeal on such questions to the Supreme Court.'[177] The draft of 19 October said: 'The High Court shall have original jurisdiction to entertain and determine the question of the validity of any law having regard to the provisions of this Constitution.'[178] This provision survived the cabinet discussions of October 1936. There is a summary of the provisions of the Constitution dated 5 November 1936 stating: 'The jurisdiction and organisation of the Courts and the tenure of office of the judges thereof will generally be the same as heretobefore.'[179]

This provision was revisited in late 1936. The draft of 2 January 1937 vested the power to review legislation in the Supreme Court.[180] One possible problem was the fact that the High Court was given 'full original jurisdiction' to decide 'all matters and questions, whether of law or fact, civil or criminal (not including the question of the validity of any law)'. The Supreme Court was to have jurisdiction 'exclusive of all other courts' over judicial review of legislation. However, this jurisdiction was arguably only an appellate jurisdiction, that is, the facts of the case would fall to be

[176] 13[?] October 1936 (UCDA: P150/2373).

[177] Fourth summary (UCDA: P150/2375). The third summary states: 'The jurisdiction of these Courts and the tenure of office of the judges thereof will generally be the same as heretobefore.'

[178] 19[?] October 1936 (UCDA: P150/2385).

[179] 5 November 1936 (UCDA: P150/2375).

[180] 2 January 1937 (UCDA: P150/2387):

> The Supreme Court shall have jurisdiction (exclusive of all other courts) to determine the question of the validity of any law having regard to the provisions of this Constitution and the decision of the Supreme Court on every such question shall be final and conclusive. Provided that the Supreme Court shall not have jurisdiction to entertain or pronounces upon the question of the validity of any law the Bill for which shall previously have been referred to the said Court under ARTICLE hereof and in respect of which the said Court shall have pronounced an advisory opinion to the effect that such Bill was not in conflict with any of the provisions of this Constitution.

determined by the High Court.[181] Under this theory, if a case was brought which involved a challenge to the validity of a law, the facts could be heard only in the High Court but judicial review only in the Supreme Court. This clearly could not have worked. This potential problem was eliminated in the draft of 11 January 1937, which vested the 'full original jurisdiction' in the Supreme Court for the purposes of judicial review.[182] The 11 January draft also deleted the provision of the 2 January draft, which provided an exception for Article 26 cases. This provision was re-introduced in the 15 March draft.[183] What prompted the drafters to vest the power in the Supreme Court rather than the High Court? One possibility is provided by changes which had occurred in the composition of the Supreme Court. The alteration was made between November 1936 and January 1937. In December 1936, the Fianna Fáil government appointed three new members to the Supreme Court. These were Timothy Sullivan,[184] James Creed Meredith[185] and James Geoghegan.[186] There were five members of the Supreme Court in total so this meant a majority of those members had been appointed by Fianna Fáil. The difficulty with vesting the power of judicial review in the High Court was that it left the state subject to the vagaries of a single High Court judge. De Valera may not have been convinced of the soundness of all the individual members of the High Court; this concern would have been ameliorated in a collegiate body such as the Supreme Court.[187]

[181] It is not clear such a claim would have succeeded. The same draft vested 'appellate jurisdiction' in the Supreme Court from all High Court decisions subject to regulation by law. This arguably indicates the jurisdiction conferred in relation to judicial review was original as 'appellate' was not used.

[182] 11 January 1937 (UCDA: P150/2387).

[183] 15 March 1937 (UCDA: P150/2401):

> The Supreme Court shall not, however, entertain any question as to the validity of any law the Bill for which shall have been referred to the Supreme Court by the President under Article 22 of this Constitution and in respect of which that Court shall have pronounced the opinion that no provision of such Bill is repugnant to this Constitution or to any provision thereof.

[184] Who became chief justice upon the death of Hugh Kennedy. Timothy Sullivan had previously been president of the High Court.

[185] Previously a judge of the High Court.

[186] Previously minister for justice and attorney-general.

[187] These were William Johnston, Henry Hanna and John O'Byrne.

The provisions relating to judicial review remained in the draft printed in the newspapers. John A. Costello claimed that it could not 'have been intended by the framer of the Constitution' that a citizen could not claim habeas corpus due to a law which was unconstitutional:

> A law is passed which appears to be unconstitutional, and under that law a person is deprived of his liberty. If he applies to a judge of the High Court for relief by way of habeas corpus, on the ground that he is illegally detained by virtue of the unconstitutional provisions of a law, the High Court judge must refuse his application until the Supreme Court have determined the question by whatever machinery may be devised to enable the Supreme Court to decide on the constitutionality or unconstitutionality of the law. In the meantime the person remains, perhaps illegally and unconstitutionally, deprived of this liberty.[188]

In the Dáil, de Valera indicated that his preference for a Supreme Court was based on the fact that no better alternative could be thought of:

> 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 […] [than] 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. I confess, however, that, as I confessed on another occasion with regard to the Senate, I could not get any other body that would be satisfactory [….] 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.[189]

De Valera made his peace with the prospect of judicial review by the Irish courts during the drafting process but this statement indicates that his preference was for a constitutional court; he simply could not conceive

[188] *Irish Independent* 6 May 1937.
[189] 67 Dáil Debates (11 May 1937) col. 54.

of one which would operate well. The final version of the text was inserted on 2 June 1937 during the Dáil debates.[190]

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[190] 67 Dáil Debates (2 June 1937) col. 1495.

CHAPTER 6

Citizen and State

The legal relationship between the citizen and the state is one of the most problematic to define in a new constitution. This was complicated in the Irish context by four further aspects: the constant feature of republican violence in Ireland meant that the civil service were concerned to ensure the balance did not tip too far in favour of rights; the relatively strict amendment process meant it had to be correct the first time; the relative paucity of human rights provisions in the 1922 Constitution meant that further rights had to be guaranteed; and the intellectual currents meant that the extension of these rights would tend towards a Catholic interpretation of the relationship between the individual and the state.

Trial of Offences

Ó Longaigh's excellent volume on emergency law does not deal with the drafting of the 1937 Constitution.[1] It covers the discussions of the constitution committee of 1934 and the 1937 Constitution once it had been enacted.[2] It does not deal, however, with the drafting process itself. This is an unfortunate omission for a number of reasons. First, the drafting of Article 38 on trial of offences was explicitly linked with the emergency provisions of the

[1] Seosamh Ó Longaigh, *Emergency Law in Independent Ireland 1922–1948* (Dublin: Four Courts Press, 2006).

[2] Ó Longaigh, *Emergency Law in Independent*, 158–160.

D. K. Coffey, *Drafting the Irish Constitution, 1935–1937*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76246-3_6

Constitution. It is difficult to appreciate the intricacies of the articles included in the Constitution without some consideration of what had been discarded during the drafting process. Second, the drafting process provides a means to trace the influence of individuals on the Constitution, the most important of whom, when it came to the drafting of the emergency provisions, was Stephen Roche, secretary of the department of justice. Ó Longaigh's analysis of emergency law deals with the influence of Roche on a number of different occasions. This analysis, however, overlooks an area relating to emergency law where Roche was arguably at his most influential, in relation to the trial of offences.

Suspension of the Constitution

The 1934 constitution committee was asked to ascertain which articles of the 1922 Constitution should be regarded as fundamental and how these articles should be protected from change. They also, however, recommended that Article 2A:

> should be replaced by a simple Article which would enable the Oireachtas, by ordinary legislation, to empower an Executive to take any measures necessary to deal effectively with a state of public emergency not amounting to armed rebellion or state of war, including, when necessary, the temporary suspension of many Articles of the Constitution which under normal circumstances are rightly regarded as fundamental.[3]

This recommendation was extrapolated further in Appendix B in the report; this was entitled 'Emergency Powers'. Roche first proposed what was to become this appendix in a memorandum to the other committee members on 14 June 1934.[4] In the final appendix, the committee recommended the establishment of special courts which could, on the certification of an 'ordinary Judge or Justice', try people accused of crimes. This was to be supplemented by a further scheme whereby the Oireachtas could provide special powers, including the power to temporarily suspend any article of the Constitution, to preserve public order when 'ordinary laws' proved inadequate.[5] This appendix was explicitly linked with Article 70 of

[3] National Archives of Ireland (hereafter NAI): Taois s.2979.

[4] NAI: Taois s.2979, 14 June 1934.

[5] This scheme was quite elaborate and provided inter alia for the convocation of all judges exercising criminal jurisdiction in the state to advise the executive council whether the ordi-

the 1922 Constitution, which regulated trial in due course of law.[6] Roche did not suggest in his original draft that a proclamation should include the power to temporarily suspend articles of the Constitution; this power was inserted after the meeting of 29 June 1934.[7]

This concern with the balance of rights and the requirements of the government during a state of emergency was also evident in the draft of 18 May 1935.[8] In his explanatory memorandum, Hearne made reference to instructions which he had received from de Valera for the new Constitution to 'provide for the suspension of [basic articles guaranteeing fundamental rights] during a state of public emergency only' and to 'contain machinery for effectively preserving public order during any such emergency'. The draft provided that the Dáil could issue a proclamation declaring a state of public emergency in an area where the ordinary courts and laws were inadequate for the preservation of public order.[9] This order could 'operate to suspend temporarily the operation of such and so many of the Articles of this Constitution as may be expressed in such proclamation'. The Oireachtas would also have the power to establish extraordinary courts to operate in a state of public emergency; these would come into operation when the proclamation was issued. The provisions dealing with public emergency, for example the legislation establishing extraordinary courts, were placed beyond constitutional review.

The draft of 14 October 1936 indicated that there was to be a provision for the suspension of the Constitution by the president with the assent of the Dáil.[10] The draft of 19 October contained provisions broadly consistent with those outlined in the draft of 18 May 1935.[11] One significant difference, however, was that while the 18 May draft stated that the Oireachtas could suspend whatever constitutional rights it saw fit in a case

nary laws were inadequate for the preservation of public order. As the details of the scheme do not appear in drafts of the Constitution, however, they fall outside the scope of this examination.

[6] The committee stated: 'The suggestions submitted by us under the heading "Emergency Provisions" … might, if adopted, necessitate a revision of the text of Article 70, but this question would naturally receive attention in connection with the drafting of the new provisions.'

[7] 29 June 1934 (NAI: Taois s.2979).

[8] 18 May 1935 (University College Dublin Archives (hereafter UCDA): P150/2370).

[9] If the Dáil was not sitting, this power was to be exercised by the council of ministers. The Dáil would immediately be summoned and the proclamation laid before the Dáil, which could annul it with seven days.

[10] 14 October 1936 (UCDA: P150/2373).

[11] 19[?] October 1936 (UCDA: P150/2385).

of public emergency, the 19 October draft referred to specific provisions which could be suspended—specifically, the expression of opinion, peaceable assembly, formation of unions and associations, the liberty of the individual (including the habeas corpus provisions) and those dealing with the dwelling.[12] The only major revision of this article before 15 March 1937 vested the responsibility for issuing the proclamation in the government alone.[13]

These powers were included in the draft of 15 March 1937, which was circulated to government departments.[14] In this draft, Article 43 provided for the suspension of constitutional rights upon a government proclamation, which was to be endorsed by the Dáil, that a 'grave state of public disorder exists or is threatened'. Its deletion was urged by Roche on the following grounds:

> They appear to give the Oireachtas power, if it desires to do so, to re-enact Article 2A of the existing Constitution. This is in accordance with the Department's view. If anything, the text goes too far: I doubt if the power to suspend Article [*sic*] of the Constitution (Article 43) is necessary at all, having regard to the effect, in practice, of laws made under [the article granting power to establish extraordinary courts].[15]

The deletion of this provision was recommended on the grounds that it was unnecessary. This point was reiterated by Roche in an undated memorandum on the subject of emergency powers.[16] He stated his preference for emergency powers to be of general application and to be conferred via special emergency legislation. He also stated his belief that the power to suspend constitutional articles 'seems to be unnecessary and

[12] It is also worth noting that the power to declare a state of emergency vested exclusively in the Dáil. The draft of 18 May 1935 provided for a unicameral legislature but that of 19 October 1936 provided for a bicameral legislature. The Senate was to have no role in this matter, however. If the Dáil was not sitting then the responsibility for summoning the Dáil lay with the president.

[13] 3[?] March 1937 (UCDA: P150/2387).

[14] 15 March 1937 (UCDA: P150/2401).

[15] 22 March 1937 (NAI: Taois s.9715B).

[16] NAI: Taois s.9715B. This undated memorandum was composed between the drafts of 15 March (UCDA: P150/2401) and 1 April (UCDA: P150/2414). The articles referred to in the memorandum match those of the 15 March draft and there are no corresponding provisions in the subsequent draft.

embarrassing in face of the provision now appearing as Article 44, section 2, which automatically serves the same object'.

The article dealing with suspension of constitutional rights was therefore deleted from the draft of 1 April.[17] The drafting of Article 38, however, was shaped by its interaction with this suspension clause until late in the drafting process.

Article 38

1. *No person shall be tried on any criminal charge save in due course of law.*

Article 70 of the 1922 Constitution provided: 'No one shall be tried save in due course of law.' A memorandum, most likely written by George Gavan Duffy, was prepared on various articles of the 1922 Constitution in February 1937; this included commentary on Article 70.[18] The primary concern of the author in relation to Article 70 was that it had not provided any safeguard against internment, which did not require a trial, and was defective for that reason. He recommended that exceptional legislation be provided for in order 'to avoid disfiguring the Constitution itself'. The author believed there was a possibility that in the case of a jury trial, where all the jurors could not agree to convict, that the accused must be acquitted and that the wording should be changed to obviate the possibility that a majority verdict would be unconstitutional.

The draft of 18 May 1935 stated: 'No one shall be tried save in due course of law.'[19] This provision, however, did not appear in subsequent drafts until February 1937. The late 1936 drafts did not refer to trial 'in due course of law'. Instead they referred to the right to jury trial in criminal cases. One example of this is the draft of 14 October 1936, which stated: 'All crimes to be tried by jury save treason, crimes triable by

[17] 1 April 1937 (UCDA: P150/2414).

[18] Memorandum entitled 'Notes of Miscellaneous Points Arising on Constitution of 1922, as amended' (UCDA: P150/2396). The author of the memo is not named but it seems likely that it was prepared by George Gavan Duffy. The two people outside the drafters who had been given a remit to comment on various aspects of the Constitution, besides John Charles McQuaid, by February 1937 were Arthur Matheson and Gavan Duffy. In every other communication from Matheson the advice is given in the first person. Gavan Duffy, in contrast, preferred the passive voice, which is a signature of court submissions. Another point which indicates that it was most likely composed by Gavan Duffy is that this memorandum made the same point in relation to the use of the words 'sitting' or 'session' of the Oireachtas as Gavan Duffy did in another memorandum (UCDA: P150/2397).

[19] 18 May 1935 (UCDA: P150/2370).

impeachment, minor offences and offences against military law triable by court-martial.'[20]

This section re-appeared in the draft of 13 February 1937 in the form: 'No one shall be tried save in due course of law.'[21] 'No one' was amended to 'no person' in the draft of 15 March.[22] The draft of 24 April 1937 included the phrase 'on any criminal charge' for the first time.[23] This narrowed the remit of 'due course of law' from all trials to criminal trials alone. It is unclear what prompted this change.

2. *Minor offences may be tried by courts of summary jurisdiction.*

The draft of 13 October 1936 stated: 'The trial of all crimes shall be by jury except … minor offences triable by law before a court of summary jurisdiction.'[24]

In his review of the 1922 Constitution on 22 February 1937, George Gavan Duffy stated:

> The District Court may try only minor offences. Penalties amounting to hundreds or thousands of pounds are inflicted by a police magistrate for contravention of the customs and excise laws. As the penalty presumably fits the crime, it is hard to see how an offence punished by a very heavy fine (with corresponding imprisonment in default of payment) can be called a minor offence. Accordingly, it would seem either that the District Court today is exceeding its jurisdiction or that the article should be couched in more appropriate language. It is debatable whether the legal calibre of the District Court today is sufficient to justify entrusting it with power to impose very severe penalties in Revenue cases, when in other cases such a power is withheld from that Court.[25]

The difficulty with what exactly constituted a minor offence was not, however, defined in later drafts. Before April 1937, minor offences were included as an exception to the right to trial in criminal cases. The provision

[20] 14 October 1936 (UCDA: P150/2373). See also draft of 19[?] Oct 1936 (UCDA: P150/2385).
[21] 13 February 1937 (UCDA: P150/2387).
[22] 15 March 1937 (UCDA: P150/2401).
[23] 24 April 1937 (UCDA: P150/2427).
[24] 13[?] October 1936 (UCDA: P150/2373).
[25] 22 February 1937 (UCDA: P150/2396).

for trial of minor offences was not the subject of a dedicated subsection until the draft of 24 April 1937.[26]

> 3. *1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.*
> *2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.*

The relationship between the state and special or extraordinary courts had changed radically during the life of the Irish Free State. The 1922 Constitution provided that 'extraordinary courts [save military tribunals] shall not be established'. By the 1930s, however, a constitutional amendment had established extraordinary courts within the confines of Article 2A. The extraordinary courts structure had been set up to counter the threat of the IRA, and had subsequently been used against the Blueshirt movement.[27] The establishment of special courts had been recommended by the constitution committee in 1934.[28] The draft of 18 May 1935 provided that 'extraordinary courts shall not be established, save only […] such other extraordinary tribunals as may be established under this Constitution to deal with a state of public emergency proclaimed under this Constitution'.[29]

This provision was elaborated in the draft of 19 October 1936:

> The Oireachtas may enact such legislation establishing such extraordinary courts and investing such courts with such jurisdiction as the Oireachtas may consider to be necessary and adequate to deal with any state of public emergency as aforesaid; but such legislation shall not come into operation unless and until an order shall have been made by the President under this Article, and then only in respect of the area mentioned in such order and for the period specified therein.[30]

[26] 24 April 1937 (UCDA: P150/2427).
[27] See Maurice Manning, *The Blueshirts* (Dublin: Gill and Macmillan, 2006), 112–114.
[28] NAI: Taois s.2979.
[29] 18 May 1935 (UCDA: P150/2370).
[30] 19[?] October 1936 (UCDA: P150/2385).

The state of public emergency was defined as 'a grave state of public disorder', one in which 'the ordinary laws and the civil courts are not adequate for the preservation of public order'. This power was strengthened by the provision that the decisions of such courts could not be appealed to or reviewed by any other court. Furthermore, the provisions of the draft article were placed beyond constitutional or legislative challenge.[31]

This October formulation was modified in the draft of 15 March 1937 when the matter of extraordinary courts became the subject of its own article.[32] The substance of the draft, however, did not differ substantially from that of the October draft, except that it provided for the possibility of an appellate body.

In his submission on the Constitution, the minister for posts and telegraphs, Oscar Traynor, asked whether it would be better to link the appellate process to the existing court structure.[33] Roche stated his preference for the permanent establishment of special courts to deal with cases where 'to secure […] acquittals, jurors are habitually intimidated'.[34] Roche believed that this was necessary to prevent political crimes going unpunished until it constituted an emergency. This view was at odds with the draft of 15 March and was not incorporated into the draft of 1 April. The proposal for the provision of a more permanent special court was ultimately to be adopted.

The draft of 1 April eliminated the provisions requiring a presidential proclamation for the suspension of constitutional rights.[35] The power to establish extraordinary courts was amended to incorporate the procedure which had been originally formulated for the suspension of constitutional

[31] The article contained a provision which stated:

> Nothing in this Constitution or in any law continued thereby or made thereunder shall be invoked to nullify and provision of this Article or of any legislation passed under this Article or to oust the jurisdiction of any Court established hereunder or to invalidate any act or thing done in pursuance of this Article or of any legislation enacted for the purposes thereof.

Despite this language, it might still have been vulnerable to a natural law challenge on the basis of *State (Ryan) v Lennon*; see Donal Coffey, "Article 28.3.3, the Natural Law and the Judiciary—Three Easy Pieces," *Irish Law Times* 22 (2004): 310.

[32] 15 March 1937 (UCDA: P150/2401).

[33] NAI: Taois s.9715B.

[34] 22 March 1937 (NAI: Taois s.9715B).

[35] 1 April 1937 (UCDA: P150/2414).

guarantees.[36] There were three noteworthy additions to the original drafts of the subsection.

First, every Act to provide for extraordinary courts had to contain a statement linking it to the Constitution. Every such Act was to be entitled 'An Act for the Preservation of Public Order and in pursuance of the provisions of Article 45 of this Constitution'.[37]

Second, the relevant legislation was expressly declared to be capable of repeal or amendment by the Oireachtas 'at any time'.[38] The previous draft of 15 March 1937 had no equivalent provision.[39] The 15 March draft had stated:

[36] Article 45 stated in the draft of 1 April:

1. 1° The Oireachtas may enact legislation making special provision for the preservation of public order and in particular for the setting up of extraordinary courts with such jurisdiction and power as may be thought necessary for the purpose.
   2° Every Bill for an Act to which it is intended that this Article shall apply shall be expressed to be 'An Act for the Preservation of Public Order and in pursuance of the provisions of Article 45 of this Constitution.'
2. Nothing in Articles of this Constitution shall be invoked to invalidate any provision of this Article or any legislation passed under this Article or to oust the jurisdiction of any court established by, or to nullify any act or thing done in pursuance of any such legislation as aforesaid.
3. Legislation enacted under this Article shall not come into operation unless and until a proclamation shall have been made by the President under this Article.
4. If and whenever the Government are satisfied that the ordinary laws and the civil courts are not adequate for the preservation of public order the Government may so advise the President who shall forthwith issue a proclamation declaring that the legislation under this Article shall come into operation.
5. Upon the making of such proclamation the said legislation shall immediately come into operation and shall remain in operation in the manner provided in this Article.
6. Every proclamation made by the President under this Article shall, forthwith, be laid before Dáil Éireann, if sitting, and if Dáil Éireann is not sitting at the sitting thereof which takes place next after such proclamation.
7. If Dáil Éireann is not sitting the President may after consultation with the Council of State, and shall if so required in writing by not less than twenty members of Dáil Éireann summon Dáil Éireann for the earliest practicable date.
8. The legislation shall remain in operation until its operation is determined either by a proclamation of the President on the advice of the Government or by a resolution of Dáil Éireann without prejudice in either event to the validity of anything done thereunder.
9. The Oireachtas may at any time repeal or amend legislation enacted under this Article.

[37] 1 April 1937 (UCDA: P150/2414.
[38] 1 April 1937 (UCDA: P150/2414).
[39] 15 March 1937 (UCDA: P150/2401).

> Nothing in this Constitution or in any law continued thereby or made thereunder shall be invoked to invalidate any provision of this Article or of any legislation passed under this Article or to oust the jurisdiction of any Court established by, or to nullify any act or thing done in pursuance of, any such legislation as aforesaid.[40]

The 15 March draft seemed, on one reading, to prevent legislative repeal. The Oireachtas could pass a law which provided for the establishment of special courts. However, the same draft article provided that 'no law […] shall be invoked to invalidate any provision […] of any legislation passed under this Article'. The word 'invalidate' might be construed to mean 'set aside' or 'repeal'. Accordingly, a subsequent law which attempted to repeal the original law could be held to 'invalidate […] legislation passed under this Article' and be constitutionally prohibited. The 1 April draft remedied this defect by providing: 'The Oireachtas may at any time repeal or amend legislation enacted under this Article.'[41]

Third, the 1 April draft proposed that only certain pre-defined articles of the Constitution could not be used in a constitutional challenge against the legislation. There was no general prohibition against deploying any provision in the Constitution. The text of the 1 April draft stated: 'Nothing in Articles [blank] of this Constitution shall be invoked to invalidate any provision of this Article or any legislation passed under this Article.'[42] The 1 April draft did not, however, actually list the articles which could not be invoked in the course of a constitutional challenge. This list was provided for in the draft of 10 April; the articles were those dealing with the judiciary and fundamental rights.[43] The draft retained the procedure whereby the legislation passed under the article would come into operation upon a proclamation being passed for that purpose.

[40] 15 March 1937 (UCDA: P150/2401).

[41] 1 April 1937 (UCDA: P150/2414).

[42] 1 April 1937 (UCDA: P150/2414).

[43] 10 April 1937 (UCDA: P150/2417). These were to become Articles 34, 35 and 40. The draft refers to Article 40, which on 10 April dealt with the family, but this appears to be a typo because it would have no relevance for such a challenge and the guarantee of individual rights had been mentioned in this regard by the earlier drafts dealing with the suspension of constitutional articles.

It was not until the draft of 24 April that the provisions relating to extraordinary courts were moved from Article 45 and subsumed into Article 38 on trial of offences.[44]

In the Dáil, de Valera was unequivocal in his support for this section. He stated: 'I have no hesitation whatever in saying that this is a power which, clearly, it is necessary to have in the Constitution.'[45] He differentiated the section from Article 2A on the grounds that the latter was superior to the rest of the Constitution.[46] He argued that the fact that the Constitution would not be capable of amendment as easily as the 1922 Constitution meant some provision had to be made for emergencies.

> 4. 1° *Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.*
> 2° *A member of the Defence Forces not on active service shall not be tried by any courtmartial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any courtmartial or other military tribunal under any law for the enforcement of military discipline.*

The draft of 13 October 1936 stipulated that all criminal trials were to be jury trials, with certain exceptions—one exception was 'offences against military law triable by courtmartial'.[47] This brief mention was not elaborated upon in the draft. This contrasted with the extensive consideration of military tribunals in Articles 70 and 71 of the 1922 Constitution.[48] Article 71 of the earlier constitution stated:

[44] 24 April 1937 (UCDA: P150/2427).
[45] 67 Dáil Debates (2 June 1937), col. 1523.
[46] 67 Dáil Debates (2 June 1937), cols. 1524–1525.
[47] 13[?] October 1936 (UCDA: P150/2373).
[48] Article 70 of the Free State Constitution stated:

> No one shall be tried save in due course of law, and extraordinary courts shall not be established, save only such Military Tribunals as may be authorized by law for dealing with Military offenders against military law. The jurisdiction of Military Tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and

> A member of the armed forces of the Irish Free State […] not on active service shall not be tried by any Court Martial or other Military Tribunal for an offence cognizable by the Civil Courts, unless such offence shall have been brought expressly within the jurisdiction of Courts Martial or other Military Tribunal by any code of laws or regulations for the enforcement of military discipline which may be hereafter approved by the Oireachtas.

Article 71 was used as a template for the draft of 13 February 1937, which stated:

> A member of the defence forces of E. not on active service shall not be tried by any court martial or other military tribunal for an offence cognisable by the civil courts unless such offence shall have been brought expressly within the jurisdiction of courts martial or other military tribunal by any law or regulations for the enforcement of military discipline.[49]

The 13 February draft also contained a provision stating that extraordinary courts were not to be established, 'save only such military tribunals as may be authorized by law for dealing with military offenders against military law'. This mirrored Article 70 of the 1922 Constitution. These provisions were not modified until the draft of 1 April.[50]

The department of defence submitted a memorandum which urged the revision of the section on the basis that it only covered 'military offenders against military law'.[51] The department provided two reasons why the restriction to 'military offenders' was under-inclusive. First, it might not be capable of being used to deal with the reservist who 'commits an offence against the [Defence Forces Act 1923] while subject to it, and who then ceases to be subject to it. Reservists and volunteers continually so change their status.' This point also applied to members of the military who had been discharged and become civilians. Second, Article 10 of the Geneva Convention provided for the recognition of aid societies as military units, and these were therefore entitled to the protections of the convention, 'provided always that [they] shall be subject to military law and

> no person shall be removed from one area to another for the purpose of creating such jurisdiction.

[49] 13 February 1937 (UCDA: P150/2387).
[50] 1 April 1937 (UCDA: P150/2415).
[51] 22 March 1937 (NAI: Taois s.9715B).

regulations'. Therefore, the Irish Red Cross had to be capable of being subject to military law in order to satisfy the requirements of the Geneva Convention. The department of defence accordingly recommended the amendment of the subsection to 'offences against military law alleged to have been committed by persons while subject to military law'.

This amendment was included in the draft of 1 April.[52] The wording was completed in its final form for the draft of 24 April.[53]

5. *Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.*

The provision for jury trial may be traced as far back as the draft of 14 October 1936, which stated: 'All crimes to be tried by jury save treason, crimes triable by impeachment, minor offences and offences against military law triable by court-martial.'[54] This was modelled on Article 72 of the 1922 Constitution.[55] The exceptions were expanded in the draft of 19 October to include 'charges for offences triable by extraordinary courts during a state of war or armed rebellion or during a state of public emergency proclaimed under this Constitution'.[56] The draft of 13 February 1937 eliminated the two other exceptions present in early drafts, impeachment and treason.[57] Impeachment was presumably removed because, technically speaking, it is not a criminal charge. The qualification 'charges for offences triable by extraordinary courts during a state of war or armed rebellion or during a state of public emergency proclaimed under this

[52] 1 April 1937 (UCDA: P150/2415).
[53] 24 April 1937 (UCDA: P150/2427).
[54] 14 October 1936 (UCDA: P150/2373).
[55] Article 72 of the 1922 Constitution stated:

> No person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offences triable before a Court of Summary Jurisdiction and in the case of charges for offences against military law triable by Court Martial or other Military Tribunal.

[56] 19[?] October 1936 (UCDA: P150/2385).
[57] 13 February 1937 (UCDA: P150/2387).

Constitution' was deleted in the draft of 24 April in favour of: 'Save as provided in this Article under this Article [*sic*] no person shall be tried on any criminal charge without a jury.'[58] This was amended for the draft of 26 April to its more graceful final iteration.[59]

6. *The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article.*

The first iteration of this section occurred in the draft of 24 April 1937.[60] The first version of this subsection referred only to what was to be Article 34. This was amended in the draft of 26 April to Articles 34 and 35.[61]

The drafting of the trial of offences section demonstrate an almost purely internally focused drafting process, where the main interlocutors were government departments and the inspiration for drafts was essentially Irish. This may be contrasted with the drafting of the fundamental rights provisions, which drew on an international constitutional heritage.

Fundamental Rights

Many early drafts of the Constitution did not refer to the rights provisions, although this may perhaps be attributable to the incomplete nature of the documentary record.[62] Most of the substantive guarantees in Article 40 had already been included in the 1922 Constitution.[63] In conjunction with the provisions relating to trial of offences, we can see here the importance of the civil service commission, which reported in 1934 on the outlines of the Article 40. The other fundamental rights provisions were initially based on contemporary continental constitutions, and then gradually soaked in Catholic social teaching.

[58] 24 April 1937 (UCDA: P150/2427).
[59] 26 April 1937 (UCDA: P150/2428).
[60] 24 April 1937 (UCDA: P150/2427).
[61] 26 April 1937 (UCDA: P150/2428).
[62] See UCDA: P150/2390 where there is a written placeholder to indicate where the rights provisions are to be located but no text (13 February 1937).
[63] In fact, commentators often criticised the rights sections on the basis that they were not as strong as their 1922 forebears; see, for example, Arthur Berriedale Keith, "The Constitution of Éire," *Juridical Review* 49 (1937): 272: 'fundamental rights prove to be feebly established, despite formal assertion.'

Article 40

1. *All citizens shall, as human persons, be held equal before the law.*

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

The first draft of the equality clause on 18 May 1935 simply stated: 'All citizens of Saorstát Eireann are equal before the law.'[64] The 1922 Constitution contained no such guarantee. Oran Doyle points out that such a guarantee was consistent with continental constitutions of the inter-war period, but not with the US Constitution.[65] It was not until the draft of 28 February 1937 that this changed to the current format:

> The State acknowledges that the citizens are as human persons equal before the law.
>
> It shall, however, in its enactments have due regard to individual differences of capacity, physical and moral, and of social function.[66]

This was only superficially changed in the subsequent Y draft.[67] Equality was guaranteed only 'as human persons'. De Valera believed that men and women were equal in terms of political and civic rights but not in terms of social function.[68] This was consistent with Catholic social teaching. Leo XIII in *Quod Apostolici Muneris*, in the course of denouncing socialism, enunciated the Catholic position on equality:

> [T]he Gospel records equality among men consists in this, that one and all, possessing the same nature, are called to the sublime dignity of being sons of God; and moreover that one has to be judged according to the same laws and to have punishments or rewards meted out according to individual deserts. There is, however, an inequality of right and authority which

[64] 18 May 1935 (UCDA: P150/2370).

[65] Oran Doyle, *Constitutional Equality Law* (Dublin: Thomson Round Hall, 2004), 52. See also Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* (Newbridge: Irish Academic Press, 2017), 177–178.

[66] 28 February–1 March 1937[?] (UCDA: P150/2387). This section is not part of a longer draft and it is thus difficult to ascertain whether it is from the first or second X draft.

[67] UCDA: P150/2387. In it 'the citizens' became 'all citizens' and 'It' became 'The State'.

[68] See Doyle, *Constitutional Equality Law*, 53–60. See also de Valera's notebook from November/December 1936, which stated: 'Men + women have fundamentally the same civic rights + duties' (UCDA: P150/3680).

> emanates from the Author of nature Himself, *of whom all paternity in heaven and earth is named*.[69]

The Catholic teaching on the subject may also be found in the pamphlet *A Code of Social Principles*, which states:

> In enunciating and legally settling the corollaries of equality in nature, such as equality before the law, before justice, in taxation, and in public administration, the legislator must take account not only of equality in nature, but also of the accidental inequalities that make individuals more or less fitted to exercise this or that faculty. For instance, it should not, under a pretext of equality, allow everyone, whether learned or ignorant, to practice medicine.[70]

The second clause in the draft of 28 February 1937 was a mandatory one which would not allow the state to disregard differences of capacity and social function. The tenor of the subsection was not changed in the draft of 15 March,[71] but the department of finance in their memorandum of 19 March were highly critical of this section.[72] They attacked the second clause for 'obscur[ity]', claiming it could give rise, 'if launched out into the void in the draft Constitution', to unanticipated consequences, as well as agitation. Presumably in response to these criticisms, the draft of the 10 April contained the final version.[73] This change introduced the rather inelegant double negative formulation in the second clause; this, however, had the benefit of obviating any obligation on behalf of the state. This was not sufficient to satisfy the department of finance, which noted it remained 'obscure' in their second commentary.[74]

Gerard Hogan has recently argued that the original draft of 1935 was 'obviously intended by Hearne to be progressive and egalitarian'.[75] This

[69] Various, *The Pope and the People: Select Addresses on Social Questions* (London: Catholic Truth Society, 1932), 16.

[70] *A Code of Social Principles* (2nd ed., Oxford, 1937), 32. A French version of this edition, dating from 1934, is to be found in the de Valera papers, UCDA: P150/2366.

[71] UCDA: P150/2401. In the second clause, 'however' was replaced with 'in particular' and 'laws' was substituted for 'enactments'.

[72] UCDA: P67/184.

[73] UCDA: P150/2417.

[74] 17 April 1937 (UCDA: P67/184).

[75] Gerard Hogan, *The Origins of the Irish Constitution, 1928–1941* (Dublin: Royal Irish Academy, 2012), 155.

perhaps overstates Hearne's belief in equality. On 18 September 1936, Hearne delivered a speech to the League of Nations. Equality between the sexes, he stated:

> [F]ell into two great categories: (1) the political and civil status of women and (2) their status in industry. It might fairly be claimed that the laws of Ireland were remarkably clear from sex discrimination so far as political and civil rights were concerned. In Ireland, women exercised the Parliamentary and local government franchise. They had equal rights with men in the matter of ownership of property, in the practice of the professions, and otherwise […] He did not know how far the international women's organisations regarded the protective legislation passed by so many countries as incompatible with the dignity of their sex and as a derogation for the principle of sex equality [….] His own view was that the legislation, so hard won, so beneficial and so successful, stood as a landmark in the history of that great movement [….] There might be a tendency to regard as inequalities, legal distinctions which were based upon the phenomenon of the natural differences between the sexes. It must not be forgotten that, although the sexes might be equal in status, they were by nature dissimilar. Sex distinction in the laws or the administration of the laws which were based upon undoubted differences in nature and on a consequent differentiation of functions should not be regarded as unfair discrimination against one sex or the other.[76]

It is difficult, in this instance at least, to see any difference of note between Catholic principles and those which Hearne proclaimed. The repeated references to the special protection which maternity warranted in continental constitutions of the time illustrate that the common view was that there were differences between the sexes in the social sphere.[77] It seems likely, in the absence of any text establishing a different line of thinking, that Hearne intended to preserve this distinction in his early draft.

> 2. 1° *Titles of nobility shall not be conferred by the State. Orders of merit may, however, be created.*
> 2° *No title of nobility or honour may be conferred on any citizen except with the prior approval of the Government.*

Article 5 of the 1922 Constitution stated:

[76] *Records of the Sixteenth Ordinary Session of the Assembly: Meetings of the Committees: Minutes of the First Committee: Constitutional and Legal Questions* (League of Nations), 29.
[77] See, further, Article 41.

> No title of honour in respect of any services rendered in or in relation to the Irish Free State (Saorstát Eireann) may be conferred on any citizen of the Irish Free State (Saorstát Eireann) except with the approval or upon the advice of the Executive Council of the State.[78]

The draft of 13 October 1936 stipulated: 'There shall be no privileges or distinctions by reason of birth, sex, race, profession, wealth or religion. No titles of nobility shall be conferred.'[79] The forerunner to this provision appears to be the 1920 Constitution of the Esthonian Republic, which stated: 'Public privileges or prejudices derived from birth, religion, sex, social position, or nationality may not exist. In Esthonia there are no legal class divisions or titles.'[80] A similar provision may be found in the draft of 14 October 1936. This draft however, referred to 'rank' rather than 'birth'.[81] The draft of 19 October stated: 'No titles of nobility shall be conferred, but Orders of Merit may be created.'[82] The single line was divided in the draft of 15 March 1937 and this was to remain until promulgation.[83]

The second line was not included until the draft of 10 April 1937 and then was introduced, with the exception of the inclusion of the words 'citizen of Éire' in its final version. The department of finance noted that the prohibition would apply to entities such as the papacy, the British monarchy and the French Republic as possible grantors. They noted that such grants 'generally speaking […] give pleasure to the Nation' and

[78] Leo Kohn, *The Constitution of the Irish Free State* (London: George Allen and Unwin, 1932), 125–126; J.G. Swift MacNeill, *Studies in the Constitution of the Irish Free State* (Dublin: Talbot Press, 1925), 33–35. Swift MacNeill noted in the honours commission report 'which was issued on December 30, 1922, in respect of recommendations concerning persons who are, or who have been lately, resident in oversea Dominions, it was in each case considered desirable that the Prime Ministers of the Dominions should be consulted'.

[79] 13[?] October 1937 (UCDA: P150/2373).

[80] This may provide some evidence that it was the Esthonian guarantee of equality that was copied for Article 40.1, but as it was a common formulation, little turns on this point.

[81] 14 October 1936 (UCDA: P150/2373).

[82] 19[?] October 1936 (UCDA: P150/2385). This seems to have been based on Article 175 of the 1919 German Constitution. At this point, this clause was part of the equality provision as well as a guarantee which did not make it to the final draft but stated: 'Only citizens are eligible for civil or military offices save in special cases provided for by law.'

[83] UCDA: P150/2401. In the X draft, the phrase '[n]o titles of nobility' was changed to '[t]itles of nobility shall not'.

questioned whether a Constitution was a suitable venue for such a prohibition, rather than through diplomatic avenues.[84]

The reference to 'the Pope' may have been a coded prompt to de Valera. While the departmental memorandum mentioned, among others, Cosgrave as the recipient of such an award—he had been made a Knight of the Grand Cross of the First Class of the Pian Order in 1925[85]—it would have escaped no one's notice that de Valera had received the Grand Cross of the Order of Pius XI in 1933.[86]

3. 1° *The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
   2° *The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.*

On 4 September 1936, Edward Cahill provided a series of propositions for inclusion in the Constitution. Of particular interest is the following:

> It is the essential function of the State to safeguard the common good in regard to the life, the liberty, the property, the morals and all the natural and justly acquired rights of each and all of the citizens, especially of the working classes and the poor, whose needs have the first claim; and to promote as far as possible not only their material well-being but also their intellectual, moral and religious interest.[87]

De Valera responded on 19 September 1936 and noted the difficulty with the more general propositions; he asked for draft articles instead.[88] This particular section was, however, extracted from Cahill's September submission, which indicates de Valera's interest in the formula.

Despite this, the subsection did not appear until the draft of 28 February 1937, where it appeared in the following form:

[84] 17 April 1937 (UCDA: P67/184).
[85] *Who's Who, 1939* (London: A&C Black, 1939), 688.
[86] *Who's Who*, 845.
[87] 4 September 1936 (UCDA: P150/2393).
[88] UCDA: P150/2393.

> The State guarantees to respect, defend, and vindicate the personal rights of each citizen.
>
> Accordingly, the State shall take all necessary measures to prevent any violation of these rights, enforce respect for social order, and punish offenders against its laws.[89]

It is clear that the use of the word 'vindicate' was examined in some detail. The archives contain an extract of definitions of the word:

1. To assert, maintain, make good, by means of action, esp. in one's own interest; to defend against encroachment or interference.
2. To claim as properly belonging to oneself or another; to assert or establish possession of (something) for oneself or another.[90]

The subsequent Y draft contained a new sentence, the forerunner of the current second clause: 'In particular, the State shall protect, as best as it may, from unjust attack, and, in case of injustice done, vindicate the person, life, good name and property rights of every citizen.'[91] The draft of 15 March 1937 replaced the phrase 'in particular' with 'however': 'The State shall, however, protect, as best it may, from unjust attack, and, in case of injustice done, vindicate the person, life, good name and property rights of every citizen.'[92] This draft illustrates that the phrase 'however', and by implication the phrase it replaced, referred to a duty of the state. The draft of 10 April reversed this change.[93] The 10 April also deleted the word 'person',[94] but this was subsequently re-included on 24 April 1937.[95]

The fact that this provision was essentially retained verbatim belies the criticism which it received. The department of finance singled out the section as one with obligations that could impact negatively on the government. The department stated that such a provision could 'if launched out into the void in the draft Constitution, recoil like a boomerang on the Government of some future day in circumstances not anticipated by the

[89] 28 February 1937 (UCDA: P150/2387).
[90] UCDA: P150/2382.
[91] UCDA: P150/2387.
[92] 15 March 1937 (UCDA: P150/2401).
[93] 10 April 1937 (UCDA: P150/2417).
[94] 10 April 1937 (UCDA: P150/2417).
[95] 24 April 1937 (UCDA: P150/2427).

originators'.[96] The section was not re-drafted, despite these objections, and the department of finance noted ominously in their second commentary: 'It is still thought that they are dangerous and there still remains obscurity as to what practical obligations they impose on the State.'[97]

4. 1° *No citizen shall be deprived of his personal liberty save in accordance with law.*
   2° *Upon complaint being made by or on behalf of any person that he is being unlawfully detained, the High Court and any and every judge thereof shall forthwith inquire into the same and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such court or judge without delay and to certify in writing as to the cause of the detention, and such court or judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law.*
   3° *Nothing in this section, however, shall be invoked to prohibit, control, or interfere with any act of the Defence Forces during the existence of a state of war or armed rebellion.*

Article 6 of the 1922 Constitution stated:

> The liberty of the person is inviolable and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained, the High Court and any and every judge thereof shall forthwith enquire into the same and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or judge without delay, and to certify in writing as to the cause of the detention and such Court or judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law:
>
> Provided, however, that nothing in this Article contained shall be invoked to prohibit, control or interfere with any act of the military forces of the Irish Free State (Saorstát Eireann) during the existence of a state of war or armed rebellion.[98]

[96] 19 March 1937 (UCDA: P67/164).
[97] 17 April 1937 (UCDA: P67/164).
[98] See generally on habeas corpus in the Free State, Kevin Costello, *The Law of Habeas Corpus in Ireland* (Dublin: Four Courts Press, 2006), 27–31.

In their report of 1934, the constitution review committee recommended the retention of the provisions relating to habeas corpus.[99] The first two sections were produced verbatim, copied from the 1922 Constitution, in the draft of 18 May 1935.[100] The entire section was included in the draft of 19 October 1936 and, with the exception of the name given to the defence forces, were not amended during the rest of the drafting process.[101]

5. *The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.*

Article 7 of the 1922 Constitution had stated that the 'dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law'.[102] The Constitution Committee in 1934 recommended the article as fundamental and did not suggest any alteration be made.[103]

The draft of May 1935 contained a version very similar to the final wording of this section.[104] Despite this, the draft of 28 February 1937 stated that the state guaranteed 'not to enter the dwelling of a citizen, save in accordance with law'.[105] The subsequent Y draft altered the provision to read: 'The dwelling of a citizen shall not be forcibly entered save in accordance with law.'[106]

6. *1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-*

   (i) *The right of citizens to express freely their convictions and opinions.*
   The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the

[99] UCDA: P150/2365.
[100] UCDA: P150/2370.
[101] 19[?] October 1936 (UCDA: P150/2385).
[102] Swift MacNeill, *Studies in the Constitution of the Irish Free State*, 90–91.
[103] UCDA: P150/2365.
[104] UCDA: P150/2370. The sole exception is the use of the word 'each' instead of 'every' citizen.
[105] 28 February 1937 (UCDA: P150/2387).
[106] UCDA: P150/2387.

> *cinema, while preserving their rightful liberty of expression, shall not be used to undermine public order or morality or the authority of the State.*
> *The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.*[107]

Article 9 of the 1922 Constitution stated: 'The right of free expression of opinion … is guaranteed for purposes not opposed to public morality.' The constitution review committee of 1934 regarded this guarantee as fundamental.[108] The draft of 18 May 1935 provided for an extra limitation on the grounds of 'morality'. A similar restriction was to be retained throughout the drafting process.[109] Even with the new restriction, this guarantee was too broad for the drafters of the 1937 Constitution. The first attempt to temper the guarantee was to vest further powers in the Oireachtas. The draft of 12 October stated:

> Section 1. The State will take measures to prevent the corruption of public morals.
> […]
> Section 3. The State shall maintain a censorship of publications, cinematograph performances, stage plays and other public entertainments.[110]

A similar provision was included in the draft of 19 October 1936.[111] The most likely inspiration for this provision was Article 26 of the 1934 Constitution of the Federal State of Austria, which stated:

> 2. The following may be specifically decreed by law:-
>
> (a) In order to prevent disturbances of the public peace, order and safety or violations of the penal laws, a previous censorship of

[107] See further Gerard Hogan, 'The Historical Origins of Article 40.6.1°' in *The Irish Constitution: Governance* and Values, ed. Carolan and Doyle (Dublin: Thomson Round Hall, 2008), 71.

[108] UCDA: P150/2365.

[109] 18 May 1935 (UCDA: P150/2370). This was sometimes re-cast as 'true morality' and 'social order'. See 15 March 1937 (UCDA: P150/2401). See below for difficulties with this phrasing.

[110] 12[?] October 1936 (UCDA: P150/2373).

[111] 19[?] October 1936 (UCDA: P150/2373).

> the press, as well as the theatres, wireless, cinemas and similar public performances, the authorities being empowered to prohibit such performances.[112]

These provisions of 12 October were omitted from subsequent drafts but the underlying problem, the need to restrict the fundamental rights guarantees, remained. This restriction was ultimately provided by Catholic theory.

The Jesuit submission of 21 October 1936 proposed the following article to deal with freedom of speech:

> Liberty of speech and liberty of the Press, which are conceded to all within the [*sic*] limits, shall not extend to the utterance, publication, or circulation of anything that is subversive of the Christian religion, of Christian morality, or of public order in the State. The law, when occasion demands, shall define more clearly the limits of these liberties.
>
> The liberty accorded to the theatre, the cinema, the radio, and such like is confined within the same limits, which shall, when necessary be defined by law.[113]

Despite this submission, subsequent drafts from January 1937 did not adopt such a restriction on freedom of speech. This restrictive approach to freedom of speech was, however, evident in the draft of 28 February 1937, when McQuaid was intimately involved in the drafting process. This draft guaranteed the right to citizens:

> To express freely their convictions and opinions.
>
> The education of public opinion is, however, a matter of such grave import to the common good, that they who attempt it ought to observe prudence, justice and charity.
>
> The State shall, therefore, see to it that the organs of public opinion, such as radio, press and cinema, while preserving their rightful liberty of expression, shall not be used to overthrow social order or right morality, or, especially in times of war, the Authority of the State.
>
> The publication or utterance of blasphemous, seditious, or indecent matter are offences punishable by law.[114]

[112] Article 118 of the 1919 Constitution of the German Reich is another possible precursor, although the censorship model under the Austrian appears closer.

[113] 21 October 1936 (UCDA: P150/2393).

[114] 28 February 1937 (UCDA: P150/2387).

One interesting feature of this draft is its close link to the preamble with its reference to 'prudence, justice and charity'. This provision was removed from the subsequent Y draft, and the second and third clauses were combined:

> The education of public opinion, however, a matter of such grave import to the common good, the State shall see to it that the organs of public opinion, such as the Radio, Press and Cinema, while preserving their rightful liberty of expression, shall not be used to undermine social order or right morality, or, especially in times of war, the authority of the State.[115]

The use of the phrase 'right morality' was questioned by the department of finance during the drafting process.[116] McQuaid responded by quoting Leo XIII:

> When the bonds are broken which unite man to God, Who is the Sovereign Legislator and Universal Judge, a mere phantom of morality remains; a morality which is purely civic and, as it is termed, independent, which, abstracting from the Eternal Mind and the laws of God, descends inevitably till it reaches the ultimate conclusion of making man a law unto himself.[117]

The phrasing was abandoned in the draft of 10 April 1937, which contained the final wording.[118] It is not clear why the phrase 'right morality' was not ultimately adopted. It may have been thought unnecessarily divisive, excluding other religions whose morality would not have been thought 'right', or that the phrase 'right morality' was too vague to be justiciable.

'Blasphemous'

This provision had no forebear in the 1922 Constitution. As we have seen, the Jesuit submission contained a provision which dealt with freedom of speech; this stated that such freedom 'shall not extend to the utterance, publication, or circulation of anything that is subversive of the Christian

[115] UCDA: P150/2387.

[116] See commentary by department of finance, 19 March 1937 (UCDA: P67/184): 'What is the difference between "true" morality and "right" morality?'

[117] UCDA: P150/2406.

[118] 10 April 1937 (UCDA: P150/2417).

religion, or Christian morality'.[119] The Jesuits relied on the 1934 Austrian Constitution and the 1814 Constitution of the Kingdom of Norway as comparative constitutional provisions containing similar restrictions. In fact, the 1934 Austrian Constitution contained no such restriction based on religion; it contained a general power to establish a censor's office. The Norwegian constitution, however, did state, inter alia, that '[n]o person can be punished for any writing, whatever its contents may be, which he has caused to be printed or published, unless he has willfully and clearly, either himself shown or incited others to disobedience to the laws, contempt of religion or morality'. The Jesuit submission may have provided the basis for the revisions of February 1937 which introduced blasphemy into the Constitution.

What did the word mean? In 1960, Paul O'Higgins, writing in the *Modern Law Review*, asked de Valera what the source was for the blasphemy provision and whether the Constitution created a new offence or modified the common law offence of blasphemy.[120] The assistant secretary of the department of the Taoiseach responded that 'no new offence had been created by article 40. 6. I. i; that the offence of blasphemy is one at common law, and that it is impossible to attribute Article 40.6. I. i to any particular source'.[121]

The crime of blasphemy had undergone large changes in the nineteenth century. Early cases had taken any denial of the divinity of Christ as blasphemous.[122] Later cases did not adopt this convention; the rule adopted in *Bowman v Secular Society* was that the fundamentals of religion may be attacked if controversy was avoided.[123] It seems likely, therefore, that it was the intention of the drafters to incorporate this principle into the Constitution.

'Seditious'

Although originally the Constitution of the Irish Free State did not contain any reference to sedition, this was altered in 1931 by the Constitution (Amendment no 17) Act 1931; this inserted Article 2A into the

[119] 21 October 1936 (UCDA: P150/2393).
[120] Paul O'Higgins, "Blasphemy in Irish Law," *Modern Law Review*, 23 (1960): 153.
[121] O'Higgins, "Blasphemy in Irish Law," 153–154.
[122] O'Higgins, "Blasphemy in Irish Law," 160.
[123] O'Higgins, "Blasphemy in Irish Law," 164.

Constitution. Section 3 declared that the phrase 'treasonable or seditious documents' included 'any documents relating to or concerned with or issued, or emanating from, or appearing to issue or emanate from, an unlawful association' and constituted an offence of sedition.[124]

'Indecent'

The inclusion of 'indecent' was in line with a contemporary international concern about the circulation of obscene publications. The Irish Free State became a party to the International Convention for the Suppression of the Circulation and Traffic in Obscene Publications 1923 on 15 September 1930.[125] The convention made it an offence 'for purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects'. The constitutional draftsmen adopted, in place of 'obscene', the lower standard of 'indecent'. The former was in line with more liberal constitutions, such as the 1919 Constitution of the German Reich,[126] the latter with more restrictive constitutions, such as the 1934 Constitution of the Federal Republic of Austria.[127]

(ii) *The right of the citizens to assemble peaceably and without arms.*
Laws, however, may be enacted to prevent or control meetings which are calculated to cause a breach of the peace or to be a danger or nuisance to the general public.
Laws may be enacted for the regulation and control of open air meetings so as to ensure that they will not interfere unduly with public convenience and for the prohibition or regulation of meeting in the vicinity of the place of meeting of either House of the Oireachtas.

Article 9 of the 1922 Constitution stated:

> [T]he right to assemble peaceable and without arms … is guaranteed for purposes not opposed to public morality. Laws regulating the manner in

[124] See, for example, ss. 19(d) and 26.
[125] Michael Kennedy, *Ireland and the League of Nations 1919–1946: International Relations, Diplomacy and Politics* (Dublin: Irish Academic Press, 1996), 271.
[126] Article 118.
[127] Article 26(b).

> which … the right of free assembly may be exercised shall contain no political, religious or class distinction.

In 1934, the constitution review committee recommended that the article be retained as fundamental, but subject to an amendment clearly conferring the ability to make laws and for the police to act 'to prevent or control open-air meetings which might interfere with normal traffic or which otherwise become a nuisance or danger to the general public'.[128] They noted that legislation had prevented from introduced in parliament as it was unclear whether it would survive a constitutional challenge.

The draft of 18 May 1935 protected the right in the same fashion as the 1922 Constitution.[129] The draft of 6 August 1936, however, protected the right of citizens 'to assemble peaceably and without arms'. It also stated: 'Laws may be passed to prevent or control open air meetings which are calculated to interfere with normal traffic or otherwise to become a nuisance or danger to the general public.'[130] The draft of 19 October 1936 stated:

> Laws may be passed to prevent or control meetings which are calculated to cause a breach of the peace or to be a danger or nuisance to the general public. Open air meetings shall be subject to police regulations and control so as not to interfere with public convenience or normal traffic.[131]

The original August formula provided that laws could be passed where a meeting interfered with 'normal traffic' or had become 'a nuisance or danger to the general public', phrasing which appeared to suggest that the principal public interest endangered by public meetings was trivial traffic control. The October draft, in contrast, demoted the reference to 'traffic control' and prioritised 'public convenience' over 'normal traffic'. Conor Maguire noted that the phrase 'public convenience' would include the term 'normal traffic'.[132] In light of that observation, the reference to 'normal traffic' was removed altogether in the draft of 10 April.[133] The power

[128] UCDA: P150/2365.
[129] 18 May 1935 (UCDA: P150/2370).
[130] 6 August 1936 (UCDA: P150/2370).
[131] 19[?] October 1936 (UCDA: P150/2385).
[132] UCDA: P150/2416.
[133] 10 April 1937 (UCDA: P150/2417).

to restrict meetings in the vicinity of the Oireachtas was provided in the draft of 24 April.[134]

(iii) *The right of the citizens to form associations and unions.*
Laws, however, may be enacted for the regulation and control in the public interest of the foregoing right.
2° Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.

Article 9 of the 1922 Constitution stated:

> The right […] to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations […] may be exercised shall contain no political, religious or class distinction.

The constitution review committee recommended the retention of this article in 1934. The draft of 18 May 1935 guaranteed this right in the same manner as the 1922 Constitution. It was not until April 1937 that further restrictions were placed upon this right. The draft of 24 April guaranteed the right to form associations and unions only 'subject to the public interest'.[135] This restriction was amended only in the version of 30 April, which included the final wording.[136]

The Family

The 1922 Constitution contained no provision equivalent to Article 41 but the Free State Constitution was exceptional amongst inter-war constitutions in this regard.[137] This reflected the innate conservatism of the Irish revolutionaries and also, perhaps, the influence of the British system of governance. The drafting of Article 41, in common with Articles 42 and 43, followed a two-stage process. First, the original formulations drew on

[134] 24 April 1937 (UCDA: P150/2427).
[135] 24 April 1937 (UCDA: P150/2427).
[136] 30 April 1937 (UCDA: P150/2429).
[137] See Leo Kohn, *The Constitution of the Irish Free State* (London: George Allen and Unwin, 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.'

continental constitutions for their original drafts. Second, these drafts were supplemented by the Catholic Church's teaching on natural law.

Article 41

1. 1° *The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
   2° *The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.*

The second subsection was actually the first to appear. The draft of 12 October 1936 stated: '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.'[138] Although Broderick argues that this provision came from the 1919 German Constitution,[139] it appears to have been directly inspired by Article 12 of the Portuguese Constitution of 1933, which stated:

> 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 draft of 19 October 1936 simplified this formula considerably.[140] It provided: 'The State guarantees the constitution and protection of the family as the basis of moral education and social discipline and harmony, and the sure foundation of ordered society.'[141] This formula was not altered in the drafts of 2 and 11 January 1937,[142] though it was altered thereafter. A copy of this article was provided to the Irish drafting team on

[138] 12[?] October 1936 (UCDA: P150/2373).
[139] Broderick, *John Hearne*, 178–179.
[140] 19[?] October 1936 (UCDA: P150/2385).
[141] Ibid.
[142] 2, 11 January 1937 (UCDA: P150/2387).

29–30 January 1937.[143] In this draft, the family was guaranteed as '*a natural society possessing inalienable and imprescriptible rights antecedent and superior to all positive law*, and as the *essential* basis of social discipline and harmony, *and as indispensable to the continuance, strength and welfare of the Nation*'.[144] The portions italicised here were entirely new. Interestingly, there is no indication, either in the McQuaid papers[145] or in de Valera's records of McQuaid's correspondence, that McQuaid drafted this section.[146] This section seems to have been based upon the Jesuit submission of 21 October 1936.[147] The Jesuit memorandum stated:

> The family, *being a Natural society*, and being the fundamental unit of Civil Society, possesses natural, *inalienable, and imprescriptible rights, prior and superior to all positive law*. Being moreover indispensible to the *continuance, strength, and well-being of the Nation*, the Family shall have its essential nature, its just independence, and its rights respected and in a very special way protected by the State and its laws.[148]

The 29–30 January draft married the October 'Portuguese' draft with the Jesuit submission. The draft of 5 February 1937 provided:

> The State recognises the Family as a natural society possessing inalienable and imprescriptible rights antecedent and superior to all positive law, and guarantees its constitution and protection as an essential basis of social discipline and harmony and as indispensable to the continuance, strength and welfare of the Nation.[149]

The X draft provided:

> The State recognises the Family as the primary and fundamental unit of Society required by human nature, and as a moral and juridical institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

[143] 29–30 January 1937 (UCDA: P150/2389).
[144] UCDA: P150/2389.
[145] The provisions dealing with the family may be found in DDA: AB8/A/V/48.
[146] These are to be found in UCDA: P150/2408.
[147] UCDA: P150/2393.
[148] UCDA: P150/2393. Italics indicate sections which are closely linked to the January draft.
[149] 5 February 1937 (UCDA: P150/2414).

> The State, therefore, guarantees to protect the Family in its constitution, authority and government, as the necessary basis of order and as indispensable to the welfare of the Nation.[150]

The McQuaid papers include a draft which was the likely precursor to the X draft. The draft there, written by McQuaid, stated:

> The State recognises the Family as the primary and fundamental unit of Society, demanded by human nature, as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law, having for primary purpose the procreation and upbringing of children, in conditions suited to proper human life and development.
>
> The State guarantees to protect the Family in its constitution, authority and government, as being the essential basis of social life and order and as indispensable to the welfare of the Nation.[151]

The McQuaid draft was evidently based partly on the existing January and February drafts of the Constitution, and partly on the canonical teachings of the Catholic Church. Canon 1013 of the 1917 Code of Canon Law stated: 'The primary end of marriage is the procreation and education of children.'[152] Significantly, however, this idea was not incorporated in the official draft.

McQuaid successfully clarified and augmented the January and February drafts in relation to other Catholic teaching. McQuaid's relied heavily on *Rerum Novarum* and *Casti Connubii* in his submissions.[153] The drafting process tempered McQuaid's phrasing. His initial draft declared that the family was 'demanded by human nature', but this was incorporated as 'required by human nature'. The subsequent Y draft simply declared that the family was the 'natural, primary and fundamental' unit of society.[154] The draft of 15 March 1937 has a handwritten note next to the first subsection which indicates that de Valera believed the wording was 'too wide' as it might encompass a case where 'husband beats wife'.[155] Interestingly, the subsequent draft of 10 April 1937 contained the final

[150] UCDA: P150/2387.

[151] DDA: AB8/A/V/48.

[152] Edward Peters tr., *The 1917 or Pio-Benedictine Code of Canon Law* (San Francisco: Ignatius Press, 2001), 352.

[153] DDA: AB8/A/V/48.

[154] Undated (UCDA: P150/2387).

[155] 15 March 1937 (UCDA: P150/2401).

wording of both subsections.[156] The most notable exclusions from the previous drafts were the reference to the family as a 'juridical' institution in Subsection 1 and the reference to the 'government' of the family in Subsection 2.

> 2. 1° *In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*
> 2° *The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.*

The draft of 13 October provided: 'Maternity shall be protected by special laws.'[157] Provisions like this were commonplace in inter-war constitutions. The 1919 Constitution of the German Reich,[158] the 1920 Constitutional Charter of the Czechoslovak Republic,[159] the 1920 Constitution of the Esthonian Republic,[160] the 1921 Constitution of the Polish Republic,[161] the 1921 Constitution of the Kingdom of the Serbs, Croats and Slovenes,[162] the 1931 Constitution of the Spanish Republic[163] and the 1933 Constitution of Portugal[164] all specifically provided for the protection of maternity.

This provision was fleshed out in the draft of 19 October, which stated: 'Maternity is under the special protection of the State. Provision may be made by law for the supervision and inspection of lying-in hospitals and nursing homes.'[165] This clause appears to have been inspired by the 1920 Constitution of Austria.[166] The draft Article contained a further guarantee:

[156] 10 April 1937 (UCDA: P150/2417).
[157] 13[?] October 1936 (UCDA: P150/2373).
[158] Article 119: 'Motherhood has a claim upon the protection and care of the State.'
[159] Article 126: 'Marriage, the family and motherhood shall be under the special protection of the law.'
[160] Article 25 provided for 'the protection of maternity'.
[161] Article 103 stated that 'maternity is protected by special laws'.
[162] Article 27(2): 'It shall be the concern of the State … to give special protection to mothers.'
[163] Article 43: 'The State shall … give protection to maternity.'
[164] Article 14: 'With the object of protecting the family, it appertains to the State and local authorities... to protect maternity.'
[165] UCDA: P150/2385.
[166] Article 12(1)2.

> The State shall encourage early marriage and foster the production of large families by appropriate grants of remission of taxation in respect of children, by the promotion of saving and thrift schemes and by facilitating the provision of housing accommodation on reasonable terms.[167]

It is not clear where the inspiration for this broad guarantee originated. There was no special guarantee of maternity in the drafts of 2 or 11 January 1937.[168] However, maternity protection re-appears in the draft of February 1937, which provided:

> In particular, the State recognises that so much importance attaches to the guidance of woman in the family, as a firm support to the State, that the common welfare cannot be achieved without her. The State shall therefore see to it that woman, especially mothers and young girls, shall not be obliged to engage in avocations unsuited to their sex and strength.[169]

Note how the second line is the forerunner of Article 45.4.2°. The X draft stated:

> [i]n particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, see to it that women, especially mothers and young girls, shall not be obliged to enter avocations unsuited to their sex and strength.'[170]

We shall consider the implications of these drafts in the context of Article 45 later. This draft was provided by McQuaid; there is a handwritten draft in his papers containing the formula.[171] The inspiration for McQuaid's submission was Leo XIII's encyclical *Rerum Novarum*, which McQuaid quoted for de Valera:

> Work which is quite suitable for a strong man cannot be rightly required from a woman or a child. And, in regard to children, great care should be taken not to place them in workshops and factories until their bodies and

[167] UCDA: P150/2385.
[168] 2, 11 January 1937 (UCDA: P150/2387).
[169] UCDA: P150/2392.
[170] UCDA: P150/2387. This draft, and the subsequent Y draft, contain the same second line; see further on Article 45.
[171] DDA: AB8/A/V/48.

> minds are sufficiently developed. For just as very rough weather destroys the buds of spring, so does too early an experience of life's hard toil blight the young promise of a child's faculties, and render any true education impossible. Women, again, are not suited for certain occupations; a woman is by nature fitted for home-work, and it is that which is best adapted at once to preserve her modesty and to promote the good bring-up of children and the well-being of the family.[172]

The McQuaid formula was far more restrictive than those contained in other continental constitutions. Those constitutions simply provided for the protection of maternity; they did not refer to the life of the woman 'within the home'. It was not until the draft of 24 April that the formula for the second subsection was introduced: 'The State shall, therefore, endeavour to ensure that mothers and young girls shall not be forced by economic necessity to engage in labour to the neglect of their duties in the home.'[173] The draft of 26 April removed the reference to 'young girls'.

> 3. 1° *The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.*
> 2° *No law shall be enacted providing for the grant of a dissolution of marriage.*
> 3° *No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.*

In an article on the Constitution in 1977, Michael McInerney reported that the Catholic Church's 'total insistence for a complete ban on divorce was conceded almost without Cabinet debate. Though in the years that followed some Ministers did regret that they had not given it more consideration.'[174] This article was based on interviews with cabinet ministers from the time and may be taken as representative of their views, as expressed to him. It will be seen, however, that the drafting materials

[172] UCDA: P150/2408.
[173] 24 April 1937 (UCDA: P150/2427).
[174] *Irish Times* 30 December 1977.

reveal that this assertion considerably overstates the influence of the Church. It may be that the drafters attempted to divine the views of the Church and provide for these, but the ban on divorce pre-dated the involvement of the Church in the drafting of the Constitution.

The draft of 12 October 1936 stated '[t]he constitution of the family depends on lawful marriage' and '[d]ivorce *a vinculo* is prohibited'.[175] A replacement article was prepared for this draft:

1. The constitution of the family depends upon lawful marriage.
2. Marriage, as the basis of family life, is under the special protection of the State; and all attacks on the purity, health and sacredness of family life shall be forbidden.
3. The State shall recognise the inviolable sanctity of the marriage bond.
4. The civil validity of religiously solemnised marriages shall be recognised, provided that the details of registration prescribed by legislation are duly complied with.
5. Laws shall not be enacted providing for the annulment of marriage save on the following grounds, namely, the incapacity of either of the parties to enter into or to consummate the marriage contract, the absence of consent to the marriage on the part of either of the parties, or the absence of consummation. A marriage between unbaptized persons may be dissolved in the following circumstances, namely, (a) the refusal of one of such persons, in the event of the subsequent baptism of the other, to live peaceably with such other, and (b) the subsequent re-marriage of the baptized party.[176]

The first two subsections were derived from the 1919 German Constitution.[177] There are a number of interesting features of this draft. First, it recognised the 'inviolable sanctity' of the marriage bond. Second,

[175] 12[?] October 1936 (UCDA: P150/2373). On marriage law in Ireland, see Maebh Harding, "Religion and Family Law in Ireland: From a Catholic Protection of Marriage to a 'Catholic' approach to Nullity," in *The Place of Religion in Family Law: A Comparative Search*, eds. Jane Mair and Esin Örücü (Cambridge: Intersentia, 2011).

[176] 12[?] October 1936 (UCDA: P150/2373).

[177] Article 119.

it provided for the possibility of dissolution of marriage between unbaptised parties where one party was baptised, the other party refused to live peaceably with that party, and the baptised party subsequently re-married. This provision made the civil law relating to marriage dependent on the religious status of the parties.

Continental law often provided different facilities for marriage between those of different religions or Christian denominations. The most useful comparisons for our purposes are those of the continental Catholic countries. Non-Catholic countries tended to be far more lenient in relation to providing for divorce. For example, Denmark[178] and Germany[179] provided facilities for it. Catholic countries, or those with considerable Catholic populations, varied considerably in their provisions; France,[180] Portugal,[181] Belgium[182] and Czechoslovakia[183] provided facilities for divorce. In Austria, divorce could not be granted in respect of Catholic marriages.[184] It could be granted for marriages of non-Catholic Christians, individuals who did not belong to any religious community or Jews.[185] In Poland, the marriage law followed the religious law of the spouses. Therefore, Catholics could not divorce although adherents of other religions could.[186] In Italy, marriage could be dissolved only by the death of one of the spouses.[187] The Irish response to divorce was notable as it took a restrictive approach to the provision of divorce, although the first draft was not as restrictive as Italian law. The Irish approach may be explained by the strong stance against divorce which had been taken by influential members of the Irish Catholic Church of the time.

[178] Haim Cohn, *The Foreign Laws of Marriage and Divorce: Part I The Countries of the European Continent* (Palestine, 1937), 48–49.
[179] Cohn, *The Foreign Laws of Marriage and Divorce*, 98–99.
[180] Cohn, *The Foreign Laws of Marriage and Divorce*, 80–84
[181] Cohn, *The Foreign Laws of Marriage and Divorce*, 182–183.
[182] Cohn, *The Foreign Laws of Marriage and Divorce*, 28.
[183] Cohn, *The Foreign Laws of Marriage and Divorce*, 36–37.
[184] Cohn, *The Foreign Laws of Marriage and Divorce*, 20.
[185] Cohn, *The Foreign Laws of Marriage and Divorce*, 21–22.
[186] Cohn, *The Foreign Laws of Marriage and Divorce*, 175.
[187] Cohn, *The Foreign Laws of Marriage and Divorce*, 127.

In 1909, Cardinal MacRory, the Primate of All Ireland in 1937, wrote an article on divorce; this was, significantly, republished with his consent in 1934. The task which MacRory set himself was:

> to make it clear that, in any Christian land professing devotion or obedience to the law of Jesus Christ, divorce is nothing less than a disgrace and a blasphemous anomaly. I know that this is strong language, but if Christ solemnly forbade divorce and declared the marriage bond between Christians to be absolutely inviolable during the lifetime of husband and wife, what is it but constructive blasphemy in any Christian man or legislature to foster or sanction by law what the Law has solemnly forbidden.[188]

The use of the phrase 'inviolable' in relation to marriage, which appears in the first draft, is interesting in this context. Joseph Canavan SJ, who was involved in the drafting of the Jesuit submission, wrote: 'Catholic peoples will not, at any cost, allow the peril of divorce to enter their homes.'[189] Peter Finlay SJ argued that those who believed divorce was allowable according to their religious beliefs were like those who believed polygamy should be allowed for the same reason: 'In neither case ought a Catholic or Christian country frame legislation to meet [their] wishes.'[190] This public opposition from noted Catholic scholars and the Primate of All Ireland would have alerted the cabinet to the vast potential for conflict if any divorce facilities had been made available.

The subsequent draft of 13 October stated, in addition to the above draft: 'Divorce a vinculo is prohibited.'[191] The draft of 19 October 1936, in contrast, contained four separate clauses:

1. The constitution of the family depends upon valid marriage.
2. Marriage, as the basis of family life, is under the special protection of the State; attacks on the sanctity of marriage or of family life are prohibited.
3. Contraception and advocacy of the practice of contraception are prohibited and the possession, use, sale, and distribution of contraceptives shall be punishable by law.

[188] Joseph MacRory, *The New Testament and Divorce* (Dublin: Burns Oates and Washbourne), 3.

[189] Joseph Canavan, "Italy and Divorce," *Irish Monthly*, 52 (1924): 235.

[190] Peter Finlay, "Divorce in the Free State," *Studies*, 13 (1924): 361.

[191] 13[?] October 1936 (UCDA: P150/2373). Emphasis in original.

4. No law shall be enacted authorising the dissolution of a valid consummated marriage of baptized persons. No law shall be enacted authorising the annulment of marriage save on the following grounds, namely, that either or both of the parties did not agree to enter into the marriage contract, or was or were not free to enter, or did not freely enter into the marriage contract, or that the marriage was under the law for the time being in force invalid in form. Subject to the foregoing, the contract of marriage shall be regulated by law.[192]

This draft amalgamated some of the provisions, such as that relating to the sanctity of marriage, in the previous draft. It included a new section dealing with contraception. Section 4 also provided that no law could authorise the dissolution of a marriage between 'baptized persons'. This provision did not, however, extend to unbaptised persons, and the earlier grounds for the dissolution of marriage between a baptised and unbaptised person was not present. There is no indication that this draft met with reproach in the cabinet discussions in October 1936. This draft, notably, did not have any input from the Catholic Church. The drafting process makes it clear that the drafters had already placed significant restrictions on the ability to divorce before the involvement of either Cahill or McQuaid, notwithstanding their later comments to McInerny. The cabinet were surely correct, however, in anticipating objections from the Catholic Church to the granting of divorce facilities.

The draft of 2 January 1937 deleted clause (3) and the first line of clause (4).[193] Two new clauses were introduced:

1. No law shall be enacted providing for the dissolution a vinculo matrimonii of a valid consummated marriage.
2. No person whose marriage has been dissolved under the civil law of any other State shall be capable of contracting a valid marriage in E. during the lifetime of the other party to the marriage so dissolved.

This draft removed the loophole for unbaptized parties which had existed in the October draft.

[192] UCDA: P150/2385.
[193] UCDA: P150/2387.

The draft of 29–30 January deleted the second sentence of clause (4) and modified clause (2), which dealt with the 'special protection', so that it ran: 'Marriage, as the basis of family life, is under the special protection of the State; *propaganda directed against the sanctity of marriage and of family life are prohibited*.'[194] It seems most likely that this was introduced to allow the prohibition of pro-contraceptive materials.

In common with the rest of Article 41, this section was re-cast in February 1937. The literal translation contained no mention of the previous iterations of the section and simply stated:

1. Marriage being the foundation of the family, the State pledges itself to guard with special care the institution of marriage, and to protect it against attack.
2. It is not permissible to enact any law which would impair the essential properties pertaining to the unity and indissolubility of marriage; and no person whose marriage bond has been loosed by civil law in another State can make a valid marriage in Éire during the life-time of the other party to the bond which has been loosed.[195]

The draft of 28 February 1937 provided:

> The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.
>
> No law shall be passed which shall impair its essential properties of unity and indissolubility and no person whose marriage has been dissolved under the civil law of any other State shall be capable of contracting a valid marriage in E. during the lifetime of the other party to the marriage so dissolved.[196]

The draft of 28 February contained the final wording of Articles 41.3.1°and 41.3.3°. The wording of 41.3.2°was changed at the instigation of Seán T. O'Kelly, who noted that a judicial separation might be thought to 'impair the essential propert[y] of […] unity' and therefore recommended the following formula: 'No law shall be enacted providing for the grant by the Constitution of Eire of a dissolution of marriage.'[197]

[194] UCDA: P150/2389. Italics indicate changed portion.
[195] UCDA: P150/2392.
[196] 28 February 1937 (UCDA: P150/2387).
[197] UCDA: P150/2416.

This theory underlying this objection was incorporated into the draft of 10 April 1937 but the focus was modified from the Constitution to the courts: 'No law shall be enacted providing for the grant by the Courts of Éire of a dissolution of marriage.'[198] The difficulty with this formula was that it would have been possible to provide for the grant of dissolution of marriage by a body other than the courts, for example in parliament, as had occurred in the UK. Therefore, the draft of 24 April 1937 stated: 'No person whose marriage has been dissolved under the civil law of any other State shall be capable of contracting in Eire a valid marriage during the lifetime of the other party to the marriage so dissolved.'[199]

In the Dáil, John A. Costello and Robert Rowlette raised the possibility of conflict between canon and civil law marriages; for example, if a couple were married under the civil law of a foreign state but not under the law of the Church to which they belonged, could they marry in Ireland?[200] De Valera construed these concerns narrowly. When he introduced the final wording, he explained the original wording was objected to on the grounds 'that the mere dissolution of a marriage—whether, according to our law, it was a valid marriage or not; whether it was invalid *ab initio*, or was a valid marriage according to our law—would, of itself, prevent one of the persons involved from marrying here'.[201] De Valera therefore introduced the final wording, which provided that Subsection 3 followed the marriage law of the Irish state.

Education

Article 42

1. *The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.*

[198] 10 April 1937 (UCDA: P150/2417).
[199] 24 April 1937 (UCDA: P150/2427).
[200] 67 Dáil Debates (4 June 1937) cols. 1882–1886.
[201] 68 Dáil Debates (9 June 1937) col. 225.

The draft of 12 October 1936 contained a provision which was not part of the draft but was included as an additional article. This stated, in part: 'Parents have the right and duty of educating their children subject to the right of the State to supervise such education and to public order and morality.'[202] This provision was obviously not as strident as the wording ultimately enshrined in the Constitution. There was, however, no equivalent article in the 1922 Constitution. This clause was not incorporated in the education article in the draft of 19 October 1936.[203] The Jesuit submission was considerably stronger than even the early draft, stating: 'It is the natural right as well as the duty of parent to provide, as far as in them lies, for the education, religious, moral, physical and intellectual of their children.'[204]

At the end of January 1937, the education article began: 'Parents have the primary duty to educate.'[205] It was in February 1937 that the section as it now exists began to take shape. The draft of 5 February provided:

> The right of parents to educate their children is recognised to be a natural right antecedent and prior to all positive law (*Encycl. Divini Illius Magistri II (a)*). This right imports a corresponding duty on parents to maintain discipline in the home, to exercise due control over their children, and to provide them with suitable education either in the home or in schools established or recognised by the State.[206]

This draft explicitly refers to a papal encyclical as inspiration for the draft. It emphasised the disciplining of children as an important duty on parents. This version was considerably softened in the draft of 28 February 1937:

> The State acknowledges the Family as the primary and natural educator of the child, and guarantees to respect the inalienable right and duty of the parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.[207]

[202] 12[?] October 1936 (UCDA: P150/2373).
[203] UCDA: P150/2385.
[204] UCDA: P150/2395.
[205] UCDA: P150/2389.
[206] 5 February 1937 (UCDA: P150/2414).
[207] UCDA: P150/2387.

Canon 1113 of the 1917 Code of Canon Law stated: 'Parents are bound by the most grave obligation to take care as far as they are able for the education of children, both religious and moral, as well as the physical and civil, and of providing them with temporal goods.'[208] McQuaid quoted this provision in correspondence with de Valera.[209] This provision, along with *Divini Illius Magistri*, was also the inspiration for the Jesuit submission on the Constitution.[210]

2. *Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.*

The draft of 12 October 1936 stated: 'The obligation of parents or other persons having the legal custody of children to provide education for such children in their homes or to require them to attend national or other suitable schools shall be regulated by law.'[211] This was augmented in the draft of 13 October 1936 with a further provision: 'Primary instruction is obligatory and may be given in the home or private schools or in official schools established or recognised by the State.'[212] The genesis of this provision appears to lie in the 1933 Constitution of Portugal, which provided: 'Elementary primary instruction is obligatory and may be given in the home, or in private or State schools.'[213] The crucial difference, even at this early point in the drafting, lay in the fact that official schools in Ireland would require only state 'recognition', a key concession to religious orders' control of the schooling system. This October draft also provided for the overall supervision by the state of private schools: 'Private schools may be established subject to inspection by authorised officers of the State.' Again, this provision appears to have been derived from the 1933 Portuguese Constitution, which stipulated: 'The establishment of private schools on the lines of the State schools shall be free, but subject to State inspection.' The draft of 14 October 1936 made no mention of homeschooling but did state: 'Private schools may be maintained subject

[208] Peters tr, *The 1917 or Pio-Benedictine Code of Canon*, 383.
[209] UCDA: P150/2409.
[210] UCDA: P150/2395.
[211] 12[?] October 1936 (UCDA: P150/2373).
[212] 13[?] October 1936 (ibid).
[213] Article 43.2.

to State inspection and supervision.'[214] The draft of 19 October used the formula advanced in the draft of 13 October.[215]

It was not until 29–30 January 1937 that the interventionist formula, which provided for state inspection and supervision of private schools, was changed: 'Parents have the primary duty to educate and to provide for the education of their children in their homes or in suitable schools established or recognised by the State.'[216]

In common with many of the fundamental rights provisions, it was in February 1937 that the current provision began to take shape. The draft of 5 February 1937 recognised a duty of parents 'to provide them with suitable education either in the home or in schools established or recognised by the State'.[217] The literal translation of the Irish text stated: 'Parents are free to provide such education for their children in the home, in a private school or in a State school.'[218] The draft of 28 February 1937 provided similarly, although it referred to 'schools established by the State'.[219]

This formula was apparently the subject of some discussion. The minister for education, Tomás Ó Deirg, was opposed to the use of the word 'established' in the section. He advocated its replacement by the phrase 'aided or recognised'.[220] This would have considerably lessened the power of the state in relation to education by placing it in a supporting role. Seosamh Ó Neill, the secretary of the department of education, wrote to de Valera on 8 April 1937 and advocated a contrary view to that of his minister.[221] He stated that although the papal encyclical *Divini Illius Magistri* allowed the state to establish its own schools and institutions when the Church and family fell short, 'the attitude of our Church is one of hostility to the idea of the State establishing schools'.[222] Ó Neill advocated the use of the word 'established' as it was consistent with papal teaching. The subsequent draft of 10 April sought to reconcile the two views. It retained the word 'established', but introduced a phrase suggested

[214] UCDA: P150/2373.
[215] 19[?] October 1936 (UCDA: P150/2385)
[216] UCDA: P150/2389.
[217] 5 February 1937 (UCDA: P150/2414).
[218] UCDA: P150/2392.
[219] 28 February 1937 (UCDA: P150/2387).
[220] 23 March 1937 (NAI: Taois s.9715B).
[221] Ó Neill to de Valera, 8 April 1937 (UCDA: P150/2416).
[222] See, further, John Henry Whyte, *Church and State in Modern Ireland 1923–1979*. 2nd ed. (Dublin: Gill and Macmillan, 1980), 18–19.

by Ó Deirg, stating that education could be provided in schools 'recognised or established by the State'.[223]

> 3. 1° *The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.*

This provision was a late addition to the drafting process. It was arguably implicit in the recognition of the primary duty of parents to educate their children. It was made explicit, however, in the literal translation of the Irish text in February 1937, which stated: 'The State gives its pledge to parents that they shall not be compelled to send their children to State schools in violation of their conscience and of their lawful choice.'[224] This formula was consistent with that put forward by *A Code of Social Principles*, which propounded the view that the state:

> exceeds it rights, however, and its monopoly of education and teaching is unjust and illegal, when it uses physical or moral compulsion to force families to send their children to state schools, contrary to the obligations of Christian conscience or even to legitimate preferences.[225]

The draft of 28 February 1937 stipulated: 'The State pledges itself not to oblige parents, in violation of their conscience and lawful preference, to send their children to Schools established by the State.'[226] This provision may have become more uncertain following the objections to the word 'establish[ment]'. The draft of 10 April 1937 stated: 'The State shall not oblige parents in violation of their conscience and lawful preference, to send their children to Schools established by the State, or to any particular type of school designated by the State.'[227] This formula provided an extra guarantee from state interference.

> 2° *The State shall, however, as guardian of the common good, require in view of the actual conditions that children receive a certain minimum education, moral, intellectual and social.*

[223] 10 April 1937 (UCDA: P150/2417).
[224] UCDA: P150/2392.
[225] *A Code of Social Principles*, 24.
[226] 28 February 1937 (UCDA: P150/2387).
[227] 10 April 1937 (UCDA: P150/2417).

There was a replacement article for the draft of 12 October 1936, which provided that the right of parents to educate their children was subject to state supervision.[228] That draft was superseded by that of 13 October:

> Primary instruction is obligatory and may be given in the home or private schools or in official schools established or recognised by the State. All such instruction shall have for its aim the formation of character, the cul [*sic*] of moral and civic virtue, as well as the development of the physical and intellectual faculties.[229]

In common with other elements of this article, the genesis appears to have been the 1933 Portuguese Constitution.[230] This draft also provided for compulsory religious instruction in all schools of students under the age of 18 years: 'The direction and control of such teaching is the province of the particular Church or religious communion to which the pupils belong, without prejudice to the supreme right of control reserved to the State educational authorities.' This provision was apparently based upon Article 120 of the 1921 Constitution of the Polish Republic.[231]

It was not until the revision of February 1937 that the minimal educational standard appeared:

> But as the State is the Guardian of the common welfare it shall insist, in view of actual conditions, that each person shall receive the minimum amount of education in order to develop his intellectual, moral social and physical qualities.[232]

[228] 12[?] October 1936 (UCDA: P150/2373).
[229] 13[?] October 1936 (ibid).
[230] Article 42.3 provided:

> The instruction furnished by the State shall aim not only at physical improvement and the perfecting of the intellectual faculties, but also at the development of character and professional worth and all the moral and civic virtues, in conformity with the principles of Christian doctrine and ethics which are a tradition of the country.

[231] It stated: 'The direction and control of [religious] teaching is the province of the particular religious body, without prejudice to the supreme right of control reserved to the State educational authorities.'
[232] UCDA: P150/2392.

This new draft may have been influenced by *A Code of Social Principles*, which stated:

> The State may demand and take measures to ensure that all citizens have a knowledge of their civic and national duties, and possess a minimum of intellectual, moral and physical culture, which in view of present-day conditions is really necessary for the common welfare.[233]

The draft of 28 February stated that 'as Guardian of the common good, the State shall require, in view of actual conditions, a certain minimum education, intellectual and moral, physical and social'.[234] McQuaid wrote to de Valera and again quoted *Divini Illius Magistri*:

> The State can exact, and take measures to secure that all its citizens have the necessary knowledge of their civic and political duties, and a certain degree of physical, intellectual and moral culture, which, considering the conditions of our times, is really necessary for the common good.[235]

This was the likely inspiration for the changes made in the draft of 28 February. The only other major drafting change was the removal of the word 'physical' from the draft of 10 April 1937.[236]

4. *The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of the parents, especially in the matters of religious and moral formation.*

Despite the fact that free elementary education was guaranteed under the 1922 Constitution, the Hearne draft of 18 May 1935 contained no equivalent guarantee.[237] The constitution review committee in 1934 had not recommended the retention of the provision. This seems to have been

[233] Above, note 947, at 23.
[234] 28 February 1937 (UCDA: P150/2387).
[235] UCDA: P150/2409.
[236] 10 April 1937 (UCDA: P150/2417).
[237] UCDA: P150/2370.

influenced by concerns, articulated by the department of education, about the extent to which the duty might be justiciable.[238]

The draft of 13 October 1936 was the first to guarantee to '[a]ll persons possessing Irish nationality […] the right to free elementary education.'[239] It also provided that the state 'shall maintain primary and secondary schools as well as institutes of higher education'. This appears to have been based on the Portuguese constitution.[240] It was not until the draft of 29–30 January 1937 that the maintenance claim was dropped.[241] The February 1937 draft rendered the draft section as follows:

> Further, the State shall aid and supplement the development of private and corporate educational initiative, and shall provide primary free education, and, when necessary for the public welfare, will establish other institutions, but always with due respect for the rights of parents, particularly in regard to matters of religion and morals.[242]

In the draft of 28 February, the section appeared as follows:

> Further, the State shall aid and supplement private and corporate educational initiative, particularly by providing free primary education and, when the public good requires it, other institutions, with due respect, however, for the rights of parents, especially in the matter of religious and moral formation.[243]

The provision of free primary education was simply a particular application of the general obligation on the state to supplement private and corporate educational initiatives. The draft of 10 April 1937 re-orientated the emphasis of the section. Under this, the obligation on the state to provide for free primary education was the primary focus of the section, rather than consequent upon private initiative.

5. *In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the*

[238] 2 July 1934 (UCDA: P150/2365).
[239] 13[?] October 1936 (UCDA: P150/2373).
[240] Article 43. A comparable provision is to be found in Article 146 of the 1919 German Constitution, although the textual links are more remote.
[241] 29–30 January 1937 (UCDA: P150/2389).
[242] UCDA: P150/2392.
[243] 28 February 1937 (UCDA: P150/2387).

> *common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*

The draft of 12 October provided:

1. The State upholds the right of parents to the custody of their children and the duty of parents to exercise authority and control over their children subject to the law.
2. Parents shall not be deprived of the custody of their child save by an order of a court having jurisdiction in the matter.
3. Children deprived of parental care have the right to the special protection of the State within the limits determined by law.[244]

This provision was more legalistic than the final version incorporated into the Constitution. The second and third subsections are based on Article 103 of the Polish constitution of 1921. This draft provided greater scope for state intervention in the interests of the child than the final version; it was simply necessary to show that a child was 'deprived of parental care' to allow the State to become involved. It was not until February 1937, however, that this principle appeared in the context of education, where the literal translation of the Irish draft stated:

> In exceptional cases, when parents fail, through lack of health or morals, to perform their duty to their children, since the State is the guardian of the public welfare, the State shall take the place of the parents, but always with due respect to the unalienable rights which are due to the child.

This appeared in the X draft in its finalised form.[245] This draft was again apparently inspired directly by *Divini Illius Magistri*, which stated:

> It also belongs to the State to protect the rights of the child itself when the parents are found wanting either physically or morally in this respect, whether by default, incapacity or misconduct, since, as has been shown, their right to educate is not an absolute and despotic one, but dependent on the natural and divine law, and therefore subject to the authority and

[244] 12[?] October 1936 (UCDA: P150/2373).
[245] UCDA: P150/2387.

jurisdiction of the Church, and to the vigilance and administrative care of the State in view of the common good.[246]

Article 42 demonstrates a similar pattern to Article 41. In October, continentally based rights provisions were overhauled with more directly Catholic-inspired provisions after John Charles McQuaid became involved in the drafting process.

Private Property

Article 43

1. 1° *The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.*
   2° *The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.*

2. 1° *The State, recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*
   2° *The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.*

The draft of 12 October contains an article dealing with property rights which was not part of the main text. It stated:

> 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 com-

[246] As quoted by McQuaid (UCDA: P150/2409).

> pulsory purchase of rural property for general utility purposes shall be subordinated to the principle that the agrarian structure of E__ ought to be based on agricultural holdings capable of normal productivity and privately owned.[247]

The wording of this draft corresponds very closely to Article 99 of the 1921 Constitution of the Polish Republic:

> 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.[248]

The link with the Polish draft became more attenuated as the drafting process developed. The first mention of the right as a 'natural' one occurred in the draft of 19 October, which was notable for the stridency of its provision in relation to private property:

1. The right to private ownership of property is hereby affirmed to be a natural human right and a basic principle of ordered human society.
2. The State guarantees protection of their private property to all citizens and all bodies corporate and unincorporate within the State, and no such property shall be limited or acquired by the State save for general utility purposes and upon payment of compensation.

[247] 12[?] October 1936 (UCDA: P150/2373).
[248] See also Broderick, *John Hearne*, 180.

> Nothing in this Article shall operate to prevent the seizure or forfeiture of property under an order of a court in accordance with law.[249]

State intervention in the matter of land ownership was, however, strengthened in a subsequent article, which declared:

1. The ownership, distribution and use of land are under the special control and supervision of the state, and such control and supervision shall be exercised so as to promote the creation and development of the maximum number of economic holdings privately owned, the relief of congestion, and the establishment of working farmers on the land.
2. It is hereby declared to be the duty of landowners to work their holdings in accordance with proper methods of husbandry so as to maintain and develop the productivity of the soil to their own advantage and for the benefit of the community.[250]

It is arguable that the second article contains the germs of the concept of 'social justice' which was to be included in the completed version of the property article. Enforcing the requirement in Subsection 2 that it was the duty of 'landowners to work their holdings in accordance with proper methods of husbandry' would have required considerable state oversight of the use of property within the jurisdiction.

The subsequent draft of 2 January 1937 eliminated the section on state intervention. Instead, it contained three clauses:

1. The right to private ownership of property is recognised by the State to be a natural human right.
2. The protection of their private property is guaranteed to all citizens and to all bodies corporate and unincorporate in the State. Private property shall not be acquired by the State for public utility purposes save on payment of compensation. Private property shall not be seized by or forfeited to the State save under an order of a court of competent jurisdiction or otherwise in accordance with law.

[249] 19[?] October 1936 (UCDA: P150/2385).

[250] A final article should perhaps be added to these two which declared, inter alia, '[i]t shall be the aim of social legislation … to favour the diffusion of property'.

3. Bona vacantia as defined by law belong to the State.[251]

The draft of 11 January stated that the natural right was 'antecedent and superior to the law of the State'.[252] This formula was maintained through January 1937 until the draft of 29–30 January, in which the third section was deleted and the second section amended to read as follows:

> The protection of their private property is guaranteed to all individuals and *to all bodies corporate* in the State. Private property shall not be acquired by the State for public utility purposes save on payment of compensation. Private property shall not be seized and *detained by the State save in satisfaction of a debt due to the State or for an offence punishable by law*.[253]

The first change was the omission of the phrase 'bodies […] unincorporate'. The second and more significant change re-formulated the test for seizure in a manner which removed the courts from the central operation of the procedure.

The article was seriously revised in February 1937 so that it had a more decidedly more confessional bent. The first iteration which contains this new emphasis is to be found in the draft of 28 February:[254]

> The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> The State recognises that the exercise of this natural right is not only allowable, but is, for social needs absolutely necessary, and therefore guarantees to pass no law attempting to abolish the right of private ownership.
>
> Since the use by individuals of private property ought, in civil society, be regulated by the principles of social justice, the State is competent to delimit this use, when need arises and with a view to reconciling it with the exigencies of the common good.[255]

[251] 2 January 1937 (UCDA: P150/2387).

[252] 11 January 1937 (UCDA: P150/2387).

[253] 29–30 January 1937 (UCDA: P150/2389) (italics indicate changes).

[254] UCDA: P150/2392.

[255] 28 Feb 1937 (UCDA: P150/2387). McQuaid later wrote, against the allegations that the use of the term 'social justice' would allow a communist government to operate under it, '[i]t may be said with truth that a casual reading of the Articles on Rights will not [*sic*] reveal at once that they are not only not only based on Catholic Social principles, but that they

While the 19 October draft acknowledged the right as 'natural', it was recognised as being 'antecedent to positive law' 'in virtue of [man's] rational being' in the February draft.

Although the drafts of 1 April and 10 April[256] contained no property article, it is evident that re-drafting was occurring privately. On 16 April, Arthur Matheson submitted his commentary on a draft which does not correspond to anything in the March printed draft.[257] His suggested re-wording of the article was as follows:

1. 2° The State acknowledges further that the exercise of this natural right is, for social needs, absolutely necessary, and guarantees to pass no law attempting to abolish the right of private ownership or the *general* right to transfer, bequeath, and inherit property.
2. 1° The State recognises, however, that the *exercise of the rights mentioned in the foregoing provisions of this Article* ought, in civilized society, to be regulated by the principles of social justice.
   2° The State, accordingly, may *as occasion requires* delimit by law *the exercise of the said rights* with a view to reconciling their exercise with the exigencies of the common good.[258]

There were two sets of principal proposed changes. The first related to an insertion of the word 'general' before 'right'. The second concerned the replacement of the phrase 'use by individuals of private property',

enshrine that teaching, for the most part, in the very words of the papal encyclicals'. (DDA: AB8/A/V/48).

[256] 1 April 1937 (UCDA: P150/2415); 10 April 1937 (UCDA: P150/2417).

[257] UCDA: P150/2411:

1. 2°The State acknowledges further that the exercise of this natural right is, for social needs, absolutely necessary, and guarantees to pass no law attempting to abolish the right of private ownership or the right to transfer and bequeath or inherit property.
2. 1°The State recognises, however, that the use by individuals of private property ought, in civil society, to be regulated by the principles of social justice.
   2°The State may, accordingly, by law delimit this use when the need arises with a view to reconciling it with the exigencies of the common good.

(1.1°is omitted here and in further quotations as it remains unchanged).

[258] UCDA: P150/2411 (italics indicate proposed changes).

which occurred in the previous draft, with the 'exercise of rights mentioned' formula. This was because Matheson believed that the former formula would not include corporations. He was also concerned that the word 'use' referred to 'actual physical use and enjoyment', a concept which may not have captured all of the rights—'ownership', 'transfer', 'bequeath', 'inherit'—mentioned in 1.2°.

These changes were incorporated in the copy sent for translation on 19 April, which was further amended, with the phrase 'civilized' society in 2.1°shortened to 'civil'.[259] In the draft of 24 April, the phrase 'social needs' in 1.2°was amended to the more elegant 'social reasons'.[260] Section 1.2°was amended on 26 April to the final version, which removed the references to the necessity of the right.[261]

Private property followed a similar path to Articles 41 and 42, but was slightly different in that it was present, and constantly worked on, throughout the drafting period. There was no substantial fallow period, as existed in relation to those other articles between November 1936 and February 1937.

Directive Principles of Social Policy

There was no section equivalent to the 'Directive Principles' in the Constitution of the Irish Free State. The Free State Constitution was, however, an exception to continental constitutions of the inter-war period in not providing for economic rights.[262] The most important influence on the drafting of Article 45 was *Quadragesimo Anno*, a papal encyclical written in 1931.[263]

Quadragesimo Anno was a highly influential point of reference in 1930's Irish political ideology. De Valera's advertisement to the electorate on 15 February 1932 had proclaimed: '[a] Fianna Fáil Government will accept the full responsibility of governing in accordance with the principles

[259] 19 April 1937 (UCDA: P150/2411).

[260] 24 April 1937 (UCDA: P150/2427).

[261] 26 April 1937 (UCDA: P150/2428).

[262] See, generally, Agnes Headlam-Morley, *The New Democratic Constitutions of Europe* (Oxford: Oxford University Press, 1928), 264–291. On Article 45 see also Thomas Murray, Contesting Economic and Social Rights in Ireland: Constitution, State, and Society, 1848–2016 (Cambridge: Cambridge University Press, 2016), 112–159.

[263] See Gerard Hogan and Gerry Whyte, *J. M. Kelly: The Irish Constitution*. 4th ed. (Dublin: Butterworths, 2003), 2079.

Table 6.1 Article 45 and Statute Law[a]

Constitution	*Statutory provision*
Distribution of material resources of the community	Acquisition of Land (Allotments) (Amendment) Act 1934
Restriction of free competition	Control of Manufacturers Act 1932
Control of credit	Industrial Credit Act 1933
Establishment on the land	Land Act 1936
Favour private initiative in industry	Industrial Credit Act 1933
Protect public against exploitation by private enterprise	Control of Prices Act 1932
Support the infirm, widows, orphans and the aged	Old Age Pensions Act 1932, Widows' and Orphans' Pensions Acts 1935 and 1937
Ensure the strength and health of workers	Conditions of Employment Act 1936

[a]Text of Article 45 and corresponding statutes enacted between 1932 and 1937

enunciated in the Encyclical of Pope Pius XI on "The Social Order".'[264] When Arthur Matheson proposed to delete a reference to the division of land from Article 45, McQuaid objected: 'No reason is assigned for deleting division of land: a very prominent plank in Leo XIII's programme and in Fianna Fail's policy.'[265] Responding to a charge that the Directive Principles of Social Policy were merely 'pious aspirations',[266] de Valera claimed: 'The grand headlines—as Mr. Cosgrave called them—in the Constitution had been, in fact, the inspiring principles in the Fianna Fáil policy for the last five years.'[267] In fact, comparing the legislative agenda of the Fianna Fáil government from 1932 to 1937, it is clear that there were legislative provisions which corresponded to the constitutional protections of Article 45 (see Table 6.1).

Article 45

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in

[264] *Irish Independent*, 15 February 1932. The English title of *Quadragesimo Anno* was 'On the Reconstruction of the Social Order'.

[265] Undated but post-February 1937 (UCDA: P150/2411).

[266] 'Directive Principles' (UCDA: P150/2411): 'It has been frequently said that the Directive principles of Social Policy are but pious aspirations, devoid of effective force.'

[267] *Irish Times*, 1 July 1937.

the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.

This section was a late addition. The drafting of Article 45 had disclosed difficulties with the legal enforcement of fundamental rights. The original drafts of Article 45 were contained in the article which dealt with private property. This section was included in this fashion in the draft of 15 March 1937, which was circulated to the civil service departments for comment.[268] The proposals were the subject of sustained criticism on the basis that they could give rise to problems of judicial interpretation.[269] De Valera indicated that he believed some sections were 'merely statements of moral principles and should not be created [*sic*] positive rights'.[270]

John Hearne wrote to Charles Bewley in Berlin on 1 April to ask about the operation of the German Constitution.[271] He indicated that de Valera intended to include a provision like Section V of the 1919 Constitution of the German Reich in the new Irish Constitution. An illustrative section of Section V is Article 151, which stated:

> The organization of economic life must correspond to the principles of justice, and be designed to ensure for all a life worthy of a human being. Within these limits the economic freedom of the individual must be guaranteed.
>
> Legal compulsion is permissible only in order to enforce rights which are threatened, or to subserve the pre-eminent claims of the common weal.
>
> Freedom of trade and industry is guaranteed in accordance with the provisions of the laws of the Reich.

De Valera had two misgivings about the inclusion of such a clause. He was concerned, first, that such a statement regarding rights might be regarded as 'meaningless',[272] and, second, that such a provision could give rise to a holding of unconstitutionality if they fell short of the guarantee. Hearne therefore sought the advice of Bewley as to how such guarantees had been implemented in Germany. Bewley responded that they had been

[268] 15 March 1937 (UCDA: P150/2401).

[269] See, for example, comments by department of finance, department of local government and public health, and department of the president of the executive council (NAI: Taois s.9715B).

[270] NAI: Taois s.9715B.

[271] Hearne to Bewley, 1 April 1937 (NAI: DFA 147/2).

[272] NAI: DFA 147/2

designed merely as platitudes and had never been the basis for upholding a citizen's rights against the state.[273]

The solution the drafters hit upon was to make the rights related to economic affairs non-justiciable. There were two suggestions for the means to achieve this. First, there was a proposal to amend what was at that point Article 13.2, which vested legislative powers in the Oireachtas:

> The Oireachtas is the guardian of the Constitution. In fulfilling its trust the Oireachtas shall faithfully observe the guiding principles of social policy set down in Articles […]
>
> The application of those principles in the making of laws shall be the exclusive care of the Oireachtas and shall not be cognizable by any court under any of the provisions of this Constitution.[274]

Interestingly, McQuaid argued against the inclusion of such a provision as he preferred to keep such rights justiciable. He wanted the Supreme Court, or another court, to ascertain whether such laws were constitutional.[275] Neither this method nor McQuaid's proposal were adopted.

The second method, which was ultimately adopted, was to isolate those rights with social implications from the right to private property and to craft a new preamble. There were a number of drafts dealing with the directive principles of social policy which were prepared for a cabinet meeting of 20 April 1937.[276] Some of the drafts included a preamble, which stated:

> The principles of social policy set down in this Article are for the general guidance of the Legislature. The application of those principles in the making of laws shall be the exclusive care of the Oireachtas, and shall not be cognizable by any Court under any of the provisions of this Constitution

This formula was adopted in the draft of 24 April 1937.[277] Some minor changes were made to produce the final draft for 26 April.[278]

[273] Bewley to Hearne, 5 April 1937 (ibid).
[274] UCDA: P150/2416. It is not clear who the author of this suggestion was.
[275] UCDA: P150/2407.
[276] UCDA: P150/2411.
[277] 24 April 1937 (UCDA: P150/2427).
[278] 26 April 1937 (UCDA: P150/2428).

1. *The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.*

The draft of 28 February 1937 provided: 'The State shall endeavour to promote the economic welfare of the whole people, by securing, protecting and defending, as effectively as it may, an economic order, in which social justice and social charity shall imbue all the institutions of public life.'[279] This draft was more explicitly concerned with the regulation of economic affairs than the final version. It was inspired by the encyclical *Quadragesimo Anno*, which stated:

> It is therefore very necessary that economic affairs be once more subjected to, and governed by, true and effective guiding principles …. More lofty and noble principles must therefore be sought in order to control [economic] supremacy sternly and uncompromisingly; to wit, social justice and social charity.
>
> To that end all the institutions of public and social life must be imbued with the spirit of justice; and this justice must above all be truly operative, must build up a juridical and social order able to pervade all economic activity.[280]

The draft read at the cabinet meeting of 20 April referred to 'a social order in which justice and charity' would inform the institutions of public life.[281] The reference to 'economic' welfare was not removed until the draft of 30 April.[282] The drafting process made the provision more general; it shifted the focus of the section from the governance of the economic sphere to the structuring of society. The remainder of the article, however, was focused on economic affairs.

2. *The State shall, in particular, direct its policy towards securing:*

   (i) *That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.*

[279] 28 February 1937 (UCDA: P150/2387).
[280] UCDA: P150/2411.
[281] UCDA: P150/2411.
[282] 30 April 1937 (UCDA: P150/2429).

The draft of 28 February 1937 stated that the state should see 'to it that the adult working man, especially the fathers of families, shall receive a wage sufficient to meet adequately their domestic needs, present and future' and 'provid[e], as best it can, opportunities for work for those who are willing and able to work'.[283] This was directly inspired by *Quadragesimo Anno*, which stated:

> In the first place, the wage paid to the workingman must be sufficient for the support of himself and his family.
>
> Every effort must therefore be made that fathers of families receive a wage sufficient to meet adequately ordinary domestic needs. If in the present state of society this is not always feasible, social justice demands that reforms be introduced without delay which will guarantee every adult workingman just such a wage.[284]

The draft of 19 April 1937 provided that the state should 'endeavour to ensure that the fathers of families shall receive opportunities to acquire means of subsistence sufficient for their domestic needs, present and future'.[285] This draft was focused entirely on the fathers of familiesand made no mention of 'the adult working man' generally. It was apparently drafted by Robert Childers Barton, a signatory to the Anglo-Irish Treaty and then-chairman of the Agricultural Credit Corporation.[286] The difficulty of introducing a guarantee for fathers only must have convinced the drafters to alter the phrasing during the drafting process. The drafts prepared for the cabinet discussions of 20 April stated: 'The State shall endeavour to secure that its citizens who are able and willing, may find through their occupation the means of adequately obtaining what is needful (for their own and their domestic necessities), present and future.'[287] This was simplified for the 20 April draft to a guarantee that 'its citizens who are willing may through their occupation find the means of adequately meeting their own and their domestic needs'. This was further amended in the draft of 26 April to state that 'the citizens may through their occupations find the means of making reasonable provision for their domestic needs'.[288]

[283] 28 February 1937 (UCDA: P150/2387).
[284] As quoted by McQuaid (UCDA: P150/2411).
[285] 19 April 1937 (UCDA: P150/2411).
[286] UCDA: P150/2416.
[287] UCDA: P150/2411.
[288] 26 April 1937 (UCDA: P150/2428).

(ii) *That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.*

The draft of 28 February 1937 provided that '[t]he State shall use its best endeavour to provide that the material resources of the nation may be so distributed among private individuals and the various classes of the population as adequately to procure the common good of Society as a whole'.[289] This was amended in the draft of 20 April to guarantee that '[t]hat the ownership and control of the material resources of the State may be so distributed amongst private individuals and the various classes of the population as best to subserve the common good'.[290] The draft of 24 April changed the word 'population' to 'community', but this was abandoned in the final draft of 30 April.[291]

(iii) *That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.*

The draft of 28 February 1937 provided that '[t]he State shall make it a duty so to restrain free competition, within just limits, that no combination shall be formed whereby the undue monopoly of resources of the State or of a particular class of goods may pass into the ownership and control of one or of a few individuals'.[292] The provision was linked, in that draft, to what was to become Article 45.3. It stated: 'In particular, the State shall see to it that the economic domination of the few, in what pertains to the control of credit, shall not endanger the common good of the Society as a whole.'[293]

This provision was to act as a limitation on the general obligation to allow private initiative. The draft of 20 April stipulated: 'The State shall make it a duty so to restrain the operation of free competition that the resources of the State or of a particular class of goods may not pass into the

[289] 28 February 1937 (UCDA: P150/2387).
[290] UCDA: P150/2411.
[291] 30 April 1937 (UCDA: P150/2429).
[292] 28 February 1937 (UCDA: P150/2387).
[293] UCDA: P150/2387.

ownership and control of a few individuals save as may be provided by law for the common good.'[294] This provision was more permissive than that in the February draft. The April draft allowed the ownership and control of some industries by 'a few individuals' where it was provided by law; there was no such allowance in the February draft. The draft of 26 April divorced this provision from Article 45.3.[295] It was included in its final form in the draft of 30 April.[296]

(iv) *That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole.*

The draft of 28 February provided: 'the State shall see to it that the economic domination of the few, in what pertains to the control of credit, shall not endanger the common good of the Society as a whole.'[297] The draft read at cabinet on 20 April stated: 'the State shall take care that in what pertains to the control of credit the welfare of the community as a whole shall be its constant aim.' This draft eliminated any reference to 'the economic domination of the few'.

(v) *That there may be established on the land in economic security as many families as in the circumstances shall be practicable.*

The draft of 28 February stated: 'to obtain a more just balance between wealth and poverty, to secure a more abundant yield of the produce of the earth, and to attach its citizens more closely to their native land, the state shall endeavour to give as many families as possible a share in the land.'[298] This was amended for the draft of 15 March to give as many families 'as practicable' a share in the land.[299] The early wording would have put a far greater burden on the state.

The draft presented at the cabinet discussion on 20 April stated: 'there shall be established on the land in economic security as many families as in

[294] UCDA: P150/2411.
[295] 26 April 1937 (UCDA: P150/2428).
[296] 30 April 1937 (UCDA: P150/2429).
[297] 28 February 1937 (UCDA: P150/2387).
[298] 28 February 1937 (UCDA: P150/2387).
[299] 15 March 1937 (UCDA: P150/2401).

the circumstances shall be just and practicable.'[300] This further ameliorated the obligation on the state; only so many families as could be provided with economic security and was just and practicable were to be settled on the land. The reference to justice was removed for the 24 April draft.[301]

3. 1° *The State shall favour and, where necessary, supplement private initiative in industry and commerce.*
   2° *The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.*

The draft of 28 February 1937 stated: 'The State shall favour and, where necessary, supplement private economic initiative.'[302] The draft which was presented to the cabinet on 24 April contained the final wording of this section.[303]

4. 1° *The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.*

The draft of 28 February provided: 'The State pledges itself to support with special care the economic rights of the less favoured classes of Society.'[304] This guarantee was bolstered by an explicit recognition that the state should contribute to the 'the support of the infirm, the widow, the orphan, and the aged poor who are past their labour' in the draft of 15 March.[305] This subsection was revised a number of times in the drafting process that accompanied the cabinet meeting of 24 April; one particular vexing issue for the drafters was the use of the phrase 'less favoured classes', which ultimately gave way to the phrase 'less favoured sections' of the

[300] UCDA: P150/2411.
[301] 24 April (UCDA: P150/2427).
[302] 28 February 1937 (UCDA: P150/2387).
[303] UCDA: P150/2411.
[304] 28 February 1937 (UCDA: P150/2387).
[305] 15 March 1937 (UCDA: P150/2401).

community in the draft of 24 April.[306] One proposed draft made reference to the 'poorer' members of society. McQuaid objected to the abandonment of the phrase 'less favoured' on the grounds that the infirm were not necessarily poorer.[307]

The draft of 24 April also deleted the reference to the 'aged poor who are past their labour'. The subsection was completed in its final form for 26 April 1937.[308]

> 2° *The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.*

The draft of 15 March 1937 provided that the state should ensure 'that the tender age of children or the adequate [*sic*] strength of women shall not be abused nor mothers forced to engage in labour to the neglect of their own proper duties'.[309] This provision was the first iteration of Articles 45.4.2°and 41.2.2°. It was divided in the draft of 24 April 1937, which provided that '[t]he State shall endeavour to ensure that the tender age of children and the inadequate strength of women shall not be abused and that they shall not be forced through economic necessity to enter avocations unsuited to their strength and sex'.[310]

The reference to the inadequate strength of women, though based on *Quadragesimo Anno*,[311] attracted the ire of feminist groups during the drafting process.[312] In response to this pressure, de Valera introduced the final wording, which referred to the 'the strength and health of workers, men and women', in the Dáil.[313]

[306] 24 April 1937 (UCDA: P150/2427).
[307] UCDA: P150/2411.
[308] 26 April 1937 (UCDA: P150/2428).
[309] 15 March 1937 (UCDA: P150/2401).
[310] 24 April 1937 (UCDA: P150/2427).
[311] 'It is wrong to abuse the tender years of children or the weakness of woman. Mothers will above all devote their work to the home and the things connected with it.' (UCDA: P150/2411).
[312] *Constitutionalism in Ireland, 1932–1938*, Chap. 5.
[313] 68 Dáil Debates (9 June 1937) col. 242.

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CHAPTER 7

Constitutional Transitions and Alterations

Constitutional drafting is often a technical exercise, but these technicalities come to assume a larger legal importance over time. Considering how to make an effective transition from one legal regime to another raises the question of the extent to which one wishes to carry over features of the prior legal regime. This was the case, for example, in relation to the royal prerogative in 1937. The transitional period, once fixed, would be then subject to the question of an amendment procedure. This was significant in 1937 as the question of whether certain articles should be protected from amendment had been a consistent one throughout the 1930s.

Constitutional Amendment

Article 47 of the Constitution provides two separate mechanisms for determining the outcome of a referendum. A constitutional amendment is governed by Article 47.1, whereby a majority of the voters at a referendum must vote in favour of enactment in order to pass the amendment. Referendums about matters other than constitutional amendment are governed by Article 47.2. Under this section, a proposal will be deemed to have been vetoed if it is opposed by the majority of voters at the referendum. Such a majority must constitute at least one-third of the voters on the electoral register.

D. K. Coffey, *Drafting the Irish Constitution, 1935–1937*,
Palgrave Modern Legal History,
https://doi.org/10.1007/978-3-319-76246-3_7

Two issues merit particular analysis. First, the drafters faced the substantive question of what articles could be amended. Second, the reference to the people of bills which were not amendments underwent significant revision during the drafting process.

Casey states:

> Bunreacht na hÉireann is […] unusual in that any amendment—no matter how minor or technical—requires approval in an amendment [….] Other Western European Constitutions do not go so far, allowing constitutional amendment by the legislature alone, albeit by a special majority.[1]

This anomaly can be accounted for as a reaction against the over-permissive power of legislative amendment permitted by the 1922 Constitution.

The question of amendment was a vexed one under the Free State Constitution. Article 50 provided for statutory amendment of it.[2] This article was to run for eight years but its term was subsequently extended by a further eight years. This amending power was upheld in *State (Ryan) v Lennon*.[3] The terms of reference of the 1934 Constitution Review Committee were to ascertain what articles were fundamental and 'how these Articles might be specially protected from change'. This question was to have been the focus of a second report by the committee but this report was never completed. The concern with the question was evident in de Valera's instructions to Hearne in 1935, where the draft was, again, to guarantee fundamental human rights. Hearne was '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'.[4] Hearne's draft accordingly provided two mechanisms for constitutional amendment. A general power was granted to the Oireachtas to amend the Constitution by way of ordinary legislation expressed as an amendment of the Constitution. Exceptions were carved out to this method for certain fundamental rights—those rights protected by Article 40 of the current Constitution and the right to the free exercise of religion. These rights

[1] James Casey, *Constitutional Law in Ireland*. 3rd ed. (Dublin: Round Hall Sweet & Maxwell, 2000), 709. He states that Denmark is an exception to this rule, 710.

[2] Constitutionalism in Ireland, 1932–1938, Chap. 1 and 2. See also Bairbre O'Neill, "The Referendum Process in Ireland," *Irish Jurist* 35 (2000): 305–316.

[3] [1935] IR 170.

[4] 18 May 1935 (University College Dublin Archives (hereafter UCDA): P150/2370).

could be amended only if a referendum was held in which (1) a majority of voters on the register voted, and (2) either a majority of the voters on the register or two-thirds of the votes recorded were in favour of the proposed amendment.

In March 1936, Alfred O'Rahilly published an article on reform of the Senate in which he mirrored de Valera's view:

> I lay down two presuppositions: (1) We must enumerate, at least in a general way, the fundamental principles in the Constitution itself. (2) We must take away from the Oireachtas any power to amend or alter these, lest political expediency or revolutionary fervour should tempt it to forget the People, not to mention God. In both respects the present Constitution is a lamentable failure.[5]

The power to amend the Constitution by way of statutory amendment was removed in the draft of 20 August 1936.[6] In this draft, the Constitution could be amended only by the higher threshold outlined above. The amendment procedure was apparently amended again in November 1936. The summary of 5 November stated that '[c]ertain provisions of the Constitution will be declared to be fundamental and changes in those Articles will not be made unless the amendment is approved by the people in a referendum for that purpose'.[7] This provision had been discarded by 2 January 1937.[8] The draft provided that any part of the Constitution could be amended by referendum.

In the Dáil, Frank MacDermott proposed that an amendment should not be referred to the people if the Bill had been passed unanimously by both houses of the Oireachtas and if the president, who was to have personal discretion in the matter, did not feel the will of the people on the matter should be ascertained.[9] This was to operate in the event of a public emergency. Although de Valera was sympathetic to idea, he ultimately rejected it as impractical on the basis that a single deputy or senator could prevent such a Bill from passing.[10]

[5] Alfred O'Rahilly, "The Constitution and the Senate," *Studies* 25 (1936): 17–18.
[6] 20 August 1936 (UCDA: P150/2370).
[7] 5 November 1936 (UCDA: P150/2375).
[8] 2 January 1937 (UCDA: P150/2387).
[9] See 67 Dáil Debates (4 June 1937) cols. 1901–1902 and 68 Dáil Debates (10 June 1937) cols. 259–260.
[10] 68 Dáil Debates (10 June 1937) col. 260.

Article 47

1. *Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, it, upon having been so submitted, a majority of the voters at such Referendum shall have been cast in favour of its enactment into law.*
2. 1° *Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall be held to have been vetoed by the people if a majority of the votes cast at such Referendum shall have been cast against its enactment into law shall have amounted to not less than thirty-three and one-third per cent, of the voters on the register.*
   2° *Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall for the purposes of Article 27 hereof be held to have been approved by the people unless vetoed by them in accordance with the provisions of the foregoing sub-section of this section.*
3. *Every citizen who has the right to vote at an election for the members of Dáil Éireann shall have the right to vote at a Referendum.*
4. *Subject as aforesaid, the Referendum shall be regulated by law.*

Article 47 of the 1922 Constitution provided that a Bill passed could be suspended for 90 days by two-fifths of the members of the Dáil or by a majority of the Senate. If three-fifths of the members of the Senate or one-twentieth of the voters on the register asked for a referendum within the 90-day period, this was to be held 'in accordance with regulations to be made by the Oireachtas'. No such regulations were made, and when Fianna Fáil sought to force the issue Cumann na nGaedheal deleted the article.[11]

One sees in the draft of 14 October the genesis of the provisions relating to Article 27 which stated that popular sovereignty dictated that 'all disputed issues of national or public policy or expediency be decided by the people in the ultimate resort, that the will of the people on such issues is expressed by a majority vote of a national electorate created on the basis

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

of adult suffrage'.[12] The procedure relating to referendums was complicated further in another October draft. Previously, referendums had been provided for only in relation to constitutional amendment. The draft stated:

> If a resolution is passed by Dáil Éireann for which not less than two-thirds of the total membership thereof shall have voted requiring that any proposal for an Organic Law … be submitted to the people for decision by them such proposal […] shall be submitted to the people for their decision in accordance with the Organic Law for the time being in force regulating the Referendum.[13]

This proposal was curious both theoretically and practically. First, such a referendum was to be held pursuant to organic law, but such an organic law could theoretically be the subject of a referendum. What procedure would have governed the referendum if the organic law meant to regulate referendums was challenged? Second, the reason such a theoretical case would not be brought was that the two-thirds requirement meant that the Dáil would agree on the organic law to regulate referendums. However, this put in question the practical relevance of the procedure itself.

The Dáil was to be responsible for passing organic laws. Under the proposal, a two-thirds majority of the total membership of the Dáil would have to vote in favour of submitting an organic law to the people. Such a situation would never occur: a majority would vote in favour of a law but a super-majority would also vote to submit it to the people.

This draft was obviously defective and so was abandoned. The draft of 19 October contained an elaborate mechanism regulating the holding of referendums. The procedure applied to any Bill other than Money Bills or Bills which had their time for ratification shortened. A majority of the members of the Senate could call for such a Bill to be the subject of a referendum if the Bill:

1. is in conflict with any Article of this Constitution, or
2. embodies a principle which has not already been pronounced upon by the electorate, or
3. is contrary to settled national policy, or
4. affects the credit or prestige of the State to its detriment.[14]

[12] 14 October 1936 (UCDA: P150/2373).
[13] 13[?] October 1936 (UCDA: P150/2373).
[14] 19[?] October 1936 (UCDA: P150/2385).

The members of the Senate were to submit a petition to the president, who would determine, after consultation with the council of state, whether it should be referred to the people or not. The draft provided the Senate with the power to petition the president in relation to organic laws but did not stipulate that the petition had to enumerate one or more of the four criteria outlined above. If a general election was held before the referendum took place and the Oireachtas passed the same Bill before the referendum then this would be sufficient to pass the Bill without the need for a referendum. Finally, the council of ministers was to have the power to submit any Bill to a referendum.[15]

This draft would have provided the Senate with a concrete role in relation to constitutional oversight. However, the draft would also have pitted the Senate against the Dáil. The Senate alone was to have the power of petition. This power would presumably be used in circumstances where the Dáil refused to accept the Senate recommendation on a Bill and passed it through the Oireachtas in this manner. The mechanism would allow the Senate to appeal to the electorate of the Dáil. This draft, unsurprisingly, did not make it past the cabinet in October 1936.

The procedure relating to the referendum was substantially altered in the draft of 13 February 1937.[16] The draft stated a provision was to be deemed to have passed unless 'a majority of the voters voting at such Referendum shall have signified their disapproval of such Bill or such proposal by casting their votes against its enactment into law and the votes so cast shall have amounted to not less than thirty-five per cent. of the voters on the Register'. This modified the provision by putting the onus on those against a referendum. The referendum procedure was included in its final form in the draft of 15 March 1937.[17]

The provision relating to referendums was not without influential opponents. Conor Maguire stated his objections to it in a letter of 23 March 1937:

> I personally dislike and disapprove of any theory of Government which places the elected Government under the immediate control of the people, e.g. by giving the right to a referendum or by requiring a Government to confine itself to legislation for which it has a mandate.[18]

[15] Unlike the case of the Senate, there were no exceptions to this rule.
[16] 13 February 1937 (UCDA: P150/2390).
[17] 15 March 1937 (UCDA: P150/2401).
[18] 23 March 1937 (UCDA: P150/2416).

He also suggested that referendums should be possible only for new proposals; he believed there seemed 'no reason why ordinary legislation along accepted lines might not be of fundamental national importance'. These proposals were not acted upon.

Powers and Prerogatives

Article 49

1. *All powers, functions, rights and prerogatives whatsoever exercisable in, or in respect of, Saorstat Eireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstat Eireann was then vested are hereby declared to belong to the people of Eire.*
2. *It is hereby enacted that, save to the extent to which provision is made by this Constitution or may hereafter by made by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution, the said powers, functions, rights and prerogatives shall not be exercised or be capable of being exercised in or in respect of Eire, save only by or on the authority of the Government.*
3. *The Government of Eire shall be the successors of the Government of Saorstat Eireann as regards all property, assets, rights and liabilities.*

The first iteration of this section occurred in the draft of 6 August 1936, which stated:

> The domestic and foreign prerogatives of the State belong exclusively to the People of Eire.
>
> The right of the People of Eire to determine and control the manner and form in which the said prerogatives (or any of them) shall be exercised or exercisable is hereby declared to be absolute and indefeasible.[19]

This draft did not elaborate on what exact domestic and foreign prerogatives the drafters had in mind. There was also a clear link at this point with the clauses which ultimately ended up relating to the nation. This

[19] 6 August 1936 (UCDA: P150/2370).

clause was not included in later drafts. The next mention of prerogatives was in January 1937:

> All rights, powers, authorities and prerogatives whatsoever which by the Constitution enacted on the 6th December 1922 were declared to be vested in the King or were otherwise so vested whether by law, custom or usage are hereby declared to belong to the people of E., and it is hereby enacted that, save to the extent to which provision is made by this Constitution for any such right, power, authority or prerogative by any of the organs established thereby, the said rights, powers, authorities and prerogatives shall not be exercised or be capable of being exercised in or in respect of E. save only by or on the authority of the Council of Ministers or of such other of the organs so established as aforesaid as may be determined by law.[20]

This declaration is interesting for a number of reasons. First, it referred explicitly to the king and therefore explicitly had the royal prerogative in mind. Second, the draft used the date of 6 December 1922, when the position of the crown was at its zenith in the Irish Free State Constitution. Third, the draft referred to rights, powers, authorities and prerogatives which were vested either by the Constitution or 'by law, custom or usage', it was not restricted to law.

This was amended in the draft of 11 January 1937 in two major ways.[21] First, the draft eliminated the use of the word 'vested' in reference to the king and substituted 'exercised or exercisable'. This was a more passive approach to the clause. Second, the 11 January draft eliminated the use of the phrase 'law, custom or usage', which is found in the earlier draft.

The section was amended radically in the draft of 17 February 1937:

> All powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Eireann on the 10th day of December, 1936 (whether by virtue of the Constitution then in force or otherwise) by the authority in

[20] 2 January 1937 (UCDA: P150/2387).

[21] 11 January 1937 (UCDA: P150/2387):

> All rights, powers, authorities and prerogatives whatsoever *at any time exercised or exercisable by the King in or in respect of Saorstát Eireann whether by virtue of the Constitution* enacted on the 6th *day of* December 1922 or otherwise are hereby declared to belong to the people of E., and it is hereby enacted that, save to the extent to which provision is made by *or under* this Constitution *for the exercise* of any such right, power, authority or prerogative by any of the organs established thereby, the said rights, powers, authorities and prerogatives shall not be exercised or be capable of being exercised in or in respect of E. save only by or on the authority of the Council of Ministers. (italics indicate change)

> which the executive power of Saorstát Eireann was then vested are hereby declared to belong to the people of E., and it is hereby enacted, save to the extent to which provision is made by this Constitution or by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution, the said powers, functions, rights and prerogatives shall not be exercised or be capable of being exercised in or in respect of E. save only by or on the authority of the Government.[22]

This draft changed the focus from the Constitution as it was enacted in 1922 to the Constitution as it was on 10 December 1936. The date of 10 December 1936 was just before the legislation to deal with the abdication was passed. The most likely impetus behind this change in approach was two memoranda written by John Hearne and Michael McDunphy in January 1937 dealing with the prerogative.[23] McDunphy's memorandum was written on 20 January, thus after the 17 January draft, and examined the situation in the Free State relating to the royal prerogative. He based his memo on a prior examination of the prerogative of 1929. He divided it into three groups: the king's prerogatives as regards his subjects;[24] the king's prerogatives as regards property;[25] and the king's prerogatives arising out of his sovereign jurisdiction.[26] He concluded that the prerogatives in relation to the king's subjects had been abolished or were vested in the state.[27] He believed the prerogatives in relation to property 'have either been vested by law in the State or Government or are regulated by law, and can have consequently ceased to be prerogative rights'. Finally, the prerogatives arising out of the king's sovereign jurisdiction had generally, although not entirely, been extinguished.[28] What is interesting about this

[22] 17 February 1937 (UCDA: P150/2387).

[23] National Archives of Ireland: AGO/2002/15/140. McDunphy's memorandum was from 20 January 1937, Hearne's was from 25 January 1937.

[24] These were the right to allegiance and service, to restrain them from going abroad, and to appeal to the king in council.

[25] These were the right to derelict lands, to escheats, to swans and royal fisheries, to ports and harbours, to beacons and lighthouses, to wrecks, to coins, to mines, to derelict goods (which included treasure trove), and to fines and forfeiture.

[26] These were the powers in relation to ecclesiastical matters, to create offices, to make war and peace, to take care of infants, to take care of lunatics and idiots, in charitable uses, the prerogative of mercy, and issuance of grants.

[27] The rights to allegiance and appeals to the king in council had been abolished and the right to restrain the subject from going abroad had been vested in the state, according to McDunphy.

[28] The powers in relation to ecclesiastical offices and to create offices were declared dead letters. The powers in relation to infants, lunatics, and charities were vested in the chief jus-

memorandum is that it assumes (1) that the prerogative survived the enactment of the 1922 Constitution, and (2) that the vast majority of the prerogative rights and powers had been superseded by legislation.

Hearne's memorandum was composed on 25 January 1937. It does not follow the same method of division as is found in McDunphy's memo. It is clear, however, that Hearne believed that statute law had largely replaced the exercise of the prerogative in the Free State.[29]

Both of these memoranda would have been under consideration by the drafting team in January 1937.[30] They show that the drafters believed the prerogative survived the enactment of the 1922 Constitution and that the prerogative powers were being gradually replaced in the state. This shows the problem with the January drafts which referred to December 1922—this date would have resurrected the prerogative powers as they existed when the 1922 Constitution was first enacted, and would therefore have conflicted with the statutory framework which had eliminated the prerogative powers. The solution, therefore, was to vest the prerogative power as it existed in December 1936 in the state. Lenihan states:

> The assumption underlying Article 49 of the Constitution can be succinctly summarised: until the implementation of the constitutional changes effected on 11 December 1936, the position of the Crown in Irish affairs was such that the royal prerogatives *traditionally enjoyed by the Crown before 1922* were still part of the legal order of the State.[31]

tice. The power of the king in relation to war and peace was to be determined by the new Constitution. The prerogative of mercy was to be placed under statutory control by the new 'Transfer of Functions Bill'. The prerogative power in relation to grants was further subdivided and examined according to subject area. The grant of titles was declared a dead letter. The grant of arms seemed 'to be incapable of being operated at the moment' due to the fact that the office of arms had not been transferred. The grant of charters and patents of precedence were to be regulated by statute under the 'Transfer of Functions Bill'. Passports were still issued in the king's name.

[29] One place where he did not feel this, incidentally, was in the following situation:

> With the exception of the doctrine that the King can do no wrong, and the doctrine that the Crown is not bound by statutes unless by express words referring to the Crown, these theories are of no great practical importance here. The legal position with regard to both these doctrines is well settled in Saorstát Eireann.

[30] Hearne was an author while O'Donoghue was the recipient of both memoranda.

[31] Niall Lenihan, "Royal Prerogatives and the Constitution," *Irish Jurist* 24 (1989): 1, emphasis added. See also John Maurice Kelly, "Hidden Treasure and the Constitution," *Dublin University Law Journal* 10 (1988): 5.

The drafting of the Constitution makes clear that this reading is not plausible. The royal prerogatives enjoyed by the Crown before 1922 were no longer those enjoyed in 1936.[32] The purpose underlying Article 49 was to ensure that those prerogative rights which had not been superseded by statutory provisions were retained by the state. Lenihan's position is correct in reference to the first draft, but not to the draft which was finally included in the Constitution.

The analysis outlined here also means that the approach of the Supreme Court in *Byrne v Ireland* does not tally with an historical interpretation of the Constitution. In that case, Walsh J held that as the Irish Free State was based on popular constitutionalism, any prerogative which relied on the pre-eminence of the Crown, such as legal immunity from suit, could not survive the enactment of the 1922 Constitution.[33] However, it is clear that the drafters of the 1937 Constitution did believe the royal prerogative survived, at least until 1936. The reason for this was that between 1922 and 1936, the Free State was a constitutional monarchy, albeit a truculent one. Indeed, Walsh J's presentation of the prerogative power is not entirely consistent with the British court's approach to it immediately before the establishment of the Free State. In *Attorney-General v de Keyer's Royal Hotel*, Lord Dunedin adopted Dicey's definition of this power as 'the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'.[34] It is clear that this formulation was not inconsistent with the division of powers set up under the Free State Constitution.

The Article appeared in its entirety in the draft of 15 March 1937.[35]

Transitory Provisions

The transitory provisions were one of the last set of articles to be systematically tackled. Although there was a section labelled 'Transitory Provisions' in the Hearne draft of 18 May 1935, this section bore no relation to the final version; the Hearne provisions were concerned with the relationship between the new state and the Commonwealth, an issue

[32] See Kevin Costello, "The Expulsion of Prerogative Doctrine from Irish Law: Quantifying and Remedying the Loss of the Royal Prerogatives," *Irish Jurist* 32 (1997): 145.

[33] [1972] IR 241, 269–274.

[34] [1920] AC 508, 526.

[35] 15 March 1937 (UCDA: P150/2401). This involved the replacement of the phrase 'on the 10th day of December' with 'immediately before the 11th day of December'.

which was overtaken by the abdication crisis.[36] The earliest drafts which are comparable to the final transitory provisions appeared in October 1936, but the effort was cursory. One finds the following note in the draft of 14 October: 'Insert Article providing for continuance of laws generally. Provide for continuance of existing courts, Departments of State, etc., law relating to elections of Dail Eireann, etc.'[37] This is understandable as it was only when the text of the main body of the Constitution was finalised that it could be determined what the proper ambit of the transitory provisions was. It should come as no surprise, therefore, that it was in February 1937, when the drafting was well advanced, that the transitory provisions began to appear in their familiar form.

Article 51

1. *Notwithstanding anything contained in Article 46 hereof, any of the provisions of this Constitution, except the provisions of the said Article 46 and this Article may, subject as hereinafter provided, be amended by the Oireachtas, whether by way of variation, addition or repeal, within a period of three years after the date on which the first President shall have entered upon his office.*
2. *A proposal for the amendment of the Constitution under this Article shall not be enacted into law, if, prior to such enactment, the President, after consultation with the Council of State, shall have signified in a message under his hand and Seal addressed to the Chairman of each of the Houses of the Oireachtas that the proposal is in his opinion a proposal to effect an amendment of such a character and importance that the will of the people thereon ought to be ascertained by Referendum before its enactment into law.*
3. *The foregoing provisions of this Article shall cease to have the force of law immediately upon the expiration of the period of three years referred to in section 1 hereof.*
4. *This Article shall be omitted from every official text of this Constitution published after the expiration of the said period.*

[36] 18 May 1935 (UCDA: P150/2370).
[37] 14 October 1936 (UCDA: P150/2372).

This article appeared for the first time in the draft of 15 March 1937 and, barring slight grammatical and typographical corrections, remains the version which exists today.[38] Under the 1922 Constitution, amendment by the Oireachtas could take place for a period of eight years, which was subsequently extended.[39] The 1937 Constitution, however, was to be a rigid one, which meant it was less amenable to change than its predecessor. This was secured by the provision in Subsections 3 ('the foregoing provisions of this Article shall cease to have the force of law immediately upon the expiration of the period of three years referred to in section 1 hereof') and 1 (forbidding any amendment of Articles 46 or 51).

In their discussion of this article, Hogan and Whyte draw attention to the problem of implicit amendment which existed under the 1922 Constitution.[40] According to the cases of *Attorney General v MacBride*[41] and *R (Cooney) v Clinton*,[42] an amendment to the 1922 Constitution could be effected by way of ordinary legislation, which did not have to stipulate that it was intended to operate as such an amendment. This concern exercised the drafters of the Constitution—one finds in the margin of the first draft of this article the notes 'legislation?' and 'without reference'.[43] In his commentary on the draft Constitution, Gavan Duffy drew attention to this problem also, asking whether an amendment should not 'be so entitled, to prevent questions as to amendment by implication during the first 3 years?'[44] However, this problem was not addressed by the draftsmen.

Article 52

1. *This Article and the subsequent Articles shall be omitted from every official text of this Constitution published after the date on which the first President shall have entered upon his office.*

[38] 15 March 1937 (UCDA: P150/2401). The main changes dealt with the removal of brackets in the original versions and their replacement with commas and the replacement of the typo 'test' with 'text' in part 4.

[39] *Constitutionalism in Ireland, 1932–1938*, Chap. 1.

[40] Gerard Hogan and Gerry Whyte, *J. M. Kelly: The Irish Constitution*, 4th ed. (Dublin: LexisNexis Butterworths, 2003), 2161–2163. Casey also adverts to the problem, *Irish Constitutional Law* at 23.

[41] [1928] IR 451.

[42] [1935] IR 245.

[43] 15 March 1937 (UCDA: P150/2401).

[44] UCDA: P150/2416.

2. *Every Article of this Constitution which is hereafter omitted in accordance with the foregoing provisions of this Article from the official text of this Constitution shall notwithstanding such omission continue to have the force of law.*

This article made its first appearance, in its final form, in the draft of 17 March 1937.[45]

Article 53

1. *On the coming into operation of this Constitution a general election for Seanad Éireann shall be held in accordance with the relevant Articles of this Constitution as if a dissolution of Dáil Éireann had taken place on the date of the coming into operation of this Constitution.*
2. *For the purposes of this Article references in the relevant provisions of this Constitution to a dissolution of Dáil Éireann shall be construed as referring to the coming into operation of this Constitution, and in those provisions the expression 'Dáil Éireann' shall include the Chamber of Deputies (Dáil Éireann) established by the Constitution hereby repealed.*
3. *The first assembly of Seanad Éireann shall take place not later than one hundred and eighty days after the coming into operation of this Constitution.*

General Election for Seanad Éireann

The first two sections were included for the first time in their final form in the draft of 15 March 1937.[46] The Senate established under the 1922 Constitution had been removed by constitutional amendment so there was no upper house to continue under the 1937 Constitution. The time between ratification of the Constitution and the Constitution coming into operation was used to pass legislation for the Senate elections.

[45] UCDA: P150/2401.
[46] 15 March 1937 (UCDA: P150/2401).

Article 54

1. *The Chamber of Deputies (Dáil Éireann) established by the Constitution hereby repealed and existing immediately before the repeal shall, on the coming into operation of this Constitution, become and be Dáil Éireann for all the purposes of this Constitution.*
2. *Every person who is a member of the said Chamber of Deputies (Dáil Éireann) immediately before the said repeal shall, on the coming into operation of this Constitution, become and be a member of Dáil Éireann as if he had been elected to be such member at an election held under this Constitution.*
3. *The member of the said Chamber of Deputies (Dáil Éireann) who is immediately before the said repeal Ceann Comhairle shall upon the coming into operation of this Constitution become and be the Chairman of Dáil Éireann.*

The Chamber of Deputies 'Shall … Become and Be'

The first draft of Section 1 provided 'after the date of the coming into operation of this Constitution' the parliament in existence 'immediately prior to such date may exercise' the powers of the Oireachtas under the 1937 Constitution.[47] This was an awkward drafting. The parliament in existence on the coming into operation of the Constitution would not become a parliament under the 1937 Constitution although it would have the equivalent powers; it would remain the parliament constituted under the 1922 Constitution.

This potential difficulty was remedied in the draft of 15 March 1937, which contained, with minor stylistic and grammatical changes, the final version.[48] The third subsection was not added until the draft of 1 April 1937, where it appeared in its final form.[49]

Article 55

1. *After the coming into operation of this Constitution and until the first Assembly of Seanad Éireann, the Oireachtas shall consist of one House only.*

[47] 13 February 1937 (UCDA: P150/2390).
[48] 15 March 1937 (UCDA: P150/2401).
[49] 1 April 1937 (UCDA: P150/2415).

2. *The House forming the Oireachtas under this Article shall be Dáil Éireann.*
3. *Until the first President enters upon his office, the Oireachtas shall be complete and capable of functioning notwithstanding that there is no President.*
4. *Until the first President enters upon his office, Bills passed or deemed to have been passed by the House or by both Houses of the Oireachtas shall be signed and promulgated by the Commission hereinafter mentioned instead of by the President.*

Seanad Éireann as the 'First President'

The fact that the Senate and presidency had to be established under the 1937 Constitution meant the Dáil would continue to function as a unicameral legislature for a short period. The structure of Article 55 was as a result of the original draft of Article 54, which provided that the parliament under the 1922 Constitution with the powers of the Oireachtas 'pending the entry upon his office of the first President and the first assembly of Seanad Eireann'.[50] One finds handwritten notes on this draft: 'two things' and 'Senate may come first'. The subsequent draft of 15 March therefore differentiated between the times when the presidency and the Senate were to be established.[51] It contained the final versions of Sections 1 and 3 of Article 55.

'House Forming the Oireachtas'

Section 2 was also drafted for the first time on 15 March 1937 but it was somewhat convoluted; it attempted to provide for the possibility of a dissolution of the Dáil before the first Senate assembled. It stated:

> The House forming the Oireachtas under this Article shall be the Chamber of Deputies established by the Constitution hereby repealed, but if a dissolution takes place before the first assembly of Seanad Eireann, the said House shall, after such dissolution, be Dáil Éireann.[52]

[50] 13 February 1937 (UCDA: P150/2390).
[51] 15 March 1937 (UCDA: P150/2401).
[52] UCDA: P150/2401.

The difficulty with this provision was that the draft of Article 55 tried to provide for two distinct bodies exercising the full unicameral power: the chamber of deputies under the 1922 Constitution, and a newly elected Dáil under the 1937 Constitution. The machinery was obviously unnecessarily complicated and was subsequently shortened to the more concise and elegant final version.

'Shall be signed'

Section 4 actually predates the rest of this article. It was originally contained as part of the first drafts of Article 54 on 19 February 1937 but at that stage it stipulated only that Bills had to be signed by any two members of the presidential commission.[53] The draft of 15 March contains the final version of the section, revised in light of the revision of Article 57, which provided for a temporary presidential commission.[54]

Article 56

1. *On the coming into operation of this Constitution, the Government in office immediately before the coming into operation of this Constitution shall become and be the Government for the purposes of this Constitution and the members of that Government shall without any appointment under Article 13 hereof, continue to hold their respective offices as if they had been appointed thereto under the said Article 13.*
2. *The members of the Government in office on the date on which the first President shall enter upon his office shall receive official appointments from the President as soon as may be after the said date.*
3. *The Departments of State of Saorstát Éireann shall as on and from the date of the coming into operation of this Constitution and until otherwise determined by law become and be the Departments of State.*
4. *On the coming into operation of this Constitution, the Civil Service shall become and be the Civil Service of the Government.*
5. 1° *Nothing in this Constitution shall prejudice or affect the terms, conditions, remuneration or tenure of any person who was in any Governmental employment immediately prior to the coming into operation of this Constitution.*

[53] 19 February 1937 (UCDA: P150/2387).
[54] 15 March 1937 (UCDA: P150/2401).

> 2° *Nothing in this Article shall operate to invalidate or restrict any legislation whatsoever which has been enacted or may be enacted applying to or prejudicing or affecting all or any of the matters contained in the next preceding sub-section.*

The first and second drafts of Sections 1 and 2 of this article are both contained in the draft of 13 February 1937.[55] The draft Constitution contains two alternate versions, one referring to the executive council under the 1922 Constitution and one to the government under it. The draft Constitution of that date also contains the first draft of Article 56.4. These drafts were not superseded until the draft of 15 March, which included the first version of Article 56.3.[56] The first draft of Article 56.3 made reference to the department of the attorney general. The department of finance subsequently pointed out the department of the attorney general was not a department of state, which required that any provision for the attorney general had to be made the subject of its own article—Article 59.[57]

'Terms, Conditions, Remuneration or Tenure'

The most contentious parts of the transitory provisions during the drafting process were those contained in Articles 56.4 and 56.5. The draft of 15 March contained the following provision:

> Every existing officer of the Government of Saorstát Eireann at the date of the coming into operation of this Constitution shall on that date become and be an officer of the Government of Éire, and shall hold office by a tenure corresponding to his previous tenure.[58]

On 23 March, the department of finance pointed out that it was debatable whether that wording would be sufficient to cover the staff of the Oireachtas, or bodies governed by trustees, such as the national gallery, or bodies governed by commissioners, such as the revenue commissioners.[59] These people could not be said to be 'an officer of the Government of

[55] 13 February 1937 (UCDA: P150/2390).
[56] 15 March 1937 (UCDA: P150/2401).
[57] 17 April 1937 (UCDA: P67/184).
[58] 15 March 1937 (UCDA: P150/2401).
[59] 23 March 1937 (UCDA: P67/184).

Éire'. In their subsequent commentary, the department of finance drew attention to the plight of the transferred officers.

Officials who had been employed under the British regime may have felt no allegiance to the new state, or the government of the Free State may not have wished for them to continue in office. Such individuals were governed by Article 10 of the Anglo-Irish treaty, which provided they were to be given compensation rights if they did not continue in office. This was made justiciable by Article 78 of the 1922 Constitution. The matter was litigated in *Wigg and Cochrane v Attorney General* and was accepted for consideration by the Judicial Committee of the Privy Council.[60] Controversially, the privy council overruled the Supreme Court, and the Irish and British governments subsequently agreed that the matter should be dealt with through legislation rather than through the courts.[61] This was enshrined on the Irish side by the Civil Service (Transferred Officers) Compensation Act 1929.[62] Section 2 of that Act provided it was in pursuance of 'an agreement interpreting and supplementing Article 10 of the Treaty […] and the Treaty shall have effect accordingly'.

The department of finance pointed out the potential for difficulties posed by the repeal of the guarantees contained in the Anglo-Irish treaty and the Free State Constitution by the 1937 Constitution in their memorandum of 23 March 1937.[63] The issue was subsequently discussed with Philip O'Donoghue of the office of the attorney general and became the subject of a separate letter from the secretary of the department of finance to the secretary of the department of the president.[64] The difficulty may be stated simply. The Fianna Fáil Government had said repeatedly that they would not interfere with the rights of the transferred officers.[65] It was agreed that under the new Constitution that the statutory guarantees contained in the Civil Service (Transferred Officers) Compensation Act 1929 would be carried over. It was also agreed that the statutory

[60] [1927] IR 285. On this case, see Thomas Mohr, *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Dublin: Four Courts Press, 2016), 64–67.

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

[62] The agreement was reached on 27 June 1929 and was contained in the First Schedule to the Irish Act.

[63] 23 March 1937 (UCDA: P67/184).

[64] Letter of 22 April 1937 (UCDA: P67/184). The O'Donoghue meeting took place on 16 April 1937.

[65] See 41 Dáil Debates (19 May 1932) cols. 2107–2108.

rights of the transferred officers were to be the same as under the 1922 Constitution. Under the 1922 Constitution, however, if the Act were repealed, the transferred officers would be entitled to fall back on Article 78 of the Constitution. There was no intention under the draft Constitution to continue any constitutional guarantee, particularly one which drew its provenance from the Articles of Agreement for a Treaty of 1921. In response to this reluctance, the department of finance suggested the inclusion of a neutral phrase which did not refer to the treaty, such as 'and shall retain such rights (if any) to compensation on retirement or discharge from office as he had immediately before that date'. Instead, Section 5 was subsequently included.

Article 57

1. *The first President shall enter upon his office not later than one hundred and eighty days after the date of the coming into operation of this Constitution.*
2. *After the date of the coming into operation and pending the entry of the first President upon his office the powers and functions of the President under this Constitution shall be exercised by a Commission consisting of the following persons, namely, the Chief Justice, the President of the High Court, and the Chairman of Dáil Éireann.*
3. *Whenever the Commission is incomplete by reason of a vacancy in an office the holder of which is a member of the Commission, the Commission shall, during such vacancy, be completed by the substitution of the senior judge of the Supreme Court who is not already a member of the Commission in the place of the holder of such office, and likewise in the event of any member of the Commission being, on any occasion, unable to act, his place shall be taken on that occasion by the senior judge of the Supreme Court who is available and is not already a member, or acting in the place of a member of the Commission.*
4. *The Commission may act by any two of their number.*
5. *The provisions of this Constitution which relate to the exercise and performance by the President of the powers and functions conferred on him by this Constitution shall apply to the exercise and performance of the said powers and functions by the said Commission in like manner as those provisions apply to the exercise and performance of the said powers and functions by the President.*

'Enter Upon His Office'

The draft of 13 February twinned the entry of the president to his office and the first Senate meeting, and set the time limit as six months from the date of the coming into operation of the Constitution.[66] The provisions were not separated until the draft of 10 April 1937.[67]

Exercised by a Commission consisting of the following persons … substitution

The first draft of the temporary Presidential Commission is contained in the draft of 19 February 1937.[68] The membership of the commission was originally to be the prime minister, the chief justice and the ceann comhairle. The inclusion of the prime minister was a curious one because it introduced a political dimension to an institution which was not designed for political controversy. This was corrected by the draft of 15 March 1937 with the omission of the prime minister and the inclusion of the president of the High Court.[69] The draft also apparently identified that there was a problem with membership: there is a handwritten note which states 'commiss to fill up gaps'.[70] This note may have been prompted by the department of finance's memorandum, which drew attention to the rigidity of the membership and suggested the three members could be selected by ex officio members of the council of state from amongst their own number.[71] This proposal was not implemented, but the draft of 1 April did provide for the next most senior judge in place of any member of the commission 'being unable to act'.[72]

The commission, which acted for close to six months, inter alia dissolved the Dáil and declared a general election, and signed 17 public and two private Bills.[73]

[66] 13 February 1937 (UCDA: P150/2390).
[67] 10 April 1937 (UCDA: P150/2417).
[68] 19 February 1937 (UCDA: P150/2387).
[69] 15 March 1937 (UCDA: P150/2401).
[70] UCDA: P150/2401.
[71] 23 March 1937 (UCDA: P67/184).
[72] 1 April 1937 (UCDA: P150/2415).
[73] Michael McDunphy, *The President of Ireland: His Powers, Functions and Duties* (Dublin: Browne and Nolan, 1945), 3.

Article 58

1. *On and after the coming into operation of this Constitution and until otherwise determined by law, the Supreme Court of Justice, the High Court of Justice, the Circuit Court of Justice and the District Court of Justice in existence immediately before the coming into operation of this Constitution shall, subject to the provisions of this Constitution relating to the determination of questions of the validity of any law, continue to exercise the same jurisdiction respectively as theretofore, and any judge or justice being a member of such Court shall, subject to compliance with the subsequent provisions of this Article, continue to be a member thereof and shall hold office by the like tenure and on the like terms as theretofore unless he signifies to the Taoiseach his desire to resign.*
2. *Every such judge and justice who shall have so signified his desire to resign shall make and subscribe the declaration set forth in section 5 of Article 34 of this Constitution.*
3. *This declaration shall be made and subscribed by the Chief Justice in the presence of the Taoiseach, and by each of the other judges of the said Supreme Court, the judges of the said High Court and the judges of the said Circuit Court in open court.*
4. *In the case of justices of the said District Court the declarations shall be made and subscribed in open court.*
5. *Every such declaration shall be made immediately upon the coming into operation of this Constitution, or as soon as may be thereafter.*
6. *Any such judge or justice who declines or neglects to make such declarations in the manner aforesaid shall be deemed to have vacated his office.*

This article first appeared in draft form on 13 February 1937.[74] The first draft was also the final version of Subsections 1, 3, 4 and 6. Section 2 was different in that the original draft laid out the declaration a judge had to subscribe to in full; it was otherwise identical with the final version. The original draft of Section 5 contained a formula which included reference to the temporary incapacity of a judge and stated a judicial declaration was necessary before the judge could perform any of the duties of his office. This section was subsequently simplified in April 1937. The department of finance called attention to the fact that the Constitution nowhere provided that the chief justice of the Free State would become and be the

[74] 13 February 1937 (UCDA: P150/2390).

chief justice of Éire and it was therefore not clear whether the chief justice therefore could claim to be such.[75] Conor Maguire, who was at the time a High Court judge, noted that the reference to the 'District Court of Justice' was the first such reference in the Constitution.[76] Neither of these notes influenced the text of the Constitution.

The article was based on Article 75 of the 1922 Constitution, which provided for the continuance in office of the personnel of the British courts system. Article 75 provided for automatic reinstatement unless a judge wished to opt out, and had no provision requiring that an oath be taken.

Article 59

On the coming into operation of this Constitution, the person who is the Attorney General of Saorstát Éireann immediately before the coming into operation of this Constitution shall, without any appointment under Article 30 of this Constitution, become and be the Attorney General as if he had been appointed to that office under the said Article 30.

See commentary on Article 56.

Article 60

On the coming into operation of this Constitution, the person who is the Comptroller and Auditor General of Saorstát Éireann immediately before the coming into operation of this Constitution shall, without any appointment under Article 33 of this Constitution, become and be the Comptroller and Auditor General as if he had been appointed to that office under the said Article 33.

The first draft of this article appears in the draft of 19 February 1937.[77] It was very similar, albeit syntactically different, from the final version.

Article 61

1. *On the coming into operation this Constitution, the Defence Forces and the Police Forces of Saorstát Éireann in existence immediately before*

[75] 17 April 1937 (UCDA: P67/184).
[76] UCDA: P150/2416.
[77] 19 February 1937 (UCDA: P150/2387).

the coming into operation of this Constitution shall become and be respectively the Defence Forces and the Police Forces of the State.

2. 1° *Every commissioned officer of the Defence Forces of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a commissioned officer of the corresponding rank of the Defence Forces of the State as if he had received a commission therein under Article 13 of this Constitution.*
   2° *Every officer of the Defence Forces of the State at the date on which the first President enters upon his office shall receive a commission from the President as soon as may be after that date.*

The earliest draft of Article 61 occurs on 15 March 1937.[78] The original draft stated that the defence and police forces 'in existence at the date of the coming into operation of this Constitution' were to become the defence and police forces under the new Constitution. The question of whether any such force existed on the date of the coming into operation of the new Constitution, as the forces would presumably cease to exist legally with the repeal of the 1922 Constitution, meant that the article was changed in April 1937.[79] This change referred to the defence and police forces immediately *before* the coming into operation of the Constitution.

Article 62

This Constitution shall come into operation

(i) *on the day following the expiration of a period of one hundred and eighty days after its approval by the people signified by a majority of the votes cast at a plebiscite thereon had in accordance with law, or,*
(ii) *on such earlier date after such approval as may be fixed by a resolution of Dáil Éireann elected at the general election the polling for which shall have taken place on the same day as the said plebiscite.*

'Shall Come into Operation'

The earliest draft of this provision, the draft of 14 October 1936, simply provided that the Constitution would come into operation, after a plebi-

[78] UCDA: P150/2401.
[79] 10 April 1937 (UCDA: P150/2417).

scite had been passed, on a date stipulated by the chamber of deputies.[80] A potential difficulty was that a hostile chamber could simply refuse to stipulate such a date, or an indifferent chamber could postpone it indefinitely.[81] The solution was to make the Constitution self-enacting at an outer limit but allow it to come into operation at an earlier date if that was deemed preferable. The earliest draft to adopt this approach is from 2 January 1937 and the outer limit was set at six months from the first meeting of the new Dáil.[82] This was briefly superseded in February 1937 with a provision whereby a specific date would be named as the outer limit.[83] The drafts returned to the six-month formula in March,[84] and finally changed to 180 days on 10 April.[85] Despite this, there a number of notes on the back of the draft Constitution of that date which bear on the problem—'come into force operation' and 'operation comes'.[86] This objection seems to have been met as the provision was not tampered with thereafter. The department of finance objected to the six-month time limit '[i]n view of all the preparations, legislative and otherwise, that have to be made' and suggested that if it could not be amended, it should run from the start of the financial year.[87]

'Signified by a Majority of Votes Cast at a Plebiscite'

The original drafts dealing with the plebiscite were influenced by the referendum procedure which had once existed in the 1922 Constitution. The original article 50 of the Free State Constitution provided for amendment by referendum if the majority of voters on the register voted on the referendum and either (1) a majority of the voters registered, or (2) a two-thirds majority of those voting, voted in favour.[88] This procedure was followed in the first draft of Article 62 of the 1937 Constitution, that of 2

[80] 14 October 1937 (UCDA: P150/2373).

[81] Presumably there would have been some political price to pay for ignoring a plebiscite.

[82] 2 January 1937 (UCDA: P150/2387). The article provided a general election would be held at the same time as the plebiscite.

[83] 19 February 1937 (UCDA: P150/2387). The date was blank in the draft.

[84] 15 March 1937 (UCDA: P150/2401).

[85] 10 April 1937 (UCDA: P150/2417).

[86] The handwriting is a little difficult to decipher and the reading of the words as 'comes' may be incorrect.

[87] 23 March 1937 (UCDA: P67/184).

[88] Article 50 of the Irish Free State Constitution.

January 1937.[89] The obvious difficulty with this procedure was that it set a hurdle which the proposal for a new Constitution was not guaranteed to surmount. The requirement was changed by February 1937 to a simple majority of votes cast.[90]

Article 63

A copy of this Constitution signed by the Taoiseach, the Chief Justice, and the Chairman of Dáil Éireann shall be enrolled for record in the office of the Registrar of the Supreme Court, and such signed copy shall be conclusive evidence of the provisions of this Constitution. In case of conflict between the Irish and the English texts, the Irish text shall prevail.

This provision was the last addition to the transitory provisions of the Constitution. It was added to draft Constitution only on 10 April 1937 but to the version which was eventually enacted.[91] There is a note on the back of this copy of the draft Constitution which states 'Conflict of texts—Expert decision'.[92] The proposal, if it was ever seriously entertained, was not given the force of law. On 31 January 1938, the clerk of the Dáil certified a copy as being a 'true and correct copy' for the purposes of this article and it was enrolled in the registrar's office on 18 February 1938.[93]

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[89] 2 January 1937 (UCDA: P150/2387).

[90] 13 February 1937 (UCDA: P150/2390).

[91] 10 April 1937 (UCDA: P150/2417).

[92] Ibid.

[93] Richard Humphreys, "The Constitution of Ireland: The Forgotten Textual Quagmire," *Irish Jurist* 22, no. 2 (1987): 169. Humphreys details the textual discrepancies between the Article 63 copy, subsequent amended Constitutions enrolled under Article 25.5 and the copies prepared by the Stationery Office.

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Conclusion

The 1937 Constitution of Ireland is, as was stated at the outset, something of an anomaly. The great liberal democratic constitutions of the inter-war years were swept aside in a wave of nationalism and war shortly after they were introduced. The dictatorial Catholic constitutions of the Atlantic fringe remained after the Second World War, but ultimately collapsed in the 1970s. While Europe still has older constitutions, the Belgian constitution of 1831 or the unwritten British constitution, the Irish is the sole remaining inter-war constitution. As outlined in this monograph, it was a creature of its time. One can see the permeation of liberal democratic ideas in the presidency and Article 40, the influence of Catholicism in the Senate and the articles relating to the family, education and private property. The echoes of Commonwealth constitutionalism can be seen in the essential continuity of the machinery of parliamentary governance between the 1922 and 1937 Constitutions.

This monograph has been concerned with the drafting history of the 1937 Constitution. The recognition that it, alone amongst its inter-war peers, survives to this day prompts a question: Why has it survived when others have failed? The response to this falls outside the survey of this monograph, but some trends do suggest themselves. First, the relative homogeneity of the Irish polity until recently meant that the underlying moral outlook was broadly consistent with the wishes of the majority of the population. This can be seen in a variety of ways, but perhaps the most

D. K. Coffey, *Drafting the Irish Constitution, 1935–1937*,
Palgrave Modern Legal History,
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telling is the extent to which the party responsible for drafting the Constitution, Fianna Fáil, dominated the political landscape of post-1937 Ireland. Second, while the amendment process set out in the Constitution was relatively stringent, requiring a referendum, this did not prove an insuperable barrier in a small polity which was prepared to hold referendums. The nationalist provisions of Articles 2 and 3, for example, were amended by referendum. A more constrained amendment process, such as found in the US or Australian federal constitutions, might have rendered the document too brittle. Third, although formal amendments were relatively few, there was an intellectual permeability about the fundamental presuppositions. The conception of rights which underpins the Irish Constitution was once viewed as theological but is now treated as essentially coterminous with the European Convention on Human Rights (ECHR) and Fundamental Freedoms. This is an intellectually problematic posture, as it requires us to treat a convention crafted in the aftermath of the second world war as essentially the same as inter-war rights protections, but this permeability has ensured a normative fluidity to the Irish Constitution which makes it more dynamic than the wording of the articles might suggest. Fourth, and relatedly, the permeation of more European norms in the form of both the ECHR and the European Union since the 1970s has required integration into a broader European polity. Ironically, this European ideal underpinned the drafting process itself, although this has not been widely appreciated. The position of Ireland in the twenty-first century, as an outward-facing European state, returns us to the beginning of the drafting process in 1935 and 1936, when European ideas infused the draft constitution. In the 1930s, these were essentially formal textual influences, which were not necessarily underpinned by an awareness of the jurisprudence of the various countries relied upon.

It seems likely that Irish constitutionalism in the twenty-first century will therefore mimic the basic structure of the drafting of the 1937 Constitution: influenced by Britain and Commonwealth countries, but increasingly drawing on foreign, and particularly European, norms in order to craft an Irish conception of constitutionalism.

Appendix: Draft Dating

One of the great difficulties with constructing an accurate history of the drafting of the 1937 Constitution is the lack of archival clarity. As there a large number of drafts, and their chronological order is not clear, the drafting direction has become obscured. In order to remedy this, a sequential method of draft dating is proposed. This allows us to consider the drafting history of each provision more clearly than is currently possible.

Draft Dating

My method of dating was as follows. Some drafts had dates appended to them. These dates were of three types: printed on the draft; handwritten on the draft; and written on the folio which contained the draft. These dated drafts provide the basis for the dating of the non-dated drafts. I examined the handwritten amendments which were indicated on drafts and then established whether the changes had been incorporated into other drafts. If changes had been incorporated then this indicated that these other drafts were written at a later time. Let us say that draft A stated 'Eire is a sovereign, independent, democratic State' and a handwritten note indicated that 'democratic' was to be deleted and 'Christian' inserted. If draft B incorporated this change—'Eire is a sovereign, independent, Christian State'—then it is an indication that draft B was composed later than draft A. This is insufficient evidence by itself but if there are a number

D. K. Coffey, *Drafting the Irish Constitution, 1935–1937*,
Palgrave Modern Legal History,
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of amendments then the evidence becomes more compelling. It was also necessary to be aware of the possibility that a change may precede the draft in question. Using the example above, let us say draft B indicated that 'Eire is a sovereign, independent, Christian State' but the handwritten notes indicate that 'Christian' was to be deleted and 'democratic' to be inserted. The evidence is now balanced on either side; draft B may have pre-dated or post-dated draft A. In an instance such as this I simply made note of further handwritten amendments. One or two articles may change back and forth but the majority of articles change and remain that way for a number of drafts.

Generally speaking, drafts contained a number of handwritten amendments which were incorporated into subsequent drafts. Due to the sheer number of the changes I have indicated only some of those changes in the remainder of this appendix. These changes are illustrative rather than exhaustive and there are corresponding changes in other articles which I do not indicate. In a smaller number of drafts there are a limited number of handwritten amendments. In these cases, I have included all of these amendments. This is because it is easier to make an error when there are a limited number of amendments than if there are many of them. In this way I have constructed the sequence of the drafts. Thus, I will say that draft A is followed by draft B, which is followed by draft C. I have attributed dates to these undated drafts. This is simply to make the text easier to follow. There is often no reason to prefer a specific date to any other. As an example, let us say drafts A and C are dated 13 September 1922 and 19 September 1922, respectively. If draft B falls in the middle of the sequence then I will attribute it a date such as 16 September 1922. This does not mean the date the draft was composed on was actually 16 September 1922; it may have been any date between 13 September 1922 and 19 September 1922. The speculative dates are indicated in the text as follows: '[16?] September 1922'. Further discoveries— hitherto undiscovered dated drafts—may provide greater accuracy in dating these drafts, though I believe that they will not alter the drafting sequence to any great extent.

In the following list I include all drafts which have a date on them. A number of these drafts are incomplete or cover a limited number of articles. The following drafts are dated:

1. 18 May 1935—Draft Heads of a Constitution.[1]

[1] University College Dublin Archives (hereafter UCDA): P150/2370. Date contained in memo.

2. 20 August 1936—Plan of Fundamental Constitutional Law and Preliminary Draft.[2]
3. 14 October 1936—draft which begins 'Preliminary: Fundamental Declarations'.[3]
4. 19 October [1936]—draft which begins 'Part I.: The State'.[4]
5. 20 October [1936]—draft which begins 'Part I.: The State'. This draft is headed 'draft used at cabinet discussions Oct. 20, 21, 22.'[5]
6. 22 October 1936—draft which is headed 'Draft No. 1. Page 1.'[6]
7. 5 November 1936—summary of the Constitution which begins: 'The general scheme of the Constitution will be as follows.'[7]
8. 18 November [1936]—draft begins with Article 8 'Powers and Functions of the President'.[8]
9. 30 November 1936—draft of Article 21 (the Government).[9]
10. 1 December 1936—2nd Draft.[10]
11. 2 January 1937—draft begins 'Part VI. The Courts'.[11]
12. 11 January 1937—3rd Draft.[12]
13. 29 January 1937—draft begins 'Article Thirty-Six'.[13]

[2] UCDA: P150/2370. Date on folio containing draft. This date may be seen faintly on the microfilm but can be seen clearly in hardcopy (the date is written in pencil against a deep red background which did not transfer to microfilm well.)

[3] UCDA: P150/2373. This draft was contained in a folio entitled 'Draft Heads of a Constitution' which is dated 12 October 1936. I use 14 October as it is written on the draft itself.

[4] UCDA: P150/2374. Date is handwritten.

[5] UCDA: P150/2374. Date is handwritten. I prefer to use the date of 20 October due to the following draft.

[6] UCDA: P150/2374. Date is handwritten.

[7] UCDA: P150/2375. Date is handwritten.

[8] UCDA: P150/2370. Date is handwritten.

[9] UCDA: P150/2379. Date is on index card attached to file which states 'Returned by M. O Griobhtha'.

[10] UCDA: P150/2378. Date is handwritten on the covering sheet, which states '2nd draft. President's Copy of English (Art 1–20)'. It seems likely this draft was composed before this time as the article in the next folio, P150/2379, which is dated 30 November, is most likely the next article in this draft. This may be seen from the fact that the draft in 2378 ends with the handwritten annotation 'B25' in the upper right corner of the page and the 2379 draft begins with 'B26' in the upper right corner. The Irish numbering, 'B60' in 2378 and 'B61' in 2379, are also sequential.

[11] UCDA: P150/2387. Date is written on the folio containing the draft.

[12] UCDA: P150/2387. Date is handwritten on the covering page.

[13] UCDA: P150/2389. Date is on the covering page. The date is either 29 or 30 January 1937; they are written on top of each other. I have taken the earlier date.

14. 3 February 1937—4th Draft.[14]
15. 4 February 1937—draft begins 'Part V. Council of State.'[15]
16. 5 February 1937—draft begins 'Part VI. The Courts.'[16]
17. 13 February 1937—Fourth Draft (Duplicate).[17]
18. 19 February 1937—draft begins 'Transitory Provisions'.[18]
19. 28 February 1937—draft headed 'Kath. Sunday Draft'. This draft is numbered X1, X2, etc. I call this particular draft the X1 draft or first X draft to distinguish it from later X drafts.[19]
20. 7 March 1937—First Printed Copy.[20]
21. 15 March 1937—Second Printed Copy.[21]
22. 1 April 1937—Third Printed Copy.[22]
23. 7 April 1937—Articles entitled 'The Family' and 'Education'.[23]
24. 8 April 1937—Article entitled 'Fundamental Rights'.[24]
25. 10 April 1937—Fourth Printed Copy.[25]
26. 10 April 1937—Draft of Preamble.[26]
27. 11 April 1937—Draft of Preamble.[27]
28. 11 April 1937—Article dealing with Religion entitled 'Proposed Draft'.[28]
29. 14 April 1937—Article entitled 'Religion'.[29]

[14] UCDA: P150/2387. Date is handwritten on the first page.
[15] UCDA: P150/2387. Date is on the covering letter by John Hearne.
[16] UCDA: P150/2387. Date is on the covering letter by John Hearne.
[17] UCDA: P150/2390. Date is written on folio and covering page.
[18] UCDA: P150/2387. Date is on the covering letter by John Hearne and also on the draft itself.
[19] UCDA: P150/2387. Date is handwritten but with a question mark next to it.
[20] UCDA: P150/2399. Date is handwritten.
[21] UCDA: P150/2401. Date is handwritten.
[22] UCDA: P150/2415. Date is handwritten.
[23] UCDA: P150/2413. Dates are printed.
[24] UCDA: P150/2413. Date is handwritten.
[25] UCDA: P150/2417. Date is stamped. This draft has a handwritten note 'First to be circulated for comments + observation.' This note may be read in two ways. First, it may be read as a declaratory statement—that this was the first draft to be so circulated. This is incorrect as the draft of 15 March had previously been circulated. Second, it may be read as an order—that the first thing to do with the draft was to circulate it for comments. This reading is preferable to the first.
[26] UCDA: P150/2425. Date is printed.
[27] UCDA: P150/2419. Date is printed.
[28] UCDA: P150/2421. Date is printed.
[29] UCDA: P150/2419. Date is printed.

30. 19 April 1937—Article entitled ‘Private Property’.[30]
31. 20 April 1937—Article entitled ‘Directive Principles of Social Policy’.[31]
32. 21–26 April 1937—Draft articles dealing with Religion.[32]
33. 23 April 1937—Draft of Preamble.[33]
34. 24 April 1937—Fifth Printed Copy.[34]
35. 26 April 1937—Draft of Preamble.[35]
36. 26 April 1937—Sixth Printed Copy.[36]
37. 30 April 1937—Final Copy.[37]

The undated drafts are more complex. I will go through them folder by folder.

P150/2370

P150/2370 has a number of different drafts and two drafts of a law regulating foreign affairs. It is useful to begin with the draft laws. The first draft is entitled ‘EIRE: FOREIGN RELATIONS BILL, 1936’. The accompanying memorandum has two dates attached to it. The printed date at the head of the memo is 6 August 1936. The handwritten date at the foot is 6 September 1936. The second draft law is entitled ‘POBLACHT na h-EIREANN: ORGANIC LAW ON FOREIGN RELATIONS’. This draft is dated 31 August 1936. It is possible to ascertain which of the two dates on the first draft is correct by referring to the second draft.

The first draft contains a number of handwritten amendments, which are all incorporated into the second draft. The section dealing with treaties or conventions which impose a charge on the exchequer has a note in the

[30] UCDA: P150/2411. Date is handwritten.
[31] UCDA: P150/2411. Date is handwritten; ‘copy read for cabinet’.
[32] UCDA: P150/2421. The dates on 21, 22, 23 and 26 April are printed. The date on 24 April is handwritten.
[33] UCDA: P150/2425. Date is printed.
[34] UCDA: P150/2427. Date is stamped.
[35] UCDA: P150/2424. Date is printed.
[36] UCDA: P150/2428. Date is stamped.
[37] UCDA: P150/2429. Date is handwritten.

margin, 'or agreement'.[38] The second draft uses the term 'international agreement' to cover the whole section.[39] The section in the first draft which deals with the state's relationship with the Commonwealth has a number of handwritten amendments: the 'Group' of states is preferred to 'Association of States', there is a question as to whether there is any synonym for 'Heads of States', and the power is to be exercised 'on advice of Exec. Council'. The instruments were to be passed under the Great Seal of Eire and countersigned by the Minister for Foreign Affairs. A note in the margin question 'authenticated by counter-signature of - M.F.A, Prime Mtr, Presdt'. The second draft radically simplifies the section but does so in a manner which is consistent with the handwritten notes.[40] Finally, the Act was to be cited as the 'Foreign Relations Act 1936' and there is a handwritten note in the margin, 'Special Act'. The second draft refers to the Law as the 'Foreign Relations Organic Law, 1937'. The notes indicate that the first draft preceded the second and the correct date for the first draft is 6 August 1936. This is bolstered by the official biography of de Valera. In the English version, the authors recount that the phrase 'Poblacht

[38] The section reads:

> The State shall not be bound by any treaty or convention which imposes a charge upon the Exchequer unless the terms thereof shall have been approved by Dáil Éireann prior to the ratification of such treaty or convention.

[39] It reads:

> Poblacht na h-Eireann shall not be bound by any international agreement which imposes a charge upon the Exchequer unless the terms thereof shall have been approved by Dáil Éireann prior to the ratification of such agreement.

[40] The section reads:

> So long as Poblacht na h-Eireann is associated with the States of the British Commonwealth of Nations, the Council of Ministers may, for the purpose of the exercise of the executive powers of Poblacht na h-Eireann to which this Organic Law relates, adopt all or any, as they think fir, of the practices or usages from time to time adopted by the said States (or any of them) in relation to the like exercise of executive powers.

na h-Éireann' was used in a draft Foreign Relations Bill in August 1936.[41] This draft had been preceded by one which referred to the state as 'Éire'.

We can use these dates to ascertain the dates of the undated constitutional drafts.

There a number of different constitutional drafts contained in P150/2370. One folio is entitled 'Plan of Fundamental Constitutional Law and Preliminary Draft'. This folio is dated 20 August 1936.[42] It contains three documents. The first is headed 'Plan of Fundamental Constitutional Law'. The second begins 'The State'. The third is headed 'Saorstát Eireann The Constitution Bill, 1936'. The first two are the documents indicated in the title of the folio. This may be seen from the fact that in the case of the first document it bears the same name, and the second document is a draft based on the plan. We may therefore attribute the date of 20 August to the first two documents. I will refer to the draft which begins 'The State' hereafter as 'the Preliminary Draft'. This does not provide us with a date for the final document.

The biggest problem with dating the Constitution Bill 1936 draft is that there are few handwritten notes on either it or the preliminary draft of 20 August. In fact, there are only two notes on the Constitution Bill 1936. The section stating '[t]he manner and form in which all or any of the said prerogatives shall be exercised may be determined by law' has a note next to it which simply states 'organic'. The Oireachtas is said to be composed of the president of E., 'otherwise called and herein generally referred to as An Uachtaran', but the quoted section has been struck through. Both of these changes are incorporated into the Preliminary Draft.

The phrase 'organic' is telling as it links into the drafts of the Foreign Relations Bill. The first of these drafts was to be called the Foreign Relations Act 1936, while a handwritten note on this indicated a change which was incorporated in the second draft. The second draft was to be called the Foreign Relations *Organic* Law 1937 (emphasis added). This change from 'law' to 'organic law' occurred between 6 and 31 August 1936. This indicates that the Constitution Bill 1936 was drafted before 20 August 1936. There are further links between the Constitution Bill 1936

[41] Earl of Longford and Thomas O'Neill, *Eamon de Valera* (Dublin: Gill and Macmillan, 1970), 294.

[42] This is quite difficult to make out on the microfilm but is easier with the physical file. The folio itself is a deep red and the date is written in pencil; it does not transfer to microfilm well.

and the Foreign Relations Act 1936. The memorandum accompanying the Foreign Relations Act 1936 stated:

The new Constitution will contain the following fundamental declarations

1. A Declaration that Eire is an independent sovereign (democratic) State,
2. A Declaration that all the internal and external prerogatives of the State vest in the people of Eire,
3. A Declaration of the right of the people of Eire to determine and control and [*sic*] manner and form in which the said prerogatives (or any of them) shall be exercised or exercisable.
   The new Constitution will also contain an enactment to the effect that the manner and form in which all or any of the prerogatives referred to shall be exercised or exercisable may be determined by law.[43]

These declarations are listed in the Preamble to the Foreign Relations Act 1936, which indicated what the corresponding articles were.[44] The articles link into the drafts contained in the folio 'Plan of Fundamental Constitutional Law and Preliminary Draft'. The one exception to this is that the Foreign Relations Act 1936 lists the prerogatives vested in the state by Article 3, while the drafts merely refer to the 'domestic and foreign prerogatives of the State'. The covering memo attached to the Foreign Relations Act 1936, however, makes it clear that this is the declaration that the draft constitution would make.

There are minor textual variations between the Constitution Bill 1936 and the Preliminary Draft. In all of those variations, the Foreign Relations Act 1936 or the covering memorandum accords with the Constitution Bill 1936 instead of the Preliminary Draft. First, the memo refers to Eire as 'an independent sovereign (democratic) State'. This is the order of the words in the Constitution Bill 1936. In the Preliminary Draft, the order is 'sovereign independent democratic'. Second, the Foreign Relations Act refers to Article 3, which stated 'the right of the people of Eire to determine and control the manner and form in which the said prerogatives (or any of them) shall be exercised or exercisable is declared to be absolute and inde-

[43] UCDA: P150/2370. This memo was composed by John Hearne.

[44] Article 2 declared that Eire was an independent sovereign state. Article 3 dealt with the prerogatives of the state. Article 4 stated that the exercise of the prerogatives was to be determined by law.

feasible'. This is the exact formula used in the Constitution Bill 1936. In contrast, the Preliminary Draft includes the phrase 'from time to time' before the word 'exercised'.

The evidence suggests that the Constitution Bill 1936 was composed before 20 August 1936. This is when the Plan of Fundamental Constitutional Law and Preliminary Draft were composed: the amendments in the Constitution Bill 1936 were incorporated into the later drafts. Furthermore, the Constitution Bill 1936 appears to have been the companion draft Constitution to the draft Foreign Relations Act 1936. As we have already ascertained that the date of the Foreign Relations Act was 6 August 1936, we may attribute the same date to the Constitution Bill 1936.

P150/2371

This folio contains two fragmentary drafts dealing with the Government and the Council of State which may be dated. They are headed 'Discussed with Hearne ? + took to Zurich' and 'Discussed with Hearne + took to Zurich', respectively. In 1936 and early 1937, de Valera took trips to see an eye specialist, Dr Vogt, in Zurich. The trips in 1936 were too early to account for these drafts. The explanation, therefore, is that these drafts were taken by de Valera to Zurich on his trip between 5 and 15 January 1937.[45] The drafts were discussed with Hearne before de Valera left. This may be seen from the fact that the changes which were indicated on the 2371 draft were incorporated in the 11 January draft.[46] These changes include, but are not limited to, the removal of an upper limit on the number of ministers in the council of ministers, and the removal of the requirement that the minister for defence and the minister for external affairs be members of the Dáil. We may date this draft as late December 1936 or early January 1937.

P150/2373

P150/2373 contains three separate drafts. These are entitled 'PRELIMINARY FUNDAMENTAL DECLARATIONS', 'PART I. FUNDAMENTAL DECLARATIONS' and 'PRELIMINARY DRAFT OF THE CONSTITUTION'. I will call these drafts A1, A2 and A3,

[45] See *Irish Independent* (6 January 1937) and (15 January 1937).
[46] UCDA: P150/2387 (11 January 1937).

respectively. The most likely order for these drafts in order of earliest to latest is A3, A2, A1.

None of the drafts incorporate wholly the handwritten amendments to the previous draft which makes dating more difficult. A3 begins with an article which states 'E__ is an independent sovereign democratic State'. This has been amended by hand to indicate that the phrase 'independent' is to be omitted and 'Christian' included. These changes are made for the A2 draft.[47] The A1 draft contains the same formula as the A2 but with an indication that the wording is to be changed to omit 'Christian' and include 'independent', although this time after 'sovereign'. This change is not incorporated in the draft of 19 October, found in P150/2374, but it is in the draft of 20 October, in the same folder.

Second, the A3 draft states: 'The right of the Sovereign Irish People to the whole or any part of the national territory can never be renounced.' In the margin is the note 'indefeasible(?)'. The A2 draft states: 'The right of the Irish Nation to the whole and every part of the national territory is absolute and indefeasible.'[48] The A1 draft states: 'the right of the Nation to the whole of the national territory is indefeasible'. The use of the word 'indefeasible' is gradually inserted into the drafting process but, once inserted, it remains. This indicates A3 is the earliest draft.

Third, the first page of the A3 draft contains a note: 'Insert somewhere powers to continue in L.N.' We find a new Article V in the A2 draft, which is entitled 'Relations with other States'. This principle is included in the A1 draft.

These details are illustrative of the changes which are gradually incorporated through the drafting process. It should be noted that not all changes indicated in the A3 draft are incorporated in the A2 draft. Examples include amendments indicating that the president should take office within 40 days, that the president's investiture should take place on a fixed date, 'say 25 Mar', and that impeachment was to be assented to by the second house. None of these changes were incorporated in the A2 draft. They do not appear in any other draft either. The A2 draft is unmarked.

Despite the fact that not all changes were incorporated, the preponderance of the evidence points to the order I have suggested. The draft enti-

[47] 'E__ is a sovereign, democratic, Christian State.'

[48] This phrase occurs in the A3 draft in relation to the right of the people to determine the form of the state.

tled 'PRELIMINARY FUNDAMENTAL DECLARATIONS' is dated 14 October 1936. I will attribute the date 13 October 1936 to the draft entitled 'PART I. FUNDAMENTAL DECLARATIONS' and the date 12 October 1936 to the draft entitled 'PRELIMINARY DRAFT OF THE CONSTITUTION'. It is also possible that the draft entitled 'PART I. FUNDAMENTAL DECLARATIONS' was drafted contemporaneously with the draft entitled 'PRELIMINARY FUNDAMENTAL DECLARATIONS'. It is impossible to dismiss this hypothesis but as little turns on it, and the proposed dates are easier to follow, I will attribute the dates I have indicated.

P150/2375

P150/2375 contains four different versions of summaries of the draft Constitution. We may date the fourth document in the series entitled 'Summary of Draft Heads of the Constitution'. This draft was prepared after 14 October 1936 as the handwritten amendments indicated on the 14 October draft have been incorporated in the 2375 'Summary of Draft Heads of the Constitution'. The 14 October draft, for example, contained handwritten notations indicating there was to be an Article 4 dealing with nationality, that Eire was a 'sovereign, independent, democratic' state and not a 'sovereign, democratic, Christian' state, that the president was to be able to address parliament on 'special' and not on 'stated' occasions, and that the president could have further powers conferred on him by organic laws that were not limited to external affairs. These are simply examples of the changes which were indicated.

It is difficult to ascertain exactly when it was drafted. P150/2374 contains drafts of 19, 20 and 22 October 1936. The summary does not map exactly onto either the 19 or 20 October draft. It pre-dates the 22 October draft. Changes such as the fact that power was to 'vest in' the people rather than 'emanate from' them, and that the president was to be notified of government decisions rather than be able to take command of a national government during a period of emergency under certain circumstances were indicated in the summary and are incorporated in the 22 October draft. The difficulty is that these amendments were also indicated in the 20 October draft. This may appear to make the summary and the draft of 20 October contemporaries but there are significant differences between the two. The 20 October draft contained a provision dealing with the flag and stipulated that citizenship should not extend to those who oppose organ-

ised government. The 20 October draft indicates that these provisions were to be deleted, as they are deleted in the summary. On the other hand, the summary uses the form 'E__' to signify Eire, which the draft of 19 October indicated was to be eliminated, as it was eliminated in the draft of 20 October. The formula used in the citizenship article in the summary was 'the following are of Irish nationality' and a handwritten note indicated this was to be amended to include 'and are citizens of State'. Again, this was included in the draft of 20 October. The vast majority of the handwritten amendments to the summary mirror those of the 20 October draft, however. The examples which I have listed above which are indicated on the summary and are incorporated in the 22 October draft are also indicated in the 20 October draft.

The evidence is mixed but three points should be made. First, October 1936 was a period of rapid revision of the drafts. Therefore, it is possible that two drafts prepared contemporaneously might be different—the drafters may have failed to incorporate all the changes in one of the drafts by mistake. Secondly, the summary is only a summary of draft heads of the Constitution. It is long but it does not purport to be the draft itself. Since the summary was not intended to be exhaustive, this may explain some of the discrepancies. Finally, the vast majority of the handwritten changes indicated on the 20 October draft also occur on the summary. Therefore, I will attribute the date of 20 October 1936 to the summary entitled 'Summary of Draft Heads of the Constitution'.

The first summary contained in P150/2375 is entitled 'Summary of Main Provisions of the Constitution' and is incomplete. It ends with the heading 'Dáil Éireann', in which it states: 'Dáil Éireann shall be constituted as heretofore.' It does not contain any provisions dealing with the judiciary or the government. It maps most closely onto the draft of 20 October 1936. The provisions dealing with state languages, for instance, indicated that '[s]pecial provision may be made by law for the recognition of only one of the said languages as the official language of the State in districts or areas in which that language only is in general use'. With the exception of the phrase 'of the State', this is the exact formula used in the drafts of 20 and 22 October. It is not the wording contained in the 19 October draft.[49] As the draft of 19 October is itself very brief and we are

[49] This stated: 'Special provision may be made by law for districts in which only of the said languages is in general use.' A handwritten note indicated the phrase 'the use of either language in' was to be included.

comparing it with a summary, this is the best indication that it post-dated the 19 October draft.

The summary also contained a provision that the president could become head of a national government. As we have seen, this survived until the 20 October draft and was then eliminated in the 22 October draft. It also stated that the Oireachtas should make provision for 'such free postal facilities' as the Oireachtas may determine. This was present in the 20 October draft, which indicated it should be eliminated—and this was done for the 22 October draft. Finally, the summary made provision for an acting president in the case of the death, resignation or permanent incapacity of the president. The draft of 20 October had a like provision, while the draft of 22 October vested the power in a commission. This means the closest companion draft for the summary is the draft of 20 October.

The most likely explanation for the summary entitled 'Summary of Main Provisions of the Constitution', therefore, is that it was an incomplete summary prepared contemporaneously with, but superseded by, the summary entitled 'Summary of Draft Heads of the Constitution', to which I have attributed the date of 20 October. Both may have been prepared on the same day, but I shall give the date of 19 October to the summary entitled 'Summary of Main Provisions of the Constitution' for the purposes of clarity.

The third summary is more difficult to date. Those provisions which were excluded in the draft of 22 October—the acting president, postal facilities, and the president as head of a national government—were included in the third summary. This summary pre-dated the 22 October draft. There are very few notes on the third summary. The notes that exist seem to indicate that the summary was prepared at the same time as the fourth summary. For example, the provision allowing the president to head a national government is bracketed. Moreover, the provision relating to the acting president has a line through it. These changes were also indicated in the fourth summary. The third summary is relatively complete. It deals with all of the organs of state and ends with the repeal of the 1922 Constitution. It seems probable, therefore, that this summary was prepared after the incomplete first summary on 19 October. The two are not identical. For example, the first summary lists exactly what the fundamental declarations relating to sovereignty are while the third provides a synopsis of these declarations.

The likely order of the summaries therefore is:

1. First Summary—19 October
2. Third Summary—19 October (probable)
3. Fourth Summary—20 October

P150/2385

The draft contained in P150/2385 post-dates the 19 October draft contained in P150/2374. This may be seen from the fact that most of the changes which are indicated in the 19 October draft are incorporated into the P150/2385 draft. Some of the changes are trivial, for example 'E__' is to be replaced with 'E.' Others are more substantive, for example the phrase '[t]he exercise of the said powers of government or any of them may be regulated by Organic law' contains a handwritten amendment which states 'or established or recog. by organ. laws made thereunder'. The 2385 draft says that the powers of state 'are exercisable only through the Organs established by this Constitution or established or recognized by Organic Laws made thereunder.' The beginning of the provision dealing with nationality is to be changed from '[t]he following possess Irish nationality' to '[t]he following are of Irish nationality and citizens of E.' This change was made for the 2385 draft. Also, the line '[s]pecial provision may be made by law for districts in which only one of the said languages is in general use' was to be amended by the inclusion of the phrase 'the use of either language in'. This was not transcribed directly but the sentence was changed to '[s]pecial provision may be made by law for the recognition of only one of the said languages as the official language in districts or areas in which that language only is in general use'. The flag provision was to be amended to delete the phrase 'honoured by the people'. This phrase was deleted in the 2385 draft. The description of the state in 19 October draft was a 'sovereign, democratic State' but a handwritten note indicated the word 'indep.' was to be included. The 2385 draft describes the state as 'sovereign, independent, democratic'.

All of these changes were also incorporated into the draft entitled 'Draft used at Cabinet discussions Oct. 20, 21, 22', which is to be found in P150/2374. Significantly, however, neither the changes which were indicated on the 20 October draft in 2374 nor the changes which were indicated on the 2385 draft were incorporated into the other. The 2374 draft has far more changes indicated on it but these were not incorporated. The 2385 draft has some changes, for example one which would have stipu-

lated that the ministers for defence and external affairs had to be elected to the Dáil, but these were not incorporated into the 2374 draft.

The changes indicated in the 20 October draft were incorporated into the 22 October draft, which is to be found in P150/2374. For example, the article dealing with the flag was to be deleted, as was the section which stated that people who were opposed to organised government should not have Irish nationality conferred upon them. These are indicative but virtually all of the handwritten amendments in the 20 October draft were incorporated into the 22 October draft. The fact that the 2385 draft has a limited number of amendments and that these occur in articles which were not included in the 22 October draft means it is not possible to link the two drafts directly. Nonetheless, the most likely explanation of the 2385 draft is that it was a copy which was used at the cabinet discussions. It is a more complete version of the 20 October draft. I have assigned it the date of 19 October 1936.

One further piece of evidence in this regard is the fact that above Article 7 of the 2385 draft is a note: 'Ask for a meeting with Min. of the Cabinet.' This indicates that the draft was composed before the cabinet discussion.

P150/2386

This folder contains a draft relating to the presidency. The draft pre-dates the draft contained in P150/2374 dated 20 October. This may be seen from the fact that the changes indicated in the 2386 draft are incorporated into the 20 October draft. For example, the 2386 draft stated that the oath of office of the president should be taken before the chief justice in the presence of the council of ministers, the members of the superior courts and the members of the Dáil. A handwritten amendment indicated the oath was to be taken only before the chief justice, and this change was incorporated into the 20 October draft. A commission of three members of the council of state were to be 'nominated' by the president to discharge his functions where he was temporarily unable to do so under the 2386 scheme. A handwritten note indicated this was to be changed to 'appointed' and this change is made for the 20 October. The president was to appoint judges on the advice of the executive council under 2386. A handwritten amendment struck out the advice provision. This change was incorporated into the 20 October draft.

The changes were not incorporated absolutely. The phrase 'So help me God' in the presidential oath is circled in the 2386 draft but no change

was made for the 20 October draft. It is also possible that the 2386 draft may pre-date the draft of 19 October, also to be found in P150/2374. This cannot be determined as the 19 October draft is quite short and does not include the provisions dealing with the presidency. I attribute the date of 18 October to the draft contained in P150/2386.

P150/2387

P150/2387 contains two X drafts. The first has the handwritten note 'Kath. Sunday Draft 28.2.37?' on the Preamble. 'Kath' presumably refers to Kathleen O'Connell, de Valera's private secretary. Given this, we may surmise that the Preamble is the work of de Valera as it does not appear in other drafts, it is headed by a note mentioning his private secretary and is written on a Sunday. Furthermore, there is another version of the Preamble; this contains the handwritten amendments de Valera made to the draft just noted, which begin the first X draft. The second X draft is headed 'Following on Sunday draft 28.2.37'. This second X draft incorporates the handwritten changes that were made to the first draft.[50] The date is inserted into this sentence at a later point.

The fact that the date is inserted later, the first date is immediately followed by a question mark, and that along with these two drafts there is a third draft contained in P150/2387 which all precede the galley proofs in March 1937, make it possible that de Valera made a mistake subsequently in remembering the date of the first X draft. It seems possible the draft was produced on 21 February 1937, a Sunday, allowing sufficient time for the drafts to be revised before the galley proof stage. This would tally with what we know of the drafting process relating to the 'Fourth Draft', where Hearne sent on parts to be translated on 4 February,[51] 5 February,[52] 17

[50] For example, the provision dealing with majority voting in the houses of the Oireachtas was split from two subsections in the first X draft to three in the second. Similarly, the word 'to' relating to privilege from arrest for members of the Oireachtas becomes 'for' in the second X draft.

[51] Part V dealing with the Council of State; P150/2387.

[52] Parts VI, VII and VIII dealing with the courts, the comptroller and auditor general, and the referendum; P150/2387.

February[53] and 19 February 1937.[54] The X1 draft could, therefore, have been produced two days after the final communication on the 'Fourth Draft'. However, as against this, we must bear in mind that the galley proof date attribution is itself speculative.[55] There is a one-week range within which they may have been produced, between 2 and 9 March. Given this potential for error, I attribute 28 February, and sequential ordering thereafter, to the X drafts. This is consistent with either speculative date of the galley proof stage and matches the speculative notation found on the draft itself.

There is a third draft which is not headed by a letter in P150/2387.[56] This incorporates the changes made to the second X draft[57] but precedes the galley proof stage of 2 March 1937 contained in P150/2400. This third draft comprises 23 articles and ends with 'National Parliament (Relations Between Houses)'. The remaining articles in this draft are actually separate from the first 23 articles. They may be found earlier in the same folder. The remaining articles begin with Article 24, 'The Government', which is headed 'Continuation'.

As it seems likely to surmise that at least two of these drafts, X1, X2, non-X and galley proof occurred on the same day (as there are only three days in the timeframe of 28 February and 1–2 March) but there is no way to prefer one date to another within this timeframe, I have chosen the following speculative timetable:

[53] The previous letter, of 5 February, was addressed to Kathleen O'Connell 'for Mr. Griffin.' In contrast, this letter, although also for Kathleen O'Connell, does not specify the recipient but does note '*Two copies*'. It seems plausible to assume the same process of translation was ongoing but there remains the possibility that the draft, particularly given the 12-day gap, was to end up in different hands. Hearne sent on Articles 46–50 dealing with trial of offences, the repeal of the 1922 Constitution and the continuation of laws; P150/2387.

[54] Here Hearne sent on 'two copies of Transitory Provisions'; P150/2387.

[55] See further below P150/2400.

[56] There is a third X draft contained in P150/2387 which is headed 'Remainder given to Ceann Comhairle Nat. Parlt. and Seanad 2.3.37', which is the same as the first X draft. The date refers to when the draft was handed over rather than written.

[57] The handwritten notations to then-Article 13 in the X2 draft include changing 'the Chamber of Deputies (otherwise called 'Dáil Éireann')' to 'a Chamber of Deputies to be called "Dáil Éireann"' and a similar change to the wording of the Senate. Similarly, 'for the powers and functions thereof' becomes 'for the powers and functions of these legislatures'. Again, the Oireachtas may provide for the 'establishment of Functional or Vocational Councils' becomes 'establishment or recognition of Functional or Vocational Councils'.

X1 or first X draft—28 February 1937
X2 or second X draft—1 March 1937
Non-X draft contained in P150/2387—2 March
Galley Proof—2 March 1937 (it will be referred to as the galley proof draft and post-dates the non-X draft)

P150/2400

P150/2400 contains the galley proofs of the Constitution. One version, Hearne's, is headed 'Return to Presdt. on Tuesday'. All the amendments made in the galley proofs were incorporated in the first printed copies of the draft Constitution of 7 March 1937. As 7 March 1937 was a Sunday, we may surmise the Tuesday referred to was, at the latest, Tuesday 2 March 1937. The fact that the galley proofs were to be returned then make it likely that the latest they can have been in Hearne's hands was Monday 1 March, as otherwise he would have written 'Return to Presdt. today', if indeed, he would have written anything at all in circumstances where the work was so urgent. A second possibility which presents itself is that the Tuesday referred to may have been 9 March 1937 but Hearne simply finished the work early and returned the drafts with sufficient time for them to have been printed by 7 March 1937. There is little to choose between these estimates, but I assign it the date of 2 March 1937. There is some circumstantial evidence in favour of this. De Valera met the printers on 5 March 1937 and again on 6 March 1937.[58] This is consistent with the timeline of a return on 2 March 1937. The final galley proof may be found in the parliamentary draftsman's file dealing with the Constitution.[59]

P150/2425

This folio contains a draft Preamble with a note 'Mr. Hearne'. This Preamble is linked to the draft of 20 August 1936. The draft of 20 August had a number of handwritten notes. These state: 'Source of Auth. National life. People. Family. Protect.—1916, 1921—Give themselves the Const.' The 1936 draft refers to the 'source of all lawful authority', the 'restor[ation] of national life', 'the Sovereign Irish People' and 'maintain[ing] and foster[ing] the sanctity and welfare of the family as the

[58] UCDA: P150/300.
[59] National Archives of Ireland (hereafter NAI): AGO/2000/22/796.

basis of moral education and social harmony'. Each of the handwritten notes, therefore, had a textual link to the 1936 Preamble. This Preamble in P150/2425 is the counterpart to the draft of 20 August 1936.

Other Holdings

The de Valera archives constitute the largest archive relating to drafting materials. Other holdings include the National Archives of Ireland and the McQuaid papers.

National Archives of Ireland

The following drafts may be found in the National Archives:

(a) 14 October 1936[60]
(b) Literal translation of Irish text from February 1937[61]
(c) 28 February 1937[62]
(d) 2 March 1937[63]
(e) 15 March 1937[64]
(f) 1 April 1937[65]
(g) 10 April 1937[66]
(h) 24 April 1937[67]
(i) 26 April 1937[68]

[60] NAI: Taois s.9715A. This draft is not dated in the Taoiseach's file. The date has been taken from the de Valera archives. The folder contains a note which states: 'The attached preliminary draft of the Constitution was circulated privately by the President.'

[61] NAI: AGO/2000/22/796.

[62] NAI: AGO/2000/22/796.

[63] NAI: AGO/2000/22/796.

[64] NAI: Taois s.9715A. The draft is headed '1st Official Draft 16.3.37'. This draft corresponds to the draft contained in P150/2401, which is dated 15 March 1937. The discrepancy is most likely a result of the drafts being first received by de Valera on 15 March and thereafter distributed to the departments which received them on 16 March. I prefer the 15 March date.

[65] NAI: Taois s.9746.

[66] NAI: Taois s.10159.

[67] NAI: Taois s.10160.

[68] NAI: Taois s.10160.

McQuaid Papers

The McQuaid drafts are marked with a 'Q'. Keogh and McCarthy suggest that the Q drafts were sent by McQuaid to de Valera.[69] This does not seem to be the case, however. The McQuaid papers contain a copy of the draft Constitution as amended on report marked 'Q' which could not have been drafted by McQuaid. Neither could the draft of 7 March 1937, which was the first printed draft. A book entitled *The Story of the Constitution* was sent by de Valera to McQuaid and is dedicated to 'Q'.[70]

One interesting facet of the McQuaid papers is that they contain one of de Valera's private drafts. This file is contained in DDA: AB8/A/V/52 and dates from 11 January 1937.

The following drafts may be found in the McQuaid papers:

(a) 19(?) October 1937[71]
(b) 11 Jan 1937[72]
(c) Literal translation of the Irish text from February 1937[73]
(d) 15 February 1937[74]
(e) 7 March 1937[75]
(f) 15 March 1937[76]
(g) 30 April 1937[77]
(h) Partial X draft[78]
(i) 12 June 1937[79]

[69] Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hÉireann* (Cork: Mercier Press, 2007), 109.

[70] Sol Bloom, *The Story of the Constitution* (Washington DC: United States Constitution Sesquicentennial Commission, 1937).

[71] Dublin Diocesan Archives (DDA): AB8/A/V/48. This is a partial draft which includes sections dealing with 'Constitutional Guarantees', 'Economic Life', 'Power to Suspend Certain Constitutional Guarantees', 'General' and a blank section headed 'Transitory Provisions'. This draft is the same as that contained in UCDA: P150/2385 which I have dated as 19 October.

[72] DDA: AB8/A/V/52. The date is taken from the equivalent draft in the de Valera papers.

[73] DDA: AB8/A/V/50.

[74] DDA: AB8/A/V/53. The date is written by de Valera.

[75] DDA: AB8/A/V/57. The date is taken from the equivalent draft in the de Valera papers. This is a partial draft that covers 23 articles.

[76] DDA: AB8/A/V/53.

[77] DDA: AB8/A/V/56. The date is taken from the equivalent draft in the de Valera papers. This is a partial draft that begins with the Irish version of Article 12.

[78] DDA: AB8/A/V/51.

[79] DDA: AB8/A/V54–55. The date is marked on the front page.

Final List of Drafts

A final list of all drafts that can be dated either because of notations or sequentially is as follows:

1. 18 May 1935—Draft Heads of a Constitution.[80]
2. 6(?) August 1936—Saorstát Eireann The Constitution Bill 1936.[81]
3. 20 August 1936—Plan of Fundamental Constitutional Law and Preliminary Draft.[82]
4. 20(?) August 1936—Plan of Fundamental Constitutional Law.[83]
5. 20(?) August 1936—draft Preamble headed 'Mr. Hearne'.[84]
6. 12(?) October 1936—Preliminary Draft of Constitution.[85]
7. 13(?) October 1936—draft which begins 'Part I. Fundamental Declarations'.[86]
8. 14 October 1936—draft which begins 'Preliminary: Fundamental Declarations'.[87]
9. 18(?) October 1936—draft relating to the presidency.[88]
10. 19(?) October 1936—summary of main provisions of the Constitution.[89]
11. 19(?) October 1936—third summary.[90]
12. 19 October [1936]—draft which begins 'Part I.: The State'.[91]
13. 19(?) October 1936—full draft. Post-dates preceding draft.[92]
14. 20 October [1936]—draft which begins 'Part I.: The State'. This draft is headed 'draft used at cabinet discussions Oct. 20, 21, 22'.[93]
15. 20(?) October 1936—Summary of draft heads of the Constitution.[94]

[80] UCDA: P150/2370.
[81] UCDA: P150/2370.
[82] UCDA: P150/2370.
[83] UCDA: P150/2370.
[84] UCDA: P150/2425.
[85] UCDA: P150/2373.
[86] UCDA: P150/2373.
[87] UCDA: P150/2373.
[88] UCDA: P150/2386.
[89] UCDA: P150/2375.
[90] UCDA: P150/2375.
[91] UCDA: P150/2374.
[92] UCDA: P150/2385.
[93] UCDA: P150/2374.
[94] UCDA: P150/2375.

16. 22 October 1936—draft which is headed 'Draft No. 1. Page 1.'[95]
17. 5 November 1936—summary of the Constitution which begins 'The general scheme of the Constitution will be as follows'.[96]
18. 18 November [1936]—draft begins with Article 8 'Powers and Functions of the President'.[97]
19. 30 November 1936—draft of Article 21 (the Government).[98]
20. 1 December 1936—2nd Draft.[99]
21. 2 January 1937—draft begins 'Part VI. The Courts'.[100]
22. 11 January 1937—3rd Draft.[101]
23. 29 January 1937—draft begins 'Article Thirty-Six'.[102]
24. 3 February 1937—4th Draft.[103]
25. 4 February 1937—draft begins 'Part V. Council of State'.[104]
26. 5 February 1937—draft begins 'Part VI. The Courts'.[105]
27. 13 February 1937—Fourth Draft (Duplicate).[106]
28. February 1937—literal translation of the Irish draft.[107]
29. 19 February 1937—draft begins 'Transitory Provisions'.[108]
30. 28 February 1937—draft headed 'Kath. Sunday Draft.' This draft is numbered X1, X2, etc. I call this particular draft the X1 draft of first X draft.[109]
31. 1(?) March 1937—X2 or second X draft headed 'following on Sunday draft 28.2.37'.[110]
32. 2(?) March 1937—non-X draft.[111]
33. 2(?) March 1937—Galley proof draft.[112]

[95] UCDA: P150/2374.
[96] UCDA: P150/2375.
[97] UCDA: P150/2370.
[98] UCDA: P150/2379.
[99] UCDA: P150/2378.
[100] UCDA: P150/2387.
[101] UCDA: P150/2387.
[102] UCDA: P150/2389.
[103] UCDA: P150/2387.
[104] UCDA: P150/2387.
[105] UCDA: P150/2387.
[106] UCDA: P150/2390.
[107] NAI: AGO/2000/22/796. As this draft does not link into the other English drafts, it is not possible to date it more accurately.
[108] UCDA: P150/2387.
[109] UCDA: P150/2387.
[110] UCDA: P150/2387.
[111] UCDA: P150/2387.
[112] UCDA: P150/2387.

34. 2(?) March 1937—Galley proof draft.[113]
35. 7 March 1937—First Printed Copy.[114]
36. 15 March 1937—Second Printed Copy.[115]
37. 1 April 1937—Third Printed Copy.[116]
38. 7 April 1937—Articles entitled 'The Family' and 'Education'.[117]
39. 8 April 1937—Article entitled 'Fundamental Rights'.[118]
40. 10 April 1937—Fourth Printed Copy.[119]
41. 10 April 1937—Draft of Preamble.[120]
42. 11 April 1937—Draft of Preamble.[121]
43. 11 April 1937—Article dealing with Religion entitled 'Proposed Draft'.[122]
44. 14 April 1937—Article entitled 'Religion'.[123]
45. 19 April 1937—Article entitled 'Private Property'.[124]
46. 20 April 1937—Article entitled 'Directive Principles of Social Policy'.[125]
47. 21–26 April 1937—Draft articles dealing with Religion.[126]
48. 23 April 1937—Draft of Preamble.[127]
49. 24 April 1937—Fifth Printed Copy.[128]
50. 26 April 1937—Draft of Preamble.[129]
51. 26 April 1937—Sixth Printed Copy.[130]
52. 30 April 1937—Final Copy.[131]

[113] UCDA: P150/2400.
[114] UCDA: P150/2399.
[115] UCDA: P150/2401.
[116] UCDA: P150/2415.
[117] UCDA: P150/2413.
[118] UCDA: P150/2413.
[119] UCDA: P150/2417.
[120] UCDA: P150/2425.
[121] UCDA: P150/2419.
[122] UCDA: P150/2421.
[123] UCDA: P150/2419.
[124] UCDA: P150/2411.
[125] UCDA: P150/2411.
[126] UCDA: P150/2421.
[127] UCDA: P150/2425.
[128] UCDA: P150/2427.
[129] UCDA: P150/2424.
[130] UCDA: P150/2428.
[131] UCDA: P150/2429.

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[1] Note: Page numbers followed by 'n' refer to notes.

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